Filed 3/29/16 P. v. Reynaldo CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JIMI HENDRIX REYNALDO, Defendant and Appellant.	Case No. B254673 (Los Angeles County Super. Ct. No. BA405930)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund Wilcox Clarke, Jr., Judge. Affirmed in part, reversed in part, and remanded for resentencing.

Michelle T. Livecchi-Raufi, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Jason Tran and Jonathan J. Kline, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jimi Hendrix Reynaldo appeals his convictions of corporal injury to a cohabitant, disobeying a court order, and robbery. Reynaldo contends the trial court erred in admitting hearsay evidence, taking judicial notice that he met an element of a crime, instructing the jury on prior uncharged acts of domestic violence, and sentencing him for each conviction.

The judgment is affirmed in part, reversed in part, and remanded for resentencing. We find no evidentiary error in admitting the statements Reynaldo contends are hearsay evidence because the statements fell under the spontaneous statement exception to the hearsay rule. Reynaldo's conviction for disobeying a court order must be reversed because the trial court erred by taking judicial notice of a minute order; this count may not be retried. There was no error in instructing the jury on prior uncharged acts of domestic violence. As to the sentencing issue, we conclude the trial court properly imposed the sentence for robbery. We will remand to the trial court for resentencing in light of our reversal of the conviction for disobeying a court order.

FACTUAL BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution Evidence.*

a. *Reynaldo's arrest and the restraining order*.

Reynaldo began dating Kathleen Williams in February 2012. Reynaldo moved in with Williams and her two daughters shortly thereafter. The relationship took a dangerous turn sometime before May 2012 when Reynaldo first attacked Williams. When asked the nature of that incident, Williams replied: "Just threatening, choking me out on my bed, threatening to kill me if I would leave him." She testified that Reynaldo pushed her face down on her bed, climbed on top of her, and began choking her to the point where she nearly passed out.

In June 2012, Williams called the police after Reynaldo became furious because Williams went through his phone and discovered that he was seeing another woman. He told her that he would "make [her] life a living hell" and repeatedly threatened to kill her.

Reynaldo was arrested and Williams obtained a stay-away restraining order, which she later had modified to a peaceful contact order so that she and Reynaldo could work on their relationship. In November 2012, Reynaldo again moved in with Williams and her daughters. However, Williams soon began to tell Reynaldo that she wanted to end their relationship. Reynaldo responded angrily by saying, "We can work it out. I'm not going anywhere."

b. *The November 16 beating.*

Williams was a certified nurse's assistant. She worked primarily at a nursing home in Long Beach, but during the week of November 15, 2012, she was assigned to work at a nursing home in Los Angeles from 11:00 p.m. to 7:00 a.m. That day, Reynaldo jumped in Williams's car as she was leaving for work; he refused to get out of the car until they were about two to three minutes from the nursing home. The following night, November 16, before leaving for work Williams told Reynaldo that she no longer wanted to be in a relationship and that she wanted him out of her house. Reynaldo became upset and left, slamming the front door as he went. When Williams arrived at work that night, she had trouble latching the lock to the front gate. Shortly after her shift began, Reynaldo began calling her phone incessantly, saying he did not want their relationship to end. Williams turned her phone off.

Sometime around 4:00 a.m., Williams began hearing rustling noises coming from the front yard outside the home. She went to the front door to look out the window. When she turned back, she found Reynaldo advancing angrily toward her. Williams shouted, "What are you doing at my job? What are you doing at my fucking job?" Grabbing her shoulders and shaking her, Reynaldo responded: "I want to talk to you. Let's work things out." He pushed her into a chair and tried to kiss her as she attempted to fight him off. After Williams bit his right forearm, Reynaldo began calling her a "bitch" and punched her left eye. When asked to describe how hard Reynaldo punched her, Williams answered: "He hit me so hard in my eyelid it cracked my sinus cavity and I have an entrapment muscle in this left corner and I have double vision." Williams was also bleeding from her mouth and nose. She fell from the chair and onto the floor as

Reynaldo tried to pull her out through the front door. Eventually he gave up and demanded her keys, which she surrendered to him. Before leaving in her car, Reynaldo told Williams to say that someone had broken into the home.

