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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JASON BATTS CAPITMAN, Defendant and Appellant.	B269808 (Los Angeles County Super. Ct. No. BA425784)

APPEAL from a judgment of the Superior Court of Los Angeles County, Shelly Torrealba, Judge. Affirmed.

Christian C. Buckley, 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, Assistant Attorney General, Michael R. Johnsen and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

In an information, the People charged appellant Jason B. Capitman with one count of felony child abuse (Pen. Code, § 273a, subd. (a)),[1] with an allegation that he inflicted great bodily harm on the victim, his three-month old daughter (§ 12022.7, subd. (d)). Appellant pleaded not guilty and denied the allegation. A jury subsequently convicted him of the child abuse charge and found true the allegation.

Appellant advances two arguments in this appeal. First, he contends that the trial court erred by allowing the prosecution to introduce "propensity" evidence — evidence of uncharged prior acts of domestic violence (Evid. Code, § 1109) — because it was more prejudicial than probative. Second, Appellant argues that the trial court abused its discretion in sentencing him to a maximum term of 12 years, calculated by application of the upper term of six years on the base count and six years for the great bodily injury enhancement.

We find no abuse of discretion, and therefore we affirm.

BACKGROUND

Appellant and Regina M. dated for approximately three years and had a child together, S., in December 2013. In March 2014, Regina went on a week-long trip, leaving S. with Appellant's mother, C.P., who in turn lived with her mother Gloria. Both women worked. Regina testified Appellant intended to visit for a few hours each day and for C.P. to take S. to work with her. When Regina returned, she noticed scratches between S.'s upper lip and nose. Appellant told Regina that Regina's dog had jumped on S.

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

The next day, Regina noticed that S. was quieter than normal. Regina then noticed bruises on S.'s body, including her jaw and her arms. Regina called the police and then took S. to the hospital, where she remained for several days. Pediatrician Diana Guse testified that S. had bruising on her eyelid, jaw, and arm; scratches to the back of her head and over her lip; and a laceration on the back part of her internal palate. Blood and ultrasound tests revealed a potential laceration on S.'s liver, which was consistent with a single trauma incident, and X-rays showed a potential corner fracture to S.'s right femur consistent with trauma. Board-certified child abuse pediatrician Dr. Janet Arnold-Clark reviewed S.'s medical records, CT scans, photos, and X-rays, and testified that the bruising on her face, arm, neck and back of head, a laceration of her liver, and other injuries consistent with trauma. She opined that the injuries were not the result of an accident or attack by a dog.

Regina testified regarding three previous incidents of domestic violence. The first incident occurred in 2012. Appellant and Regina were driving, and after Regina refused to answer questions Appellant leaned over and started choking her. In a second incident, also in 2012, Appellant choked Regina on the driveway outside of their home, after which Regina ran down the driveway while Appellant chased her yelling, "I'm going to kill you." After the incident in the driveway, Appellant convinced Regina to return to the house and, once inside, attempted to suffocate her with a pillow. Regina did not report these incidents to the police. The third incident took place in 2014, the day prior to Regina's departure. Appellant, while holding S., became angry, kicked a table, and grabbed Regina by the neck and pushed her onto a couch. Regina reported this incident to police.

DISCUSSION

I. Evidence of Prior Uncharged Acts of Domestic Violence

Appellant argues that evidence of the three prior uncharged acts of domestic violence should not have been admitted because their probative value was substantially outweighed by the danger of undue prejudice, and that the admission of the evidence violated his due process rights under the United States Constitution. The trial court, after a hearing, concluded that the incidents were not remote in time, all occurring within two and a half years of the charged incident, and that the evidence was more probative than prejudicial.

A. Standard of review

On appeal, we review a trial court's ruling regarding evidence of a criminal defendant's uncharged crimes for abuse of discretion. (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531.)

B. Admissibility of domestic violence evidence

Absent an exception, character evidence, including evidence of specific instances of conduct, generally is inadmissible to prove conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) Evidence Code section 1109, however, provides several exceptions, two of which are relevant here, stating that "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." (Evid. Code, § 1109, subd. (a)(1).) It also addresses child abuse cases, providing that "subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, in a criminal action in

which the defendant is accused of an offense involving child abuse, evidence of the defendant's commission of child abuse is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1109, subd. (a)(3).) Although section 1109 does not "explicitly provide for the admission of acts of domestic violence in a prosecution for an offense involving child abuse, nor vice versa" (*People v. Dallas* (2008) 165 Cal.App.4th 940, 952 (*Dallas*)), subdivision (d)(3) defines "domestic violence" to have the further meaning as set forth in section 6211 of the Family Code, if the act occurred no more than five years before the charged offense. (Evid. Code, § 1109, subd. (d)(3).) Section 6211, in turn, defines "domestic violence" to include abuse perpetrated against a child of a party. (Fam. Code, § 6211, subd. (e).) In *Dallas*, *supra*, the Court discussed the admissibility of domestic violence propensity evidence in cases alleging child abuse: An "Assembly analysis stated that using the 'broader definition' of domestic violence in Family Code section 6211 'will have two effects. First, and most important, *prosecutors will be able to use propensity evidence in the prosecution of child abuse cases*. . . . Second, in any domestic violence case, the prosecutor will be able to bring in relevant evidence of prior violence against children.'" As such, "the definition of domestic violence in Family Code section 6211 can apply not only to the type of evidence admissible under Evidence Code section 1109, subdivision (a)(1), but also to the type of prosecution in which such evidence is admissible." (*Dallas, supra*, 165 Cal.App.4th at p. 956.)

