Filed 6/29/17 P. v. Hardson CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RANDALE HARDSON, Defendant and Appellant.	B269154 (Los Angeles County Super. Ct. No. BA433231)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie A. Swain, Judge. Affirmed.

Meredith J. Watts, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant Randale Hardson appeals the judgment following his conviction and sentence for two counts of domestic violence and one count of assault stemming from two incidents with his then-ex-girlfriend Stacy H. (hereafter Stacy). He raises various challenges to his conviction and sentence, none of which warrants reversal of the judgment. We affirm.

PROCEDURAL BACKGROUND

Appellant was charged with four counts: (1) domestic violence against Stacy on January 25, 2015 (Pen. Code, § 273.5, subd. (a));[1] (2) domestic violence against Stacy on January 26, 2015 (§ 273.5, subd. (a)); (3) assault with a deadly weapon on January 26, 2015 (§ 245, subd. (a)(1)); and (4) criminal threats (§ 422, subd. (a)). For counts 1 and 2, it was alleged he used a dangerous or deadly weapon (§ 12022, subd. (b)(1)), and for count 2, he personally inflicted great bodily injury (§ 12022.7, subd. (e)). It was also alleged he suffered two prior strikes under the "Three Strikes" law (§§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d)); three prior convictions under section 667.5, subdivision (b); and for counts 2, 3, and 4, two prior convictions under section 667, subdivision (a)(1).

Following trial, the jury found defendant guilty of counts 1, 2, and 3, and found the enhancements true. It found him not guilty of count 4. He admitted the prior conviction allegations, and the court denied a *Romero* motion.[2] He was sentenced to 66 years to life, composed of a base term of 40 years to life for count 2 (25 years to life under the Three Strikes law plus 10 years under § 667, subd. (a)(1); four years under § 12022.7, subd. (e); and one year under

---

[1] All undesignated statutory citations are to the Penal Code unless noted otherwise.

[2] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

§ 12022, subd. (b)(1)), plus a consecutive term of 26 years to life for count 1 (25 years to life under the Three Strikes law plus one year pursuant to § 12022, subd. (b)(1)). The court stayed the sentence on count 3 and the remaining enhancements.

FACTUAL BACKGROUND

1. Prosecution Case

This case arises from two altercations between appellant and Stacy on successive days. Stacy ultimately did not testify at trial, but the evidence showed the following facts.

On January 26, 2015, Stacy called 911 and reported to the operator that appellant "just beat me with a rock." She asked for the police and paramedics because she was bleeding "real bad." When police made contact with Stacy outside the police station, she seemed afraid and was bleeding from the back left portion of her head.

She cried on and off and was shaking as she told officers what happened. She said she stood at the corner of a strip mall when she saw appellant walking toward her. Her teenage daughter was there and yelled at appellant, "What did you do to my mom? Why did you hit my mom?" Appellant then hit the daughter in the face with a cell phone charger. Stacy approached him, and he said, "I will kill both of you bitches." She and her daughter were afraid, so they backed away. Appellant picked up a rock and threw it at Stacy, hitting her in the back of the head near her left ear.

Stacy showed police two baseball-sized bruises on the left side of her back. She said on the previous day—January 25, 2015—she and appellant were passengers in a car when they got into an argument. Appellant told the driver, "Pull over. I'm going to beat the shit out of her." He then exited the car, picked up a brick, got in the back seat, pushed Stacy over, and hit her multiple times on her back. He pulled her out of the car by her hair and had the driver

pull away without her. Stacy said there were four other incidents of abuse in the past.

While being treated in an ambulance, Stacy made statements to paramedics consistent with what she had just told the police. She was transported to the hospital, where she told the doctor her ex-husband hit her in the head with a brick. She also said she suffered an injury to her left side flank from an assault by appellant the previous day. As treatment, her head wound required four staples. A "CT" scan revealed one of her ribs had an "old" fracture on the back left side.

Two days after the assault on January 28, 2015, Stacy met with Los Angeles Detective Joseph Graves at her apartment. She again said on January 25, 2015, she and appellant were riding in a car together when they began to argue. Appellant told the driver to pull over, and he exited the car, got back in, and struck Stacy in the back with a brick. She said on January 26, 2015, appellant came up to her and her daughter and they began to argue. He hit her daughter in the face with a cell phone charger and said, "I'll kill you two bitches." Stacy and her daughter tried to run from appellant, and he picked up a rock and threw it, hitting Stacy in the head.

Stacy's version of events changed when she spoke with officers on February 5, 2015. She told them on January 26, 2015, her daughter showed up with a sock full of rocks to retaliate against appellant for hitting Stacy with a brick the day before. Appellant got control of the sock and hit Stacy in the head with it.