Candice Saldivar, one of the patients at the home, called the police as Reynaldo was trying to drag Williams outside. The prosecution played an audio recording of that telephone call at trial. In the call, Saldivar told the police that "a Black guy" was "taking [Williams] out of here, through the door." The prosecution also played an audio recording of a 9-1-1 call that Williams made that night, in which she told the dispatcher that her ex-boyfriend had come to her workplace and beat her up. Another patient, Renita Coleman, had come down from her room shortly after the attack. She saw Williams on the floor, crying, distraught and bleeding. Coleman testified that Williams told her: "Call 9-1-1 because I have a restraining order on him." The jury also heard testimony from Ronald Cox, a third resident at the home. His bedroom was on the ground floor and had two French doors that opened to the outside. Before going to bed earlier that night, he only partially closed the French doors. Cox testified he awoke from the cold night air. He could not see clearly, but said he did see a small figure, with long hair like Reynaldo's, come through the French doors and quickly walk through his room.

c. *Prior incident of domestic violence six years earlier.*

The prosecution presented the testimony of a former girlfriend, Glyness Felton. She recounted a July 29, 2006 incident in which Reynaldo, in a fit of rage, followed her down the street, punched and choked her, and then stomped on her face. At the time, Reynaldo and Felton were in a romantic relationship and Reynaldo had recently moved into her apartment. After Felton left her apartment to calm down following an argument with Reynaldo, he came up behind her as she was walking and attacked her. He knocked her to the ground and then stomped on her so hard that his Nike sandal left an imprint on her face. As Reynaldo beat her, he accused her of cheating on him. At some point Felton was able to get away by running to her apartment and locking the door. However, Reynaldo gained entry to her apartment by removing the screen from the bedroom

window and climbing inside. He told her that he was going to kill her. He began hitting and choking her until she told him the police were en route.

Officer Ernesto Betancourt testified that he had responded to the scene. He prepared a report detailing his observations, which included wavy imprints on Felton's face from Reynaldo's Nike sandal, a phone Reynaldo ripped out of the wall and threw into the alley when Felton called 9-1-1, and the bedroom window screen which Reynaldo had removed.

2. *Defense Evidence.*

At trial, Reynaldo testified on his own behalf. Regarding the June 2012 incident, he said that Williams "called the police and put me in jail" because he wanted to end the relationship. He denied threatening to kill or otherwise harm Williams. Reynaldo testified he was arrested for the June 2012 incident and spent two months in custody. During cross-examination the following colloquy occurred:

"Q. And you were also issued a restraining order to stay at least a hundred yards away from Miss Williams and to have no contact with her, correct?

"A. Yes.

"Q. And you're aware of that because you were in court when that order was made, right?

"A. Yes, I was."

As for the November 2012, incident, Reynaldo's defense was that he had been in California City on the night of November 16, 2012, after having caught a 5:30 a.m. train earlier that day.

Roeisha Thomas, Reynaldo's girlfriend who lived in California City, was called as an alibi witness. Thomas testified she and Reynaldo met on a train at the beginning of July 2012, began dating, and saw each other every day after that.[1]

[1] However, the record shows Reynaldo was arrested on June 9, 2012, for the June 2012 domestic violence incident, and remained in custody for about two months.

Thomas testified that on November 16, 2012, Reynaldo had taken a train to California City and stayed with her from that day until his arrest in April 2013. She initially told an investigator that she and Reynaldo had gone to see a movie on November 17, but at trial she said, "I know I told you the 17th, but it was the 16th." Thomas admitted to having a 2009 conviction for a fraud-related offense.

In contrast to Thomas's version of events, Reynaldo testified that they met near the end of June, but did not start dating until he was released from jail at the end of July. Reynaldo testified that he and Thomas went to the movies on November 16 and then "hung around" Thomas's home on the 17th.

With regard to his relationship with Williams, Reynaldo testified he saw her intermittently from the time he was released from jail until November 15, 2012, when he ended the relationship: "I stopped having contact with Miss Williams because she told me that she's tired of me. She's tired of females calling my phone and that she was going to kill me, so I decided to cut the relationship short and I left her alone."

3. *Trial and Verdict.*

The jury found Reynaldo guilty of corporal injury to a cohabitant (Pen. Code,[2] § 273.5, subd. (a); count 1), willfully disobeying a court order (§ 166, subd. (a)(4); count 2), and second degree robbery (§ 211; count 3) The jury also found to be true an alleged domestic violence enhancement for personal infliction of great bodily injury (§ 12022.7, subd. (e)), and an enhancement for a prior prison term (§ 667.5, subd. (b)). The trial court sentenced Reynaldo to a total of 11 years in state prison.

Reynaldo filed a timely notice of appeal.

CONTENTIONS

Reynaldo contends: (1) the trial court improperly admitted hearsay evidence; (2) the court erred in taking judicial notice of the fact that Reynaldo had been served with a copy of the restraining order; (3) the court should not have instructed the jury pursuant

[2] All undesignated statutory references are to the Penal Code.

to CALCRIM No. 852 regarding evidence of uncharged acts of domestic violence; and (4) his sentence for count 3 violated section 654's prohibition of multiple punishment.