The review required by the trial court pursuant to Evidence Code section 352 requires that the court, in its discretion, exclude the 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." (Evid. Code, § 352.) At trial, defense counsel objected to the admission of the three prior incidents to which Regina testified, arguing that the first two incidents, occurring in 2012, were remote in time from the March 2014 incident. Appellant contends that the probative value of the three domestic violence incidents to which Regina testified is minimal, because S. and Regina were not similarly situated. He contends that he and Regina had a lengthy relationship and that each of the three incidents arose in the context of a conversation between them, and that the types of injuries to which Regina testified were not the same as those suffered by S. We disagree.

At least one of the incidents took place the day before Regina's departure, and Appellant held S. in his arms as he committed the violent act against Regina. Appellant argues that the court should not have allowed all three incidents, with photographs, and argues that the jury was left with the impression that he was a consistently violent and aggressive person. He also argues that the case against him with respect to S. was circumstantial, although it was undisputed that Appellant was alone with S. while Regina was away, that the injuries appeared during that time, and that Appellant attempted to explain them by stating they were caused by a dog. The trial court, after reviewing the evidence, concluded that the probative value of the three incidents, which were not remote in time, was not substantially outweighed by the probability that its admission would unduly consume time or create substantial danger of undue prejudice. Given the purpose of Evidence Code

section 1109, this was not an abuse of the court's discretion. "'The [trial] court's exercise of discretion under Evidence Code section 352 will not be disturbed on appeal unless the court clearly abused its discretion, e.g., when the prejudicial effect of the evidence clearly outweighed its probative value.'" (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314-1315.)

II. Sentencing

Appellant argues that the trial court abused its discretion in sentencing him to a maximum term of 12 years, calculated by application of the upper term of six years on the base count and six years for the great bodily injury enhancement. He contends that the trial court relied on irrelevant materials, failed to acknowledge mitigating factors, and improperly utilized S.'s vulnerability and relationship to Appellant to impose the upper term when the charge required a finding that S. was under the age of five.

A. Objection at time of sentencing

The People assert that Appellant failed to raise objections to the rationale for the sentence with the trial court, and accordingly has waived that objection. (*People v. Scott* (1994) 9 Cal.4th 331, 351.) Appellant contends that he was not apprised of the sentence the court intended to impose and permitted a chance to object or seek clarification. The trial court in this case, however, invited the parties to add "anything further that either side wants to address," after which defense counsel argued several points. Defense counsel also addressed the points raised by the People in the presentence report, which sought the maximum term. "Under California law, information pertinent to sentencing is frequently contained in the presentence probation report, thus enabling the parties to anticipate the trial court's

sentencing choice and its reasons. [Citation.] In the rare instance where the actual sentence is unexpected, unusual, or particularly complex, the parties can ask the trial court for a brief continuance to research whether an objection is warranted, or for permission to submit written objections within a specified number of days after the sentencing hearing. Such a procedure would satisfy a requirement, if any, under the due process clause of advance notice of the trial court's sentence." (*People v. Gonzalez* (2003) 31 Cal.4th 745, 754.) Moreover, as in *Gonzalez*, Appellant was permitted to make an objection relating to a different issue after the discussion of the court's choice of sentence, but did not address the sentencing rationale. (*Id.* at p. 754.) Because Appellant had such an opportunity, his objection was waived.

B. Merits of sentencing decision

Even had Appellant objected to the rationale underlying the court's imposition of a maximum term of 12 years, we find no abuse of discretion. After considering the sentencing memoranda, the trial court imposed the upper term of 12 years based on several factors: S.'s age and that she was particularly vulnerable (Cal. Rules of Court, rule 4.421(a)(3)), that Appellant took advantage of his position of trust (Cal. Rules of Court, rule 4.421(a)(11)), and that Appellant was on probation at the time of the offense. (Cal. Rules of Court, rule 4.421(b)(4).) Appellant asserts that the trial court abused its discretion improperly basing its decision on a fact, S.'s age and vulnerability, that is an element of the great bodily injury enhancement; failing to acknowledge mitigating factors; and relying on improper evidence.

"[D]etermination of the appropriate term is within the trial court's broad discretion [citation] and must be affirmed unless there is a clear showing the sentence choice was arbitrary or irrational [citation]. 'Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in qualitative as well as quantitative terms.' [Citation.] One factor alone may warrant imposition of the upper term [citation] and the trial court need not state reasons for minimizing or disregarding circumstances in mitigation." (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) We must affirm unless there is a clear showing the sentence choice was arbitrary or irrational. (*Ibid.*)

The court specifically rejected the mitigating factors offered by Appellant, stating that "it doesn't appear that there are any mitigating factors that would be persuasive to this court," and that "factors in aggravation far outweigh any mitigating factors." Appellant correctly points out that the enhancement for inflicting great bodily injury, section 12022.7, subdivision (d), applies when a victim is under the age of five years. As such, he argues that the court erred in considering S.'s age and vulnerability as aggravating factors.

S., who was three months old at the time of her injuries, could not move, communicate or protect herself, and was more vulnerable to injury than an older child under five years of age. As such, the court's conclusion that she was "particularly vulnerable" was not an abuse of discretion. (See, e.g., *People v. Ginese* (1981) 121 Cal.App.3d 468, 477 ["Extreme youth within the given age range might also be viewed as making a victim 'particularly vulnerable' in relation to others within the age range"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.