

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DWAIN SCALES,

Defendant and Appellant.

B268861

(Los Angeles County
Super. Ct. No. BA424515)

APPEAL from a judgment of the Superior Court of Los Angeles County. Douglas W. Sortino, Judge. Affirmed.

G. Martin Velez, 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, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Peggy Z. Huang, Deputy Attorney General, for Plaintiff and Respondent.

Dwain Scales appeals the judgment entered following a jury trial in which he was convicted of corporal injury to a spouse (Pen. Code,¹ § 273.5, subd. (a); count 1) and misdemeanor battery on a spouse (§ 243, subd. (e)(1); count 3), a lesser offense to the charged crime of corporal injury to a spouse (§ 273.5, subd. (a)). The jury acquitted appellant on count 2, criminal threats (§ 422, subd. (a)). As to count 1, the jury found true the allegation that appellant personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)). Following a court trial, the trial court found true all prior strike and serious felony conviction allegations, as well as all prior prison term allegations. (§§ 667, subd. (d), 1170.12, subd. (b), 667.5, subds. (a) & (b).) The trial court sentenced appellant to state prison for 25 years to life plus 15 years on count 1, and a concurrent term of 180 days in county jail on count 3.

Appellant contends: (1) The trial court abused its discretion in admitting a video recording of a prior domestic violence incident in violation of appellant's federal constitutional due process rights; and (2) In rebuttal argument to the jury, the prosecutor committed several instances of misconduct, which resulted in the denial of appellant's federal constitutional right to a fair trial. We disagree and affirm.

FACTUAL BACKGROUND

Prosecution evidence

Count 3

Karin and appellant were dating and living together in 2006, and married on December 6, 2008. During an argument in

¹ Undesignated statutory references are to the Penal Code.

October 2013, appellant grabbed and shook Karin by the throat with both hands. Appellant was larger and much stronger than Karin, and she was unable to pry his hands off her throat. After squeezing Karin's throat so hard that she could not breathe, appellant released her and bit her on the nose. The bite left redness and lacerations on both sides of Karin's nose at the bridge. Karin took a picture of the injury and sent it to her friend and neighbor, Marsha Henderson.

Count 1

In February 2014, appellant and Karin were no longer living together, but appellant had a key to Karin's house, and he stopped by to visit most mornings. Around 4:00 a.m. on February 11, appellant arrived at the house just as Karin was leaving on an errand. When she returned home a few minutes later, they began to argue. Karin demanded that appellant return her house key. Appellant walked out of the house with Karin following and repeating her demand for the key. As they continued to yell at each other, appellant (who is right-handed) turned and punched Karin on the left side of her face, rendering her unconscious. When she awoke, appellant was gone and she was alone. Her nose was bleeding profusely.

After calling the police, Karin called Henderson and asked her to come over. Paramedics were already at the house treating Karin's injuries when Henderson arrived. Henderson saw noticeable swelling on the left side of Karin's face, and Karin was holding a bloody tissue in her hand. There were also blood-stained tissues in the bathroom. While the paramedics were talking to Karin, she ran into the kitchen and vomited into the sink. Henderson later looked in the kitchen sink and saw blood there as well.

Karin was transported to the hospital and underwent facial reconstruction surgery to repair several facial fractures and an orbital rim fracture, which caused her eyeball to sink inward. The surgeon wired Karin's jaw shut, carefully retracted the bone that had been pushed in by the blow, and placed at least four titanium plates and multiple screws to stabilize Karin's facial structure. Karin stayed in the hospital for four days. Following the surgery, she experienced considerable pain and her nose continued to bleed for two weeks. At the time of trial, she still had pain and permanent numbness in her face, which interfered with eating.

Defense evidence

According to appellant, Karin began the argument with appellant the moment she returned home after her errand on February 11, 2014. Karin became enraged when appellant removed his wedding ring and started to walk out, and threw a cup of coffee at him. As appellant walked toward his truck, he could hear Karin screaming at him from the house. Suddenly he was struck from behind.² Without turning around or looking back, appellant reflexively ducked his head down, and with a closed fist blindly swung his left arm directly behind him. He felt his fist strike his attacker and took two or three steps away before looking back to see his wife lying on the ground. She was conscious and did not appear to be injured. When he reached down to help her up, Karin kicked him, and he saw what appeared to be a can opener in her hand. As he was walking

² Karin denied throwing coffee at appellant or striking him at any time.

back to his truck appellant felt blood running down his head. A picture taken that day showed a cut on the left front side of appellant's head and coffee stains on the bottom and left shoulder of his shirt.