DISCUSSION

1. *The Trial Court Properly Admitted Williams's 9-1-1 Call and Her Statement to Renita Coleman Under the Spontaneous Statement Exception to the Hearsay Rule.*

a. *The trial court did not err in admitting Williams's 9-1-1 call.*

Reynaldo contends the trial court erred in admitting into evidence the 9-1-1 call Williams made under the spontaneous statement exception to the hearsay rule because Williams had time for deliberation or reflection before making the call. For the reasons discussed below, we find the record establishes that Williams's statements in the 9-1-1 call were spontaneous rather than the product of deliberation. Thus, the 9-1-1 call was properly admitted.

"To qualify for admission under the spontaneous statement exception to the hearsay rule, 'an utterance must first purport to describe or explain an act or condition perceived by the declarant. (Evid. Code, § 1240, subd. (a).) Secondly, the statement must be made spontaneously, while the declarant is under the stress of excitement caused by the perception. (*Id.*, subd. (b).)' [Citation.] For purposes of the exception, a statement may qualify as spontaneous if it is undertaken without deliberation or reflection. [Citation.]" (*People v. Morrison* (2004) 34 Cal.4th 698, 718.) "Whether the requirements of the spontaneous statement exception are satisfied in any given case is, in general, largely a question of fact. [Citation.] . . . [T]he court 'necessarily [exercises] some element of discretion.' [Citation.]" (*People v. Poggi* (1988) 45 Cal.3d 306, 318.) "We apply the abuse of discretion standard in reviewing the trial court's determination to admit or exclude hearsay evidence. That standard applies to questions about the existence of the elements necessary to satisfy the hearsay exception." (*People v. Pirwani* (2004) 119 Cal.App.4th 770, 787.)

The 9-1-1 call opens with this colloquy:

"WILLIAMS: Yes, can you please come to this address. Please hurry.

"DISPATCH: I don't have the address, ma'am. What are you reporting?

"WILLIAMS: I'm reporting . . . . My ex-boyfriend came into my job, and he beat me up real bad."

Williams was asked if she wanted a paramedic:

"DISPATCH: Do you need a paramedic?

"WILLIAMS: Uh, I don't know. Please, hurry.

"DISPATCH: Do you need a paramedic?

"WILLIAMS: Yes.

"DISPATCH: I'm gonna transfer. Give them the address and phone number.

"PARAMEDIC: Fire Paramedics operator 1-38. What's the address and the emergency?

"WILLIAMS: Please come. My boyfriend came, ex-boyfriend came and beat me up."

After the paramedic spent some time trying to get the correct address from Williams, the following exchanges took place:

"PARAMEDIC: Okay, and the phone number you're calling from.

"WILLIAMS: God. Please, oh my God, before he comes back. [¶] . . . [¶]

"PARAMEDIC: Okay, now, when did this happen?

"WILLIAMS: This just happened. [¶] . . . [¶]

"PARAMEDIC: Is there any serious bleeding?

"WILLIAMS: Yes, please, my eye. I'm so dizzy. My nose is bleeding.

"PARAMEDIC: Your eye is bleeding?

"WILLIAMS: My eye and my nose. Please, sir, hurry. I got patients that I'm taking care of. Just hurry. Please hurry."

After the prosecution played the 9-1-1 recording, Williams testified that she recognized her voice in it, but could not remember when she made the call.

Reynaldo concedes that the 9-1-1 call "probably did not occur many hours after the incident, since [Williams] was still bleeding, and dizzy and [told the paramedic] that the event just happened." Nevertheless, he insists there is nothing in the record to indicate that Williams's "mental capacity was not stable enough to reflect." In support of

his argument, he points to the fact that Williams was able to answer the questions put to her by the 9-1-1 dispatcher and the paramedic.

However, it has long been established that statements made in response to questioning are not automatically deprived of spontaneity. "When the statements in question were made and whether they were delivered directly or in response to a question are important factors to be considered on the issue of spontaneity. [Citations.] But . . . , '[n]either the lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance*.' [Citation.]" (*People v. Poggi*, *supra*, 45 Cal.3d at p. 319.)

In *People v. Farmer* (1989) 47 Cal.3d 888, abrogated on different grounds by *People v. Waidla* (2000) 22 Cal.4th 690, the California Supreme Court upheld admission of a gunshot victim's statements in response to extensive questioning under the spontaneous statement exception: "[T]here is no doubt that Schmidt-Till was excited, or perhaps more accurately, distraught and in severe pain. He was not merely an uninjured witness whose excitement might wane – and would thus be in a position to fabricate answers – through the sobering interrogation of an investigator. His responses were not self-serving. [Citation.] Nor were the questions suggestive. [Citation.]" (*People v. Farmer*, at p. 904.)

