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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MYLES MICHAEL SWAIN, Defendant and Appellant.	2d Crim. No. B286106 (Super. Ct. No. BA458771) (Los Angeles County)

Myles Michael Swain appeals from the judgment entered after his conviction by a jury of inflicting corporal injury upon his spouse with personal use of a deadly or dangerous weapon (Pen. Code, §§ 273.5, subd. (a), 12022.1, subd. (b)(1));[1] stalking (§ 646.9, subd. (b)); two counts of felony violation of a protective court order (§ 166, subd. (c)(4)); first degree residential burglary (§§ 459, 460); and assault with a deadly weapon (§ 245, subd. (a)(1)). The trial court found true two prior serious felony convictions

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

(§ 667, subd. (a)(1)) and two prior "strikes" within the meaning of California's "Three Strikes" law. (§§ 667, subds. (b)-(j); 1170.12, subds. (a)-(d).) The court dismissed the two strikes and sentenced appellant to prison for 17 years. The sentence includes a consecutive five-year term for each of the two prior serious felony convictions. Thus, 10 years of the 17-year sentence is attributable to these prior convictions.

Appellant claims that the trial court erroneously excluded evidence concerning the mental health of the People's main witness. We conclude that the trial court did not err because appellant failed to show that the excluded evidence was relevant. Appellant also claims, and the People concede, that the matter must be remanded so that the trial court can exercise its discretion whether to strike the prior serious felony convictions pursuant to recently amended sections 667, subdivision (a)(1) and 1385, subdivision (b). We remand for this purpose and affirm in all other respects.

Facts

The People's case was based on the testimony of the victim - appellant's wife, C.S. At the time of trial, she had been married to appellant for five and one-half years. We omit a summary of her testimony because it is not necessary to decide the evidentiary issue raised by appellant.

Procedural Background

The People filed a pretrial motion in limine to exclude "evidence that [C.S.] has a mental [health] problem." (Bold omitted.) At the hearing on the motion, appellant's counsel argued: "[Appellant] says that . . . she's bipolar. She gets off her meds, gets angry and calls 911 for no reason and she drinks. So the relevance is that this is all stemming from the mental illness

itself, . . . and that's why we want to bring it in, we can bring it in through [appellant's testimony]. [C.S.] may admit it on the stand. I do know that as of 2008 she was under a [Welfare and Institutions Code section] 5150 hold for something . . . I'm sorry, I don't have it at my fingertips, but it's in the discovery provided by the People. [¶] It's not something that's just in [appellant's] imagination. There is some basis for it and we just want to explore it. It may not pan out, but . . . he does very much desire to testify on that point and we think it's relevant and admissible." Welfare and Institutions Code section 5150 authorizes taking a person into custody "for a period of up to 72 hours for assessment, evaluation, and crisis intervention" if the person, "as a result of a mental health disorder, is a danger to others, or to himself or herself, or gravely disabled." (*Id*., § 5150, subd. (a).)

The trial court responded: "*I don't believe the subject of the complaining witness's mental health is relevant to what happened on the night or the days [that appellant] is charged [with] committing crimes*. I don't believe that [appellant] has the expertise to know what or whether his wife has a mental illness. . . . Anything that . . . [appellant] would have to say on this topic would either be without foundation or hearsay." (Italics added.) The court concluded that, pursuant to Evidence Code section 352, any probative value of appellant's proposed testimony concerning C.S.'s mental health "is outweighed by its prejudicial nature."

Appellant personally protested, "I have firsthand experience with my wife being bipolar. I've gone with her for five years to the psychiatrist . . . ." "And she drinks. She drinks." The trial court continued: "I believe [appellant's proposed testimony] has limited probative value and the prejudicial nature

in terms of the mini trial that would then ensue . . . is outside the parameters of this trial. [¶] The motion [in limine] is granted, so there will be no mention of it [C.S.'s mental health] in opening statement, in cross-examination of the complaining witness or in the defendant's testimony."