Officers interviewed a security guard named Miguel Baltazar about the January 26, 2015 incident. He said he did not see anything, but the officer was skeptical because Baltazar once pointed officers in the wrong direction while they were looking for a fleeing suspect.

Appellant was arrested on January 26, 2015, and taken into custody. While in jail, appellant made a number of recorded phone calls. In a call to an associate, he asked, "Do she still love me?" In another call to a friend, the friend assured him, "they can't do too much to you" because they "ain't got no witness." In the same call, appellant was angry because "AJ" was supposed to "holler at the security guard" and the guard had "seen the whole fucking thing man." The friend asked if "Don-Don" knew the guard, and appellant said "Don-Don" knew him "good." The friend said he would contact "Don-Don." In a call to another friend, the friend asked, "What they trying to stick you with . . . ?" Appellant responded, "For domestic violence." The friend said, "Aw shit, they gotta, you gotta take them fucking classes and all that bullshit."

Appellant also called Stacy directly several times, which violated a restraining order. He used another inmate's booking number to avoid detection. During those calls, Stacy said their relationship was going to be "better" and they said they loved each other. She said the prosecution "need[s]" her, but "[t]hey don't got that so that's the good thing . . . [¶] . . . [¶] . . . in your favor." She also said the prosecution would "be dropping the case as long as I'm not at court." Appellant yelled at her for not having her phone, and when she said she got a subpoena, he said, "Oh my God! Please don't talk that on the phone!" She told him he needed "to take some classes while you're in there because you ain't getting rehabilitated," and "You need help."

Associates of appellant also called Stacy from jail. They told her not to visit appellant for his "birthday" and she should "go on a vacation" for a few weeks. She initially seemed confused and asked if he meant "c-date" because appellant's birthday was not in the near future. But then she responded, "*Oh!* I get you. I get you." He again told her, "go on your vacation, have a little fun, [and] stay

out there for like . . . a few weeks." She said, "Yeah, I think that'll be best" and "Yeah, I'm a go somewhere for a few weeks. That'll, that'll do it." At the end of the call, she said to tell appellant "he ain't in rehab. He needs to go to some classes."

Stacy spoke again with appellant, and she said he needed "help" and she was going to "go somewhere." In another call, they discussed her avoiding having to testify by pleading the "Fifth" or asserting the marital privilege. They discussed the risk of committing perjury, and appellant said she would not be lying by saying, "I called the D.A. a[nd] told her it was all these discrepancies in this paperwork." She responded that she was going to say she made everything up. Appellant responded, "Yeah!" He said the details about the rock were "fabricated." She said she would have left the state if she could.

In the next call, appellant told Stacy to say she was lying and she got "accidentally hit." He said, "That shit never even happened." At the end of the call, Stacy asked, "[A]re you reforming yourself in there?" and "You getting your mind right?" He said yes, and she said, "Because you had some problems. You feel me?" He responded, "Yeah."

In the final call, appellant told Stacy, "I changed my ways" and " . . . I'm working still on changing a lot of them." She responded, "[N]ow all of a sudden you this changed man?" and "I wish shit got better. I just look back at all this shit and I'm like, 'What the fuck?' " Appellant said, "We both did fucked up shit to each other," and he again claimed he changed his life. He also urged her to plead the Fifth and said they could go to counseling together when he got out.

Pursuant to Evidence Code section 1109, the prosecution introduced evidence of two past acts of domestic violence involving appellant. A police officer testified that on July 4, 2014, he saw four

individuals exit a car and run away. Two of them—identified as appellant and Stacy—were in a physical altercation. Appellant was angry and holding Stacy's arm as they yelled at each other. They initially ignored officers' commands to separate, but then Stacy walked away. She spontaneously told officers, "He slammed me to the ground. That's how I got this," pointing to fresh abrasions on her face and elbow. She said before the altercation, appellant had told her, "Bitch, get out of my car," and she took his keys and started running. Appellant chased her and threw her to the ground.

The prosecution introduced a certified court docket showing appellant had a 2003 felony conviction for inflicting injury on a spouse, cohabitant, or girlfriend in violation of section 273.5, subdivision (a).

2. Defense Case

Miguel Baltazar worked as a security guard at the shopping mall where the January 26, 2015 incident occurred. He had seen appellant in the area previously. On the day of the altercation, he was going to lunch out of uniform when paramedics alerted him that an altercation was occurring. He looked around and heard screaming. He saw Stacy swing at appellant with a kitchen knife and another young woman swing at appellant with a sock containing something. He told them to stop and leave. He saw Stacy bleeding from her head. He denied seeing appellant with the sock or throw a rock. No one talked to him about testifying, and he did not know appellant's friends or family.