The record here supports a finding of spontaneity even though Williams's statements were elicited through questioning. The evidence shows that Williams was dizzy and bleeding, and under the stress of the excitement caused by the attack when she made the 9-1-1 call. The questions from the dispatcher and the paramedic were not detailed or suggestive; they were brief and straightforward, and nothing like an interrogation. Williams told the paramedic that the attack had just happened, and she expressed concern that the authorities might not arrive before Reynaldo returned. Williams explained at trial that the pauses in between her answers on the 9-1-1 tape were a result of her checking to see if Reynaldo was coming back. The call appears to have

been made less than an hour after the attack because Officer Marco Diaz testified that he reported to the scene around 4:40 a.m. – approximately 40 minutes after Williams first discovered Reynaldo in the home. Officer Diaz said that when he saw Williams "she was crying" and "seemed to be in fear."

Citing *People v. Smith* (2007) 40 Cal.4th 483, which upheld a trial court's refusal to admit a statement made 30 to 60 minutes after the alleged exciting event, Reynaldo suggests that too much time elapsed between the event and Williams's 9-1-1 call. But in *Smith* there was no evidence whatsoever that the hearsay declarant experienced excitement after hearing an acquaintance say he had killed two people (*id*. at pp. 518-519), and much longer periods of time have been found not to preclude application of the spontaneous utterance hearsay exception. (See *People v. Brown* (2003) 31 Cal.4th 518, 541 [two-and-one-half hours]; *People v. Raley* (1992) 2 Cal.4th 870, 893-894 [18 hours]; *In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1713 [one to two days].) The mere passage of time in this case was insufficient to deprive Williams's statement of spontaneity.

We conclude the trial court did not abuse its discretion in admitting into evidence Williams's 9-1-1 call under the spontaneous statement exception to the hearsay rule.

b. *The trial court did not err in admitting Williams's statement to Coleman under the spontaneous statement exception.*

Renita Coleman testified she was sleeping in one of the upstairs bedrooms that night when she woke to the sounds of yelling and thumping. She headed downstairs – approximately three to four minutes after she first heard the noises – where she found Williams on the kitchen floor. Williams was crying, and she was visibly "distraught" and "upset." When the prosecutor asked Coleman what Williams said to her when she approached, defense counsel made a hearsay objection. Finding that the statement met the spontaneous statement exception, the trial court overruled the objection and permitted Coleman to testify that Williams told her, "Call 9-1-1 because I have a restraining order on him." Reynaldo contends the trial court erred because Williams's statement was "used only for its truth to identify the perpetrator" rather than to "narrate, describe, or explain an act, condition, or event perceived by the declarant." This claim is meritless.

Coleman's testimony was clearly admissible as an identifying statement that comes within the spontaneous statement exception. "[S]tatements purporting to name or otherwise identify the perpetrator of a crime may be admissible where the declarant was the victim of the crime and made the identifying remarks under the stress of excitement caused by experiencing the crime." (*People v. Morrison*, *supra*, 34 Cal.4th at p. 719; see, e.g., *People v. Stanphill* (2009) 170 Cal.App.4th 61, 74 [evidence supported trial court's determination of spontaneous statement where the deputy testified that "the victim was upset, breathing heavily and was not calm as he made the identifications"].)

In *Morrison*, the California Supreme Court expressly rejected the defendant's argument that a statement identifying someone does not constitute an excited utterance because it is not a statement narrating, describing, or explaining an act, condition, or event perceived by the declarant. *Morrison* found that the victim's "spontaneous statement of names as to 'who did it' described the event she perceived, that is, she saw [the defendant and two others] participate in the crimes in her house on the date in question." (*People v. Morrison*, *supra*, 34 Cal.4th at p. 719.) Similarly, in the present case, Williams's statement to Coleman – "Call 9-1-1 because I have a restraining order on him" – properly was construed as a statement intended to identify the person who had just assaulted her. The statement described what happened by identifying the perpetrator of the attack and alerting Coleman to the fact that it was not a random robber, but someone Williams knew. Moreover, as *Morrison* pointed out, when the declarant is available to testify as a witness, as Williams was, " 'the existence and truth of the declaration may be explored in an examination under oath.' [Citation.]" (*Ibid.*)

For these reasons, the trial court did not abuse its discretion in allowing Coleman to testify regarding Williams's statement.