Appellant denied ever biting Karin on the nose. Although he acknowledged striking Karin with his fist, he denied responsibility for the swelling on the left side of her face and the black eye shown in a picture taken at the hospital.

DISCUSSION

I. Admission of the Video of Appellant's Prior Act of Domestic Violence

A. Relevant background

Pursuant to Evidence Code section 1109, subdivision (a)(1), the trial court admitted court records from appellant's 2006 conviction for domestic violence involving his former girlfriend, Veronica Sanders.³ Appellant had pleaded no contest to a violation of section 273.5, subdivision (a), and was sentenced to 12 years in state prison.⁴ The trial court also admitted a 41-second video recording of the 2006 offense in which appellant is seen entering a store and striking Sanders on the head three or four times with a miniature baseball bat.

During the Evidence Code section 402 hearing on the admissibility of the video, Chang Mi Hong, the store owner, testified that she witnessed a confrontation between appellant

³ Los Angeles County Superior Court case No. NA069351.

⁴ The court excluded any evidence of the 12-year sentence as well as a conviction for assault (§ 245, subd. (a)(1)) arising from the same case.

and Sanders in her store sometime in 2006 which was captured on the store's video surveillance system. Shortly after the incident, Hong turned the video over to police. Karin also testified, identifying both appellant and Sanders in the video. That day, appellant told Karin he had hit Sanders in the face with a bat during an argument concerning their child.

The trial court admitted the video under Evidence Code section 1109, finding that the video depicted the incident underlying appellant's 2006 domestic violence conviction. The court concluded that the probative value of the evidence outweighed any potential for undue prejudice.

B. The trial court did not abuse its discretion in admitting the video evidence under Evidence Code section 1109.

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 (*Brown*); *People v. Reyes* (2008) 160 Cal.App.4th 246, 251.) In domestic violence cases, Evidence Code section 1109 "permits the admission of defendant's other acts of domestic violence for the purpose of showing a propensity to commit such crimes.'" (*Brown, supra*, 192 Cal.App.4th at p. 1232.) The rationale underlying the 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, Rep. on Sen. Bill No. 1876 (1995–1996 Reg. Sess.) June 25, 1996, p. 3.)

“ ‘ “The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense.” ’ ” (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531 (*Johnson*)). But 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; *People v. Fruits* (2016) 247 Cal.App.4th 188, 202 (*Fruits*)).

“ ‘[P]rejudicial’ ” in the context of the court’s Evidence Code section 352 analysis “is not synonymous with ‘damaging.’ ” (*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 Evidence Code section 352 as unduly prejudicial is evidence “ ‘ “ “which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.” ’ ” ’ ” (*Fruits, supra*, 247 Cal.App.4th at p. 205.)

Other factors relevant to the Evidence Code 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 also *People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

We review the trial court’s exercise of discretion in admitting or excluding evidence under Evidence Code 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.)

Appellant challenges the probative value of the video, asserting that the 2006 offense as depicted in the video lacked similarity with the charged offense in this case. In so arguing, appellant emphasizes differences in the details of the two incidents, contrasting appellant’s use of a weapon to strike several blows to Sanders’s head after chasing her into a store, with the single blow to Karin’s face using only his hand after she had followed him outside. But Evidence Code section 1109 states only that the propensity evidence be another act of domestic violence; it contains no requirement that the prior act of domestic violence be identical in its details to the charged offense. In this instance, appellant’s conduct on both occasions warranted

prosecution under the same statute, and admission of the video depicting appellant's prior act of domestic violence serves the legislative goals underlying the statute. The trial court thus properly found the video of appellant's assault on Sanders to be highly probative of appellant's propensity to use physical violence in resolving confrontations with his intimate partners in violation of section 273.5, subdivision (a).

We also find no abuse of the trial court's discretion in its determination that the probative value of the video outweighed any potential for undue prejudice. First, the incident depicted in the video was significantly less inflammatory than the charged offense in this case. Despite the violence of the 2006 incident, there was no blood or visible injury, the victim remained on her feet, and she walked out of the store under her own power. By sharp contrast, appellant punched Karin with such force as to render her unconscious. Her face was bloodied and swollen, and she vomited blood. The injuries to her face required immediate surgery to repair multiple fractures and to stabilize her facial structure with the placement of at least four titanium plates and multiple screws. Her nose bled for two weeks after the surgery, and over a year later she continued to experience pain and numbness which interfered with eating.