On cross-examination, Baltazar said he did not call the police after the incident. When he asked Stacy if she needed an ambulance, she did not respond. Instead, she got into a car and left. Baltazar knew a man named "Don-Don," though he was not sure if he was friends with appellant. He spoke to "Don-Don" after the

incident but did not mention it. He clarified that he might have said to "Don-Don," "Hey, was that your boy the other day almost getting stabbed by that woman?" "Don-Don" responded that it was, and Baltazar replied, "Damn fucking crazy people." Baltazar had been previously convicted of a domestic violence crime.

Diane Kirby-White was a senior district attorney investigator who interviewed Stacy on April 20, 2015. The court permitted her to testify only for the purpose of impeaching Stacy pursuant to Evidence Code section 1202. Stacy recanted the January 25, 2015 incident, claiming it never happened. Instead, the bruises on her back came from a fall while on drugs. She repeatedly said she did not want to incriminate herself and she talked to "some people" who advised her not to say certain things because they would incriminate her.

As for the January 26, 2015 incident, Stacy said she tricked appellant into meeting her at the shopping center because she was angry he did not come home the previous night. When he arrived, she chased him up and down the street with a knife. Her daughter then appeared "out of nowhere" carrying a rock in a sock and tried to help her. Her daughter hit her while swinging it. Stacy said she went to the police station for medical treatment but did not want to file a report. She lied when she told her daughter about appellant hitting her with a brick the previous night because she was mad at appellant.

Kirby-White said while talking about the attacks, Stacy said appellant "was trying to—I guess the word for it—persuade her to say that it didn't happen that way." Stacy claimed she and appellant were common-law married for 10 years and she could not be made to testify against him. When confronted with conflicting statements that she and appellant had only been together between two and four years, she had no response. She acknowledged

appellant threatened to kill her and her daughter. When Kirby-White brought up the July 2014 domestic violence incident, Stacy did not deny it, but became angry and refused to speak with her. Kirby-White testified recanting is common with domestic violence victims.

Appellant testified, acknowledging he had two 22-year-old felonies. He denied the January 25, 2015 incident entirely. As for the January 26, 2015 incident, he was walking near the shopping center when Stacy jumped out from behind a bus stop. She pulled a knife out of her purse and said, "What's up?" Then Stacy's daughter ran out of the shopping center toward them and swung a rock in a sock at him. He dodged it and moved toward the shopping center. He heard a "thud" and thought the sock connected with something. Stacy said to her daughter, "All right, bitch. That's enough." The security guard arrived and told them to disperse and drop the weapons. Appellant walked in the opposite direction from Stacy and her daughter.

When asked about his jail phone calls, he denied telling Stacy to go "on vacation" and did not instruct anyone else to tell her that, although he knew the people on the call. He admitted telling Stacy to plead the Fifth because he cared about her and did not want her to go to jail. He acknowledged that when Stacy told him he needed to take classes, she was referring to domestic violence classes. When he told her he would change, he meant he would no longer cheat on her. He admitted violating the restraining order by contacting her and using other inmates' booking numbers to hide the communication. But he denied ever discouraging Stacy from testifying or encouraging others to do so. He did admit saying if she did not come to court the case would be dropped and encouraging her to tell the prosecutor she did not wish to prosecute.

He said he told others to "holler at the security guard" because the guard saw the incident. He also testified he wanted "Don-Don" to "lace up" the security guard, meaning he wanted the guard to come into court and testify to what happened.

Appellant denied ever assaulting Stacy, including during the July 2014 incident. He also denied he had a domestic violence problem. When asked about past domestic violence against other women, he admitted he was convicted of criminal threats when he told someone to tell his then-girlfriend he was going to "fuck her up," though he had no ill intent. He also admitted to physical altercations with another female partner Cherice B. and was convicted of domestic violence against her in three cases. For one case resulting in a 2003 conviction, he admitted pulling her hair during the incident.

Appellant agreed he started trying to get back together with Stacy after his arrest. Despite what happened, he still loved her and acknowledged he told her he would marry her when he got out of jail. When he talked to her from jail, he used coded language, like using the term "the rocky" when referring to the rock. He said that was all fabricated. He also referred to a 911 call on the day before the rock incident, but still denied he was referring to the January 25, 2015 incident with the brick.