2. *Trial Court Erred by Taking Judicial Notice of the Fact that Reynaldo Was Served With a Copy of Williams's Protective Order.*

Reynaldo contends his conviction on count 2 (willful disobedience of a court order) must be reversed because the trial court erred by taking judicial notice of an

essential element of that offense, i.e., that he knew of the restraining order's existence. Because this claim has merit, we will reverse Reynaldo's conviction.

a. *Background*.

To find Reynaldo guilty of the offense of violating a court order (§ 166, subd. (a)(4)), the People had to prove the following elements:

1. A court issued a written order that the defendant not use force or threaten force against Kathleen Williams;
2. The court order was a protective order, issued under section 166, subdivision (c)(3);
3. The defendant knew of the court order;
4. The defendant had the ability to follow the court order; and
5. The defendant willfully violated the court order.

(§ 166, subd. (a)(4); see CALCRIM No. 2701.)

After the defense rested its case, the prosecutor asked the trial court to take judicial notice of a minute order showing that Reynaldo was present and had been advised of the restraining order obtained by Williams. When the trial court asked if all this was indicated in the court file, the prosecutor responded in the affirmative, saying she had reviewed the minute order that afternoon and that it stated Reynaldo had been present in court and advised of the restraining order.

Over defense counsel's objection, the trial court granted the prosecution's request. The court then instructed the jury as follows: "So, the last piece of evidence comes in from me. It's called 'judicial notice' and I can tell you that there's something that's established . . . because it appears in my records that I'm allowed to tell you about. You deem it proven. The court record shows that the protective order in favor of Kathleen Williams and against Jimi Hendrix Reynaldo, including the conditions set forth on page 2 of Exhibit 1, which you will have in the jury room, was ordered on July 23rd, 2012. The defendant was present and the defendant was served with a copy of the order."

b. *Discussion*.

Reynaldo argues that "[b]ecause the court took judicial notice of the fact that appellant was present and served with a copy of the restraining order, the court took judicial notice that appellant 'knew of the court order,' " thus improperly taking this element away from the jury. "To be sure, a defendant enjoys a federal due process right to have the state prove beyond a reasonable doubt every fact necessary to constitute the crime charged. (E.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 523 [61 L.Ed.2d 39, 50-51].) The court thus erred if it gave an instruction that removed a core element of the crime from the jury's consideration." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1224.) "[A] trial court may not direct a jury to convict, regardless of how overwhelming the evidence may appear to be. [Citation.] To do so violates the defendant's Sixth Amendment right to a jury trial. [Citation.] As stated by our Supreme Court, '[t]he rule prohibiting verdicts directed against an accused emanates from the guarantee of due process and the right to a jury trial.' (*People v. Figueroa* (1986) 41 Cal.3d 714, 725.)" (*People v. Early* (1997) 56 Cal.App.4th 753, 757.)

Evidence Code section 452, subdivision (d), "authorizes judicial notice of court records. 'The court may in its discretion take judicial notice of any court record in the United States. [Citation.] This includes any orders, findings of facts and conclusions of law, and judgments within court records. [Citations.] However, while courts are free to take judicial notice of the *existence* of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files.' [Citation.]" (*In re Vicks* (2013) 56 Cal.4th 274, 314.) Thus, in *People v. Rubio* (1977) 71 Cal.App.3d 757, 764-767, disapproved on other grounds in *People v. Freeman* (1978) 22 Cal.3d 434, 438, a trial court erred by taking judicial notice of the contents of minute orders (indicating that on two different dates the defendant had failed to appear in court for trial without sufficient excuse) because "by so doing, the trial court removed from the jury an issue which they were obligated to decide, i.e., whether defendant had fled prosecution due to consciousness of guilt." (*People v. Rubio*, at p. 764.)

There was a similar error here because the trial court instructed the jury that Reynaldo had been present in court and served with the restraining order that he was charged with violating. These facts were so intimately connected to the offense element to be proved – i.e., Reynaldo's knowledge of the restraining order – that they effectively foreclosed the jury from finding that Reynaldo had been unaware of the order.

The Attorney General argues that any error was harmless, citing *People v. Flood* (1998) 18 Cal.4th 470, where the trial court erred in a Vehicle Code section 2800.3 case (unsafe driving while fleeing peace officer resulting in serious bodily injury) by instructing the jury that the police chasing Flood were "peace officers" because the jury was supposed to make that determination. *Flood* found this error harmless because "[t]he prosecution presented unremarkable and uncontradicted evidence that they were employed as police officers by the City of Richmond," "[a]t no point during the trial did defendant contest or even refer to" this element of the offense, and "several circumstances indicate that defendant effectively conceded this issue." (*Flood*, at pp. 490, 504.) Similar factors are not present in the case at bar.