Other factors which might have justified exclusion of the evidence were also notably absent. Presentation of the 41-second video itself and Hong's testimony consumed a minimal amount of time at trial. There was virtually no risk that the jury would confuse the prior incident with the charged offense since the victims were two different women, appellant admitted the facts of the prior incident, and he was convicted of the prior offense. As the trial court found, the incident depicted in the video was not

remote in time given that appellant committed the current offense only a year and a half after being released from prison custody for the prior offense. Finally, appellant's plea and conviction in the 2006 case based on the conduct shown in the video resolved any issue of certainty with regard to that offense. In short, the video of the prior incident provided the clearest possible showing of appellant's propensity for domestic violence, and the trial court properly exercised its discretion in admitting the evidence by carefully weighing its probative value against any possible prejudicial effect.

II. Asserted Prosecutorial Misconduct

Appellant contends the prosecutor committed four instances of misconduct, which had the cumulative effect of violating his right to a fair trial, requiring reversal. We disagree.⁵

⁵ We reject respondent's assertion that appellant forfeited his claim of misconduct as to all but the first challenged comment by failing to timely object on the ground the comments constituted misconduct. Of course, the failure to timely object and request an admonition generally precludes a defendant from arguing on appeal that the prosecutor committed misconduct. (*People v. Sandoval* (2015) 62 Cal.4th 394, 440.)

However, in light of the court's admonitions here, any additional objections or requests for further admonition were unnecessary and would have served no purpose. As the law requires neither futile objections nor idle acts, appellant did not forfeit the issue for appeal. (Civ. Code, § 3532; *People v. Anderson* (2001) 25 Cal.4th 543, 587.)

A. The prosecutor's rebuttal argument

In his rebuttal argument, the prosecutor asserted that appellant had attempted to prevent Karin from testifying, and argued that the prosecution could not prove a domestic violence case without the victim's testimony or a video. During an in-chambers conference, the trial court sustained the defense objection, declaring the prosecutor's statement to be an inaccurate statement of the law. When proceedings resumed, the court admonished the jury: "I'll sustain the last objection by the defense. [¶] Ladies and gentlemen, the last portion of [the prosecutor's] argument that the only way to prove a case is with live testimony from the victim, you are admonished to disregard that argument. You're not to consider it in any way." The district attorney then resumed his argument, explaining, "Without the testimony of a victim in a one-witness case, it's very hard to prove they were the victim of a crime."

Next, the prosecutor told the jury that it could disregard the court's instructions about the treatment of circumstantial evidence (CALCRIM Nos. 223 and 224) because the prosecution's entire case was based on direct evidence alone. At the court's prompting, defense counsel objected, and the court admonished the jury: "Ladies and gentlemen, you have to follow the instructions that I give to you. You decide what the evidence is, what the facts that have been proved are in this case. You determine whether the evidence is circumstantial or direct, but you must follow each and every instruction that I give, not the interpretation given by the lawyers."

The prosecutor resumed: "So if one of you happens to go back there in the jury room and goes, well, you know, she could have run up behind him and hit him with a can opener, it's

possible. A, you should all go, no, it's not what's possible, it's what's reasonable. [¶] But if for some reason you disagree on that and think it is reasonable, this doesn't mean not guilty because that's direct evidence." Defense counsel objected, and the trial court declared, "That is an incorrect statement of the law. The jury is admonished to disregard it. [¶] If there's two reasonable interpretations from the evidence, ladies and gentlemen, one which points to innocence, one which points to guilt, you must accept the one that points to innocence."

The prosecutor continued, "With circumstantial evidence, you have to accept the one that points to guilt. With direct evidence, you make the credibility call, which is ultimately what your job is here." The court immediately interjected: "I'm going to sustain my own objection. I think it's unreasonable in context and under the circumstances. [¶] Ladies and gentlemen, you must decide in this case whether it's direct or circumstantial evidence, what is reasonable, what is not reasonable. If evidence is reasonable and points to innocence, you must accept the interpretation that points to innocence. If the only reasonable interpretation of the evidence points to guilt, then you vote guilty. [¶] That's the correct interpretation of the law and you must follow the law as I give it to you."