DISCUSSION

1. Challenges to Prior Act Evidence

a. Constitutional Claims

Appellant contends the trial court violated due process when it admitted a 2003 domestic violence conviction involving Cherice B. and evidence of the domestic violence incident between him and Stacy on July 4, 2014, pursuant to Evidence Code section 1109. He also challenges the jury instruction based on former CALCRIM No.

852 that conveyed the substance of Evidence Code section 1109. We reject his claims, which are foreclosed by existing authority.

Evidence Code section 1109 allows a trial court to admit prior acts of domestic violence in a current domestic violence case to show a defendant's propensity to commit such acts, subject to the court's discretion under Evidence Code section 352. (Evid. Code, § 1109, subd. (a)(1).) It was modeled after Evidence Code section 1108, which allows a court to admit evidence of a defendant's past sex offenses as propensity evidence in a current sex offense case, again subject to Evidence Code section 352. (Evid. Code, § 1108, subd. (a); *People v. Brown* (2000) 77 Cal.App.4th 1324, 1333.) Former CALCRIM No. 852 guided the jury's consideration of evidence admitted pursuant to Evidence Code section 1109.[3]

---

[3] As given in this case, the instruction stated: "The People presented evidence that the defendant committed domestic violence that was not charged in this case. Domestic violence means abuse committed against an adult who is a person who dated or is dating the defendant. Abuse means intentionally, recklessly causing or attempting to cause bodily injury or placing another person in reasonable fear of imminent, serious bodily injury to himself or herself or . . . someone else. 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. A 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, 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 to or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit the crime of inflicting injury on an ex-girlfriend as

In *People v. Falsetta* (1999) 21 Cal.4th 903, our high court rejected a due process challenge to Evidence Code section 1108, concluding Evidence Code section 352 guarded against the admission of propensity evidence that could result in a fundamentally unfair trial. (*Falsetta*, at pp. 917-918.) Relying on *Falsetta*, numerous courts have rejected due process challenges to Evidence Code section 1109. (See *People v. Johnson* (2010) 185 Cal.App.4th 520, 529 [listing cases].) Similarly, in *People v. Reliford* (2003) 29 Cal.4th 1007, our high court rejected a challenge to an instruction guiding a jury's consideration of prior sex crimes evidence pursuant to Evidence Code section 1108. (*Reliford*, at pp. 1009, 1012.) Courts of Appeal extended *Reliford* to reject similar challenges to former CALCRIM No. 852. (See *People v. Johnson* (2008) 164 Cal.App.4th 731, 739; *People v. Reyes* (2008) 160 Cal.App.4th 246, 251-253.)

We see no reason to depart from this authority. We reject appellant's claims for the reasons expressed in those cases.

b. Evidence Code Section 352

Appellant further contends the trial court abused its discretion under Evidence Code section 352 in admitting his two prior acts of domestic violence. As noted, Evidence Code section 1109 expressly incorporates Evidence Code section 352, so evidence of past domestic violence is "inadmissible only if the court determines that its probative value is 'substantially outweighed' by

---

charged here. [¶] 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 the crimes charged. The People must still prove each charge and allegation of every charge beyond a reasonable doubt. Do not consider this evidence for any other purpose."

its prejudicial impact. We review a challenge to a trial court's decision to admit such evidence for abuse of discretion." (*People v. Johnson, supra*, 185 Cal.App.4th at p. 531, fn. omitted.)

Probative value is chiefly measured by the similarity between the prior act and charged offense. (*People v. Johnson, supra*, 185 Cal.App.4th at p. 531.) Other factors include whether the prior act evidence came from an independent source (*id.* at p. 533), whether the prior act resulted in a conviction (*ibid.*), and whether the prior act was remote (*id.* at p. 534). On the other side of the scale, prejudice "is not synonymous with 'damaging.' [Citation.] Rather, evidence is unduly prejudicial under [Evidence Code] section 352 only if it ' " 'uniquely tends to evoke an emotional bias against the defendant as an individual and . . . has very little effect on the issues' " ' [citation], or if it invites the jury to prejudge ' " 'a person or cause on the basis of extraneous factors' " ' [citation]." (*Ibid.*) In assessing prejudice, "[c]ourts are primarily concerned where the past bad act was 'more inflammatory' than the offense for which the defendant is on trial." (*Id.* at p. 534, fn. 11.)