The Attorney General argues the *Flood* analysis applies here because, in his trial testimony, Reynaldo "admitted that he was aware of the restraining order because he was present in court when the order was made." Not so. The Attorney General is ignoring the fact there were two restraining orders in this case: an earlier "stay away" order that was later modified to become a less restrictive "protective" order. Reynaldo testified only that he was aware Williams had obtained the original "stay-away" restraining order because he had been in court when that order was issued. But when he was subsequently asked, "Why did you see her so often if she had a restraining order against you?," Reynaldo testified: "The restraining order was lifted, ma'am." Reynaldo did not testify he knew that a modified restraining order had been issued ordering him not to use or threaten force against Williams. Hence, this key element for proving a violation of section 166, subdivision (a)(4), was established only because the trial court erroneously took judicial notice of the minute order. That error was not harmless.

We will reverse Reynaldo's conviction on count 2. This count may not be retried.

3. *The Instructions Given to the Jury on How to Use the Evidence of the Uncharged Acts of Domestic Violence Were Adequate and CALCRIM No. 852 Did Not Violate Reynaldo's Federal Due Process Rights.*

Reynaldo contends CALCRIM No. 852 (Evidence of Uncharged Domestic Violence), in its entirety, violates his federal due process rights. He further contends the trial court erred in leaving out the final, optional sentence of this instruction. These claims are meritless.

a. *Background.*

CALCRIM No. 852 is a limiting instruction advising the jury how to weigh evidence of other, uncharged acts of domestic violence. Pursuant to Evidence Code section 1109[3], the People were able to introduce testimony from Williams and Glyness Felton detailing Reynaldo's prior acts of violence toward them. The trial court instructed the jury pursuant to CALCRIM No. 852 as follows:

> "The People presented evidence that the defendant committed domestic violence that was not charged in this case, specifically, choking, striking or otherwise physically assaulting a current or former cohabitant. [¶] . . . [¶]
>
> "You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged domestic violence.
>
> "Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. The fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden of proof, you must disregard this evidence entirely.
>
> "If you decide that the defendant committed the uncharged domestic violence, you may, but are not required, to conclude from that evidence that the defendant was disposed or inclined to commit domestic violence. And based on that decision [you may] also conclude that the defendant was likely to commit and did commit choking, striking or otherwise physically assaulting a current or former cohabitant as charged here.

---

[3] The statute states, 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." (Evid. Code, § 1109, subd. (a)(1).)

> "If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider, along with all the other evidence.
>
> "It is not sufficient by itself to prove that the defendant is guilty of choking, striking or otherwise physically assaulting a current or former cohabitant. The People must still prove each charge and allegation . . . beyond a reasonable doubt.

Because Reynaldo's counsel did not request it, the trial court did not give the jury the following optional final sentence of CALCRIM No. 852: "[Do not consider this evidence for any other purpose [except for the limited purpose of _____ <insert other permitted purpose, e.g., determining the defendant's credibility>].]" (See CALCRIM No. 852 Bench Notes ["Give the final sentence that begins with 'Do not consider' on request."].)

b. *Discussion.*

Under Evidence Code section 1101, evidence of a defendant's past conduct is generally inadmissible to prove his propensity to commit the crime charged. (*People v. Ogle* (2010) 185 Cal.App.4th 1138, 1143.) In domestic violence prosecutions, however, prior acts of domestic violence are admissible under Evidence Code section 1109 to prove the defendant's propensity to commit domestic violence. (*People v. Ogle*, at p. 1143.) Trial courts are given discretion, under Evidence Code section 352, to exclude this evidence if its probative value is substantially outweighed by the risk of undue prejudice, confusion of issues, or misleading the jury. (Evid. Code, § 352.) By subjecting evidence of uncharged domestic violence to the weighing process of section 352, the Legislature has ensured that section 1109 does not violate the defendant's right to due process. (See *People v. Falsetta*[4] (1999) 21 Cal.4th 903, 917; accord *People v.*

---

[4] *People v. Falsetta*, *supra*, 21 Cal.4th 903, was a case discussing Evidence Code section 1108, a parallel statute which allows the admission of propensity evidence for prior sexual offenses. For purposes of evaluating the constitutional validity of CALCRIM No. 852, there is no material difference between sections 1108 and 1109. "With regard to appellant's argument that section 1109 runs afoul of the due process provisions of the federal and state constitutions, this contention has already been rejected by the courts. In [*Falsetta*] our Supreme Court addressed the constitutionality of section

Brown (2011) 192 Cal.App.4th 1222, 1233, fn. 14 ["similar constitutional challenges have been repeatedly rejected, and courts have held the admission of evidence pursuant to section 1109 and its counterpart, section 1108, does not violate a defendant's rights to due process and equal protection"].)