Toward the end of his cross-examination of C.S., appellant's counsel asked the trial court "to reconsider [its] pretrial ruling in terms of inquiring as to [C.S.'s] mental illness . . . ." Counsel said that C.S. had previously been convicted of domestic violence: "[S]he pled to a protective pool; that she was bipolar, take medications. As part of the probationary report they presented [section] 1203.1 evaluation. . . . I think this wouldn't be any undue consumption of time. I assume she would admit it and we won't need any expert testimony and I think it would have some bearing on the case. [¶] As you know, that is, frankly, [appellant's] entire defense that she goes off her meds and calls the police."

The court responded: "I have no reason to believe that being bipolar makes somebody dishonest or have an issue with telling the truth or hallucinating. It's not a psychosis. It's a personality disorder.[2] *I don't believe that it is relevant*. I believe

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[2] Pursuant to Evidence Code sections 459 and 452, subdivision (h), we take judicial notice that "[b]ipolar disorder, also known as manic-depressive illness, is a brain disorder that causes unusual shifts in mood, energy, activity levels, and the ability to carry out day-to-day tasks. [¶] . . . [M]oods range from periods of extremely 'up,' elated, and energized behavior (known as manic episodes) to very sad, 'down,' or hopeless periods (known as depressive episodes)." <https://www.nimh.nih.gov/health/topics/bipolar-disorder/index.shtml> as of [Aug. 19, 2019], archived at <https://perma.cc/4UR6-9BE6>.

that it is unduly prejudicial in terms of confusion to the jury, as well as the time that will be required for the People to mount a rebuttal." (Italics added.)

After the court's ruling, appellant's counsel resumed his cross-examination of C.S. She testified that appellant "always say[s] that 'don't let me come' and 'you can't answer' and, you know, 'you took your medication and you rested. Then all of a sudden you called the ambulance . . . and then the police come with the ambulance . . . .' And then they take me somewhere." Counsel requested a sidebar conference, during which he said: "She just mentioned the meds and take her away. She has a mental health issue. I'm raising it one more time based on her recent testimony." The court responded: "I don't see how this mental health issue impeaches what she has said about the issues in the case. . . . [B]y asking her more details about what her diagnosis is, I don't think it sheds any light on whether she's being truthful." Counsel protested: "It does. It sheds some light on [appellant] if he testifies if he's being truthful as him being an eyewitness of her going off of the meds and calling police."

The Trial Court Did Not Abuse Its Discretion in Excluding Evidence Concerning C.S.'s Mental Health

Appellant contends: "The trial court erred by excluding relevant and probative evidence of C.S.'s mental health diagnoses, failure to take the medications prescribed to treat these illnesses, previous [Welfare and Institutions Code section] 5150 hold, and multiple trips to a psychiatrist. All of this evidence is relevant to her . . . credibility and her ability to accurately [per]ceive, recollect and testify to the events she alleged occurred in th[i]s case."

"In determining the admissibility of evidence, the trial court has broad discretion. . . . On appeal, a trial court's decision to admit or not admit evidence . . . is reviewed only for abuse of discretion. [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 153, 196-197.) "'Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

Appellant has not carried his burden of showing that the trial court exceeded the bounds of reason in excluding evidence concerning C.S.'s mental health. The court reasonably concluded that the proffered evidence was not relevant. "Only relevant evidence is admissible. (Evid.Code, § 350.)" (*People v. Brady* (2010) 50 Cal.4th 547, 558.) "'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." (Evid. Code, § 210.) "It is the burden of the proponent of evidence to establish its relevance through an offer of proof or otherwise." (*People v. Schmies* (1996) 44 Cal.App.4th 38, 51.) "An offer of proof should give the trial court an opportunity to change or clarify its ruling and in the event of appeal would provide the reviewing court with the means of determining error and assessing prejudice. [Citation.] To accomplish these purposes an offer of proof must be specific.

It must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued. [Citations.]" (*Id.* at p. 53.) "A verdict . . . shall not be set aside, nor shall the judgment . . . based thereon be reversed, by reason of the erroneous exclusion of evidence unless . . . [t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." (Evid. Code, § 354, subd. (a).)