The trial court properly weighed these considerations in admitting evidence of the July 4, 2014 incident. The incident was recent and closely mirrored the current offenses—appellant physically assaulted Stacy in public during an argument. Moreover, the key issue for the jury in this case was who to believe—appellant or Stacy. Evidence that appellant had previously assaulted Stacy in a similar way undermined his denials that the January 25, 2015 incident occurred at all and the January 26, 2015 incident occurred the way Stacy had described to police. While the July 4, 2014 incident did not result in a conviction, the evidence was trustworthy because it came from an independent source: an officer who witnessed part of the altercation. Although he relayed a statement from Stacy that

appellant had thrown her to the ground, she said it spontaneously while the incident was still occurring and the officer observed her injuries consistent with her claim. On the other side of the scale, there was little risk of undue prejudice because the charged assaults were far more serious than the July 2014 incident. Unlike in the July 2014 confrontation, in the charged assaults appellant beat Stacy with a brick and threw a rock at her head, and he threatened to kill her and her daughter.

The court abused its discretion, however, when it admitted appellant's 2003 domestic violence conviction because it did not undertake the proper balancing inquiry under Evidence Code section 352.[4] As noted above, probative value is chiefly measured by the similarities between the prior act and charged offense. (*People v. Johnson, supra*, 185 Cal.App.4th at p. 534.) But the court declined to examine any of the facts underlying the conviction other than to note it involved a different victim, Cherice B. When defense counsel asked about the facts supporting the conviction, the court stated, "I don't think [the prosecutor] needs to establish anything more than the conviction for that particular code section for it to be admissible under [Evidence Code section] 1109. So I will permit you to mark this—introduce this conviction. The other one requires additional information to make a finding that it's a domestic

---

[4] Because this conviction occurred more than 10 years before the charged offenses, Evidence Code section 1109 establishes a presumption that it is inadmissible except in the "interest of justice." (Evid. Code, § 1109, subd. (e); see *People v. Johnson, supra*, 185 Cal.App.4th at p. 539.) The trial court found the admission of the prior conviction would serve the interests of justice under Evidence Code section 1109, subdivision (e), and appellant does not challenge that ruling on appeal.

violence crime." Defense counsel said, "That's over defense, 352, foundation." The court replied, "I understand."

Generally, " '[t]he record of a ruling based on Evidence Code section 352 " 'must affirmatively show that the trial judge did in fact weigh prejudice against probative value . . . .' " ' " (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274.) " '[T]he necessary showing can be inferred from the record despite the absence of an express statement by the trial court.' [Citation.] But without an express statement by the trial court that it has weighed prejudice against probative value, the record must at least 'affirmatively demonstrate that the court did so.' " (*Id.* at p. 1275.)

Here, rather than showing the court undertook the weighing process required by Evidence Code section 352, the record shows the court affirmatively stated it did *not* have to examine the underlying facts to determine if the 2003 conviction was admissible. While the fact that it was a domestic violence conviction might have satisfied the first step of admissibility under Evidence Code section 1109, the court was required to go further and determine admissibility under Evidence Code section 352. By declining to examine the underlying facts, the court could not properly assess the relevance of the prior conviction and balance it against the risk of undue prejudice.

Nevertheless, the admission of the conviction was harmless because it was not reasonably probable appellant would have obtained a more favorable result if it had been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.) The evidence against him was overwhelming. Before recanting, Stacy gave consistent accounts of appellant's assaults to the 911 operator, to police, to paramedics, and at the hospital. She also gave the same account to Detective Graves two days later. Even after she recanted, she urged appellant in jail phone calls to get "help," "take some classes,"

"reform[]," and "get[] [his] mind right" because he "had some problems," all of which strongly implied he had assaulted her in the way she had originally reported. Appellant also showed a consciousness of guilt when he made calls from jail to Stacy in violation of a restraining order and under other inmate numbers in order to influence her testimony. Several of his comments during those calls suggested he, in fact, committed the assaults.

On the other hand, his defense case was weak. The security guard had credibility issues, and the jury heard evidence that appellant had his friends "holler" at the security guard, suggesting he might have tried to influence the guard's testimony as he had done with Stacy. Appellant also had serious credibility issues. During cross-examination, he admitted he suffered the 2003 conviction along with two other domestic violence convictions involving Cherice B. He also admitted he pulled Cherice B.'s hair during the 2003 incident. Like the July 2014 incident, this was less serious than appellant's charged assaults on Stacy, so there was little risk of inflaming the jury with his 2003 conviction. Appellant also admitted telling someone on another occasion to tell his then-girlfriend he was going to "fuck her up," and he admitted the classes Stacy referred to in the jail calls were domestic violence classes. The jury also properly heard evidence of the July 2014 confrontation to show appellant's propensity to commit domestic violence as permitted by Evidence Code section 1109.