Reynaldo concedes that CALCRIM No. 852 has long withstood due process challenges, but insists that "[n]o matter how many California cases say that the instructions . . . are clear and sensible and do not violate Due Process, appellant disagrees." However, "[i]n order to establish a due process violation, [the] appellant bears a heavy burden of showing that admission of evidence pursuant to section 1109 unduly offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. [Citations.]" (*People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095.) Reynaldo has not met his heavy burden.

First, Reynaldo does not explain in what manner Evidence Code section 352 inadequately safeguards due process rights. Second, to the extent that Reynaldo asserts CALCRIM No. 852 "could easily" confuse jurors into thinking they could convict on less than proof beyond a reasonable doubt, the California Supreme Court has already addressed and rejected that very argument. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1012 (*Reliford*).) As the court noted in *Reliford* (while discussing a jury instruction

---

1108, a parallel statute which addresses prior 'sexual offenses' rather than prior 'domestic violence,' and upheld that provision against due process challenge. [Citation.] Although the Supreme Court has not addressed the constitutionality of section 1109, at least three recent post-*Falsetta* cases from the Courts of Appeal have subsequently upheld the constitutionality of section 1109 against similar due process challenges. [Citations.]" (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310; see, e.g., *People v. Brown* (2000) 77 Cal.App.4th 1324, 1333 ["we find the reasoning underlying the *Falsetta* opinion applies to this case because sections 1108 and 1109 can properly be read together as complementary portions of the same statutory scheme"]; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1026-1027 ["In determining the constitutionality of section 1109, we adopt the reasoning of the California Supreme Court as put forth in *Falsetta*. In *Falsetta*, the court held that, under section 1108, evidence of two previous rapes by defendant could be used to show his propensity to commit the present rape. Similarly, the history of defendant's acts of domestic violence against Seals could be used to show that, on this occasion, defendant had the propensity to cause Seals great bodily injury."].)

explaining Evidence Code section 1108): "The problem with defendant's argument is that the instruction nowhere tells the jury it may rest a conviction solely on evidence of prior offenses. Indeed, the instruction's *next sentence* says quite the opposite: 'if you find by a preponderance of the evidence that the defendant committed a prior sexual offense . . . , that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime.' " (*Id*. at p. 1013.) "*Reliford* emphasized that nothing in the instruction . . . authorized the jury to use preponderance of the evidence as the burden of proof on any issue other than the preliminary determination whether the accused committed a previous sexual assault. [Citation.] On that basis, the court rejected the notion that a jury could reasonably interpret the instruction to authorize a guilty verdict of a charged offense on the basis of a lowered standard of proof. [Citation.]" (*People v. Reyes* (2008) 160 Cal.App.4th 246, 253.)

Similarly, Reynaldo's jurors were instructed that if they found the uncharged acts of domestic violence had been proved by a preponderance of the evidence, then "you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence" and, therefore, "did commit" the charged acts of domestic violence. The jurors were further instructed, however, that this was "only one factor to consider, along with all the other evidence," that this was "not sufficient by itself to prove that the defendant is guilty," and that "[t]he People must still prove each charge and allegation . . . beyond a reasonable doubt."

Accordingly, Reynaldo's argument that this instruction violated his due process rights is meritless.

Reynaldo also contends that by omitting the optional last sentence of CALCRIM No. 852 – "Do not consider this evidence for any other purpose [except for the limited purpose of _____]" – the instructions were not limited enough and should have instructed the jury more specifically regarding "how to use the priors, for example for identity, intent, motive, or credibility. Consequently, the jury was permitted to use

propensity in any way that they wanted to, and to fill in any gap in the prosecutor's case."[5]

The argument is meritless. The given instruction advised the jury, inter alia, that if it decided that Reynaldo committed the uncharged domestic violence, it could (but was not required to) conclude that Reynaldo was disposed or inclined to commit domestic violence, and based on that decision, it could also conclude that Reynaldo was likely to commit and did commit the domestic violence charged here, and that the People still had the burden of proving each charge and allegation beyond a reasonable doubt. Accordingly, there is no merit to Reynaldo's contention that the instructional omission left the jury unaware of "how to use the priors."

4. *The Trial Court Did Not Err in Refusing to Stay Execution of Reynaldo's Sentence for Robbery Pursuant to Section 654.*

Reynaldo contends the trial court erred when it sentenced him for both count 3 (robbery) and count 1 (corporal injury to a cohabitant). He argues the count 3 sentence should have been stayed under section 654 because it was merely incidental to his commission of count 1.