Appellant's offer of proof was that he would testify, or C.S. would admit on cross-examination, that she was under the care of a psychiatrist for bipolar disorder, was taking medication for the disorder, had complained to the police about appellant when she stopped taking her medication, and in 2008 had been placed on a 72-hour hold for psychiatric evaluation pursuant to Welfare and Institutions Code section 5150. Appellant's counsel said: "It's not something that's just in [appellant's] imagination. There is some basis for it and we just want to explore it. It may not pan out . . . ." What was missing from the offer of proof is evidence that, as appellant alleges in his opening brief, C.S.'s mental disorder "is relevant to her . . . credibility and her ability to accurately [per]ceive, recollect and testify to the events she alleged occurred in th[i]s case." "[T]he mental illness or emotional instability of a witness can be relevant on the issue of credibility, and a witness may be cross-examined on that subject, *if such illness affects the witness's ability to perceive, recall or describe the events in question*. [Citations.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 591-592, italics added.)

Under facts similar to those presented here, our Supreme Court concluded that the trial court had not abused its discretion in precluding the defendant from cross-examining a prosecution

witness as to her mental health. (*People v. Anderson* (2001) 25 Cal.4th 543, 578-579.) The evidence sought to be elicited "included the information, disclosed by [the witness] in [a] competence hearing, that the authorities had recently taken away her children on suspicion of sexual abuse; that these events resulted in emotional problems, psychiatric therapy, and a diagnosis of 'mental anguish'; and that she was taking medications for her emotional condition." (*Id*. at p. 578.) The Supreme Court reasoned: "Defendant fails to demonstrate the relevance of the excluded information to [the witness's] credibility about the Mackey murder. It is a fact of modern life that many people experience emotional problems, undergo therapy, and take medications for their conditions. 'A person's credibility is not in question merely because he or she is receiving treatment for a mental health problem.' [Citation.]" (*Id*. at p. 579.) In a concurring opinion, Justice Kennard noted: "This evidence would not have been particularly helpful in attacking her credibility because it did not demonstrate a condition likely to affect her ability to perceive or recall, nor is it apparent that it would give her a motive to falsely accuse defendant . . . ." (*Id*. at p. 609, conc. opn. of Kennard, J.)

Because the trial court did not abuse its discretion in excluding the evidence as irrelevant, we need not determine whether it abused its discretion under Evidence Code section 352, which 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." Irrelevant evidence has no probative value.

Remand Is Necessary so that the Trial Court Can Exercise Its Discretion Whether to Strike the Prior Serious Felony Convictions

At the time of sentencing, the trial court did not have the power to strike prior serious felony convictions within the meaning of section 667, subdivision (a)(1). (Former §§ 667, subd. (a)(1), 1385, subd. (b).) Effective January 1, 2019, Senate Bill 1393 (S.B. 1393) amended subdivision (a)(1) of section 667 and subdivision (b) of section 1385 to authorize the striking of these convictions. (See Legis. Counsel's Dig., Sen. Bill No. 1393 (2017-2018 Reg. Sess.) Stats. 2018, ch. 1013, §§ 1, 2 ["This bill would delete the restriction prohibiting a judge from striking a prior serious felony conviction in connection with imposition of the 5-year enhancement"].)

"[I]t is appropriate to infer, as a matter of statutory construction, that the Legislature intended [S.B.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases [such as the present case] not yet final when [S.B.] 1393 [became] effective on January 1, 2019. [Citations.]" (*People v. Garcia* (2019) 28 Cal.App.5th 961, 973.) We therefore accept the People's concession that "remand . . . is appropriate" so that the trial court can exercise its discretion whether to strike the prior serious felony convictions.

Disposition

The matter is remanded to the trial court with directions to exercise its discretion whether to strike one or both section 667, subdivision (a)(1) prior serious felony convictions in furtherance of justice pursuant to section 1385. Appellant has the right to be personally present. We express no opinion as to how the court should exercise its discretion. If the court decides to strike one or

both prior convictions, it shall resentence appellant. If the court decides not to strike one or both prior convictions, the sentence shall stand as originally imposed. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Leslie A. Swain, Judge

Superior Court County of Los Angeles

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