Finally, the jury acquitted appellant of the criminal threats count, suggesting it was not inflamed by appellant's other acts of domestic violence and carefully considered each count based on the evidence. (See *People v. Robertson* (2012) 208 Cal.App.4th 965, 994.)

2. Challenge to Instructions for Considering Stacy's Prior Statements

Appellant argues the court violated his due process rights to a defense and a fair trial when it gave a modified version of CALCRIM No. 319 that limited the jury to considering Stacy's statements to district attorney investigator Kirby-White only for impeachment of Stacy's prior statements to police and medical personnel, and not for their truth. We disagree.

a. Procedural Background

When Stacy refused to come to court to testify, the trial court declared her unavailable pursuant to Evidence Code section 240 and admitted her statements on the 911 call, to police, and to medical personnel under the hearsay exception in Evidence Code section 1370, which allowed the jury to consider those statements for their truth.[5] During his defense case in chief, appellant sought to admit Stacy's later statements to district attorney investigator Kirby-White for impeachment purposes, which the trial court

---

[5] Evidence Code section 240 sets forth the standards for declaring a witness unavailable. Evidence Code section 1370, subdivision (a) permits the admission of hearsay statements if all the following conditions are met: "(1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. [¶] (2) The declarant is unavailable as a witness pursuant to Section 240. [¶] (3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section. [¶] (4) The statement was made under circumstances that would indicate its trustworthiness. [¶] (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official."

allowed. When discussing jury instructions, the court noted Kirby-White's testimony was admissible "under Evidence Code section 1202, credibility of hearsay declarant."[6] The court felt it needed to give an adapted version of CALCRIM No. 319 to limit the jury's consideration of Kirby-White's testimony to impeachment. Defense counsel did not object. The court revisited the issue and read into the record its proposed CALCRIM No. 319. Again, defense counsel did not object.

As modified, CALCRIM No. 319 stated: "Now, Stacy H[.] did not testify in this trial, but her statements about the alleged crime were made to law enforcement and medical personnel. In addition to these statements, you have heard evidence that Stacy H[.] made other statements, and I'm referring to the statements about which the district attorney's investigator testified. If you conclude that Stacy H[.] made those other statements, you may only consider them in a limited way. You may only use them in deciding whether to believe the report of Stacy H[.] to law enforcement and medical personnel. You may not use those other statements as proof that the information contained in them is true, nor may you use them for any other reason."

---

[6] Evidence Code section 1202 states: "Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant."

The court also read CALCRIM No. 318 without substantive change from the model instruction: "You have heard evidence of statements that a witness made before the trial. If you decide that the witness made those statements, you may use those statements in two ways: number one, to evaluate whether the witness' testimony in court is believable; and number two, as evidence that the information in those earlier statements is true."

b. Forfeiture

Respondent argues appellant forfeited his challenge to the modified CALCRIM No. 319 because he did not object to it in the trial court. Even absent an objection, we will address the merits because appellant claims the instruction was an incorrect statement of the law and his substantial rights were affected. (§ 1259; *People v. Hudson* (2006) 38 Cal.4th 1002, 1012; *People v. Brown* (2003) 31 Cal.4th 518, 539, fn. 7.)

Respondent also contends appellant forfeited his challenge to the jury instruction because he did not ask the trial court to admit Kirby-White's testimony for its truth, rather than merely for impeachment. This argument has some weight—had appellant persuaded the court to admit this evidence for its truth, CALCRIM No. 319 would not have been needed at all. But appellant has not challenged the admission of Kirby-White's testimony and has only attacked the legal correctness of the instruction. Thus, we reject respondent's forfeiture claim and will address the merits.

c. Merits

While on the surface appellant's argument is that the modified CALCRIM No. 319 undermined his right to present a defense, his real issue is with the interplay between Evidence Code sections 1370 and 1202 as applied to Stacy's various out-of-court statements. These rules allowed the court to admit Stacy's damaging statements to medical personnel and police at the time of

the incident for their truth, while limiting Stacy's more favorable statements to Kirby-White months later for impeachment only. This was a routine application of the rules of evidence, which does not generally infringe on the right to present a defense. (*People v. Linton* (2013) 56 Cal.4th 1146, 1183.) The modified CALCRIM No. 319 accurately reflected the applicable rules.

Further, even with the limitation placed on Kirby-White's testimony, appellant adequately presented his defense. He testified to his own version of events and offered corroborating testimony from the security guard at the scene. While the jury could only consider Kirby-White's testimony to impeach Stacy's prior statements to medical personnel and police, the jury was free to discount Stacy's initial statements and credit appellant's version of events. Thus, appellant was not prevented from presenting his defense and we find no constitutional problem with CALCRIM No. 319 as given.