Section 654, subdivision (a), provides that: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." (§ 654, subd. (a).)

The People argue that substantial evidence supports the trial court's imposition of a separate sentence for robbery (i.e., taking Williams's car keys and car) because

---

[5] The People argue Reynaldo has waived this claim because the defense did not request that the optional final sentence of CALCRIM No. 852 be given. Nevertheless, in the interests of judicial economy and to avert potential ineffective assistance of counsel claims, we will address the merits of this issue. (See *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 310.)

Reynaldo harbored a criminal objective in taking Williams's car keys and car that was "independent of and not merely incidental to" his objective in assaulting her. We agree with the People's position.

Notwithstanding the language of section 654 referring to an "act or omission," in *Neal v. State of California* (1960) 55 Cal.2d 11 (*Neal*), the California Supreme Court added a "gloss" to the section to take into account the reality that " '[f]ew if any crimes . . . are the result of a single physical act.' [Citation.] Accordingly, the relevant question is typically whether a defendant's ' "course of conduct . . . comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654." ' [Citation.] To resolve this question, the *Neal* court announced the following test: 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Correa* (2012) 54 Cal.4th 331, 335-336.) "If, on the other hand, [the] defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective . . . . [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

By sentencing Reynaldo for counts 1 and 3, the trial court "implicitly found that the crimes . . . involved more than one objective, a factual determination that must be sustained on appeal if supported by substantial evidence." (*People v. Osband* (1996) 13 Cal.4th 622, 730.) "In reviewing the trial court's implicit finding that section 654 does not apply, we determine only whether there is substantial evidence to support the trial court's finding. [Citation.]" (*People v. Rodriguez* (2015) 235 Cal.App.4th 1000, 1005.)

The trial court's implicit finding – that Reynaldo had two distinct and separate objectives in committing the corporal abuse and the later robbery – is supported by substantial evidence. The evidence demonstrated that when Reynaldo showed up at

Williams's workplace, his plan was to persuade her to stay in a relationship with him. When that plan went awry, however, Reynaldo physically assaulted Williams, punching her in the eye. After Reynaldo stopped hitting her, Williams found herself on the floor as Reynaldo tried to drag her out the front door. When Reynaldo found he was unable to get Williams outside, he demanded her car keys, saying, "Where are the fucking keys at? You don't give me the keys, I'm going to hit you some more." After he obtained the car keys, and before leaving the nursing home, Reynaldo told Williams to "[t]ell them that somebody broke in here and tried to rob you."

Reynaldo argues he only committed the robbery to facilitate his commission of domestic violence – namely, by enabling his escape because he did not have his own car. This argument is unpersuasive. As the trial court observed during the sentencing hearing: "Certainly you can inflict great bodily injury on a person without then robbing her and threatening her into making up a fake story."

"[A] separate act of violence against an unresisting victim or witness, whether gratuitous or to facilitate escape or to avoid prosecution, may be found not incidental to robbery for purposes of section 654." (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 193) In *People v. Rodriguez*, *supra*, 235 Cal.App.4th 1000, the defendant was convicted of robbery and evading arrest with reckless driving. The Court of Appeal affirmed the imposition of multiple sentences, finding that since the defendant could have attained the objective of taking money from the bank – the robbery – *without* evading arrest, a trial court could reasonably find that the defendant acted with multiple objectives when he drove recklessly after leaving the bank. (*Id*. at p. 1006; see also *People v. Coleman* (1989) 48 Cal.3d 112, 162-163 ["There is ample evidence . . . that defendant's intent and objective in assaulting [the victim] . . . was separate from, rather than incidental to, his intent and objective in committing the robbery. Prior to the assault, defendant had essentially completed the robbery . . . ."]; *People v. Leonard* (2014) 228 Cal.App.4th 465, 501 ["The assault against [the victim] could not have been intended to facilitate the prior pandering because that course of conduct had ceased."].)

Similarly here, substantial evidence supports the trial court's determination that by the time Reynaldo threatened Williams for her car keys, the corporal injury offense had already been completed. Therefore, the trial court properly concluded that the robbery was not incidental to or done with the purpose of facilitating the act of domestic violence. Rather, the robbery was a discrete crime – to obtain Williams's car – for which the trial court could reasonably find Reynaldo harbored a different criminal intent and objective, rendering section 654 inapplicable.

DISPOSITION

The judgment is affirmed in part, reversed in part and remanded for resentencing. The convictions for counts 1 and 3 are affirmed. The conviction for count 2 is reversed and this count cannot be retried. In light of the reversal of count 2, the matter is remanded to the trial court for resentencing.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.