B. The trial court's admonitions to the jury cured any possible harm from the prosecutor's misstatements.

A prosecutor's misconduct constitutes a federal constitutional violation " " " "when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' ' ' ' " (*People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Thomas* (2012) 54 Cal.4th 908, 937.) Conduct by a prosecutor is misconduct

under state law “ “only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.” ’ ” (*People v. Linton* (2013) 56 Cal.4th 1146, 1205; *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 305; *Hill, supra*, 17 Cal.4th at p. 819.)

“Although counsel have ‘broad discretion in discussing the legal and factual merits of a case [citation], it is improper to misstate the law.’ ” (*People v. Mendoza* (2007) 42 Cal.4th 686, 702.) In particular, a prosecutor’s misstatement of the law may constitute misconduct when it is “done in an effort to relieve the People of responsibility for proving all elements of a crime beyond a reasonable doubt.” (*People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1268; *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1266.) Nevertheless, such misconduct will not warrant reversal unless it materially contributed to the verdict in a close case or could not have been cured by a proper and timely admonition. (*People v. McDaniel* (1976) 16 Cal.3d 156, 176–177; *People v. Sassounian* (1986) 182 Cal.App.3d 361, 396–397.)

Contrary to appellant’s assertions, this case was not at all close. Indeed, the evidence of appellant’s guilt was overwhelming. Appellant admitted he punched Karin with his closed fist, and there was no question that Karin suffered serious injuries to her face as a result of that blow. Those injuries included multiple fractures requiring immediate reconstructive surgery and titanium plates to support her facial structure, along with pain and permanent numbness which interfered with eating. The only question for the jury to resolve was whether appellant willfully inflicted those injuries or acted in self-defense, and to make that determination the jury had only to decide whether Karin or appellant was the more credible witness. In

this regard, Karin's testimony that appellant had turned and willfully punched her in the face was corroborated by two witnesses to whom Karin had described the incident immediately afterward. One of those witnesses, Henderson, also saw Karin's swollen face, blood-stained tissues in Karin's hand and in the bathroom, and blood in the kitchen sink.

On the other hand, none of appellant's testimony was corroborated, and much of his description of the incident was squarely contradicted or inconsistent with other evidence in the case. Finally, and most significantly, appellant's claim that he struck Karin in self-defense was belied by the video evidence of the 2006 assault on another of his intimate partners.

We also conclude that the trial court's admonitions to the jury immediately following each of the prosecutor's improper statements averted any possible prejudice from the prosecutor's remarks in this case. In evaluating a claim of misconduct arising from comments made by the prosecutor before the jury, we must determine—in the context of the whole argument and instructions—whether there is a reasonable likelihood that the jury understood or construed the remarks in an improper or erroneous manner. (*People v. Winbush* (2017) 2 Cal.5th 402, 480; *People v. Edwards* (2013) 57 Cal.4th 658, 734.) “ ‘In conducting [our] inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.’ ” (*People v. Covarrubias* (2016) 1 Cal.5th 838, 894.) Moreover, where, as here, “a trial court sustains defense objections and admonishes the jury to disregard the comments, we assume the jury followed the admonition and that prejudice was therefore avoided.” (*People v. Bennett* (2009) 45 Cal.4th 577, 595.)

Here, in addition to sustaining objections and promptly admonishing the jury to disregard the prosecutor's argument, the trial court specifically instructed the jury: "You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." "When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for "[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." ' ' ' (*People v. Centeno* (2014) 60 Cal.4th 659, 676; see *People v. Chatman* (2006) 38 Cal.4th 344, 385.)

The verdicts convicting appellant of the lesser included offense of battery on a spouse in count 3 and acquitting him of criminal threats in count 2 demonstrate a careful weighing of the evidence and attention to the court's instructions. There is no indication the jury did not also abide the court's admonitions and instructions in rendering its verdict on count 1. On the totality of the record in this case, we discern no pattern of misconduct, the cumulative effect of which " ' ' ' "infect[ed] the trial with such unfairness as to make the conviction a denial of due process." ' ' ' ' ' (*People v. Adams* (2014) 60 Cal.4th 541, 568.) We further conclude the court's admonitions adequately cured any potential prejudice from the prosecutor's remarks, and those remarks did not materially affect the verdict.

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.