3. Refusal to Strike Priors under *Romero*

Appellant argues the trial court should have granted his motion to strike his prior strike convictions pursuant to *Romero*. We review the trial court's refusal to strike a prior strike conviction for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony*).) A trial court "does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.) We find no abuse of discretion here.

In a bifurcated proceeding, respondent admitted two 22-year-old strike convictions for voluntary manslaughter. Appellant moved to strike those convictions under *Romero* because they were 22 years old. The prosecutor argued the offenses involved killings and, within five years of his release from prison, he was convicted of domestic violence in 2003. Further, between 2001 and the date of

sentencing, he had committed at least six acts of domestic violence, four of which resulted in convictions. And in the current case, he was convicted of two separate domestic violence incidents involving Stacy, her daughter, deadly weapons, and a death threat.

According to the probation report, appellant had suffered a misdemeanor domestic violence conviction in 2001, a felony domestic violence conviction in 2003, and a misdemeanor disorderly conduct conviction in 2009.

The trial court denied the *Romero* motion, explaining, "Based on the defendant's substantial criminal history, he falls well within the spirit of the Three Strikes law." It added, "I cannot in good faith grant your *Romero* motion given your behavior after you've been convicted several times. Even if I did grant it, I suspect the People would appeal. I would think any Court of Appeal looking at your record would reverse my decision. You're just not a candidate for me striking any of the strikes. As a result, you're subject to the Three Strikes law. So I have no—or very little discretion. So I'll have to sentence you, and we'll go from there."

Under *Romero*, a trial court retains discretion to strike or vacate prior felony conviction allegations under the Three Strikes law in furtherance of justice. (*People v. Williams* (1998) 17 Cal.4th 148, 158 (*Williams*).) In exercising this discretion, the court must consider "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Id.* at p. 161.) However, the case for striking a prior conviction must be "extraordinary . . . where the relevant factors . . . manifestly

support the striking of a prior conviction and no reasonable minds could differ." (*Carmony, supra*, 33 Cal.4th at p. 378.)

The trial court did not abuse its discretion because appellant's history demonstrated he was a life-long violent criminal falling precisely within the Three Strikes law. Although his two voluntary manslaughter convictions were older, he engaged a pattern of continued violent behavior against his partners, culminating in two physical confrontations with Stacy over the course of two days involving deadly weapons and a death threat. He argues other potentially mitigating factors existed, such as his current offenses involved a lower level of violence than his voluntary manslaughter convictions, involved a mutual confrontation, and may have involved drug or alcohol use. He also argues at his age, his 66-years-to-life sentence was the functional equivalent of life without parole and not in the interests of justice (which we discuss more fully below). But he ignores the fact that he used deadly weapons on Stacy during the current assaults and he later covertly tried to persuade her not to testify against him. Also, none of the facts he cites erases his long history of violent behavior. Even in light of possibly mitigating factors, the court acted well within its discretion in refusing to strike his prior convictions. (See *Carmony, supra*, 33 Cal.4th at p. 378 [we must affirm if " 'the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law' "].)

Appellant further argues the trial court appeared unaware of its discretion to strike his priors, either as to both counts or as to one count but not the other. The trial court does, indeed, have the discretion to strike priors as to all counts or as to one count and not others. (*People v. Garcia* (1999) 20 Cal.4th 490, 503-504.) But defense counsel never requested the court exercise its discretion to strike a prior as to only one count. In any case, the record reflects

the trial court clearly understood its discretion but simply found appellant's characteristics could not support striking the priors at all. We see nothing warranting reversal.

4. Constitutional Challenge to Sentence

Having turned 43 years old the day after his sentencing, appellant argues his 66-years-to-life sentence under the Three Strikes Law is a de facto life without parole (LWOP) sentence that constitutes cruel and/or unusual punishment in violation of the Eighth Amendment and the California Constitution. Appellant forfeited this claim by failing to raise it in the trial court. (*People v. Speight* (2014) 227 Cal.App.4th 1229, 1247-1248; *People v. Russell* (2010) 187 Cal.App.4th 981, 993.) Notwithstanding his contrary argument, this claim was not preserved through his *Romero* motion because the two issues involve different considerations. But to forestall a claim of ineffective assistance of counsel, we will address—and reject—his claim on the merits. (*Russell, supra*, at p. 993.)[7]

A sentence violates the Eighth Amendment to the federal constitution only if it is grossly disproportionate to the severity of the crime. (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1076 (*Carmony II*).) We look to three criteria in making this determination: (1) the gravity of the offense and the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences imposed for the same crime in other jurisdictions. (*Solem v. Helm* (1983) 463 U.S. 277, 292; *Carmony II, supra*, at p. 1076.)

---

[7] Even if we addressed appellant's ineffective assistance claim, we would reject it because his counsel did not perform deficiently by failing to raise a meritless objection. (*People v. Reyes* (2016) 246 Cal.App.4th 62, 86.)

A sentence is "cruel or unusual" under article 1, section 17 of the California Constitution if it is " 'so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' " (*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1230-1231 (*Retanan*).) We look to three similar criteria to determine whether a sentence is cruel or unusual under California law: "the nature of the offense and the offender (with particular attention to the degree of danger both present to society); a comparison of the sentence with those for other more serious offenses under California law; and a comparison of the sentence with those in other states for the same offense." (*Id.* at p. 1231, citing *In re Lynch* (1972) 8 Cal.3d 410, 425-427 (*Lynch*).)

Looking at the offense and the offender, we focus on " 'the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts.' [Citation.] We also focus on the particular offender's 'individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.' " (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510 (*Martinez*).)

Here, appellant's current crimes and his pattern of violent behavior supported his lengthy sentence. His criminal history is serious and repetitive, and it shows no signs of abating. After being convicted of two counts of voluntary manslaughter, he engaged in a long cycle of violence with romantic partners, resulting in additional convictions. That behavior culminated in two violent assaults against Stacy using dangerous weapons over the span of two days. While he was in custody for those assaults, he tried to manipulate Stacy's testimony.

As the trial court recognized, appellant's criminal history and current crimes placed him well within the spirit of the Three Strikes law. "[T]he Legislature may impose stiffer penalties by treating the prior convictions as factors in aggravation." (*Carmony II, supra*, 127 Cal.App.4th at p. 1079.) Compared to other serious Three Strikes sentences for far less serious crimes that have withstood constitutional challenges, appellant's sentence was neither grossly disproportionate nor shocking. (See, e.g., *Lockyer v. Andrade* (2003) 538 U.S. 63, 66-68, 77 [trial court validly imposed Three Strikes sentence of 50 years to life for two felony "wobbler" petty theft convictions with a prior and three prior residential burglaries]; *Ewing v. California* (2003) 538 U.S. 11, 19, 30-31 [plur. opn. of O'Connor, J.; Three Strikes sentence of 25 years to life for grand theft of three golf clubs worth $1,200 with three prior burglary and one prior robbery conviction]; see *id.* at p. 32 [Scalia, J., conc. in the judgment]; *id.* at p. 33 [Thomas, J., conc. in the judgment].)

To argue the length of his sentence beyond his natural life is unconstitutional, appellant relies on Justice Mosk's concurrence in *People v. Deloza* (1998) 18 Cal.4th 585, stating that a sentence of 111 years is impossible to serve and constitutes cruel and unusual punishment. (*Id.* at pp. 600-601 [conc. opn. of Mosk, J.].) Rejecting precisely the same argument, the court in *Retanan* correctly noted, " ' "no opinion has value as a precedent on points as to which there is no agreement of a majority of the court. [Citations.]" [Citations.] Because no other justice on our Supreme Court joined in Justice Mosk's concurring opinion [in *Deloza*], it has no precedential value.' " (*Retanan, supra*, 154 Cal.App.4th at p. 1231; see *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1382-1383 [also rejecting conc. opn. of Mosk, J., in *Deloza*].) In affirming a 135-year-to-life sentence, the court in *Retanan* also pointed out, "California courts

repeatedly have upheld such lengthy prison sentences." (*Retanan, supra*, at p. 1231 [noting examples of 283 years eight months and 129 years]; see *Byrd, supra*, at p. 1382 [rejecting challenge to sentence of 115 years plus 444 years to life]; see also *People v. Sullivan* (2007) 151 Cal.App.4th 524, 573 (*Sullivan*) [rejecting challenge to sentence of 210 years to life].)

Comparing his sentence to other sentences in California, appellant incorrectly focuses on the possible sentences for other violent felonies, when he should compare his sentence to other comparable *recidivist* sentences under the Three Strikes law. "[A] comparison of defendant's 'punishment for his current crimes with the punishment for other crimes in California is inapposite since it is his recidivism in combination with his current crimes that places him under the three strikes law.' " (*Sullivan, supra*, 151 Cal.App.4th at p. 571; see *Martinez, supra*, 71 Cal.App.4th at p. 1512; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1338 (*Cline*).) This prong of the proportionality analysis does not assist appellant.

Looking to sentences in other jurisdictions, appellant relies solely on the analysis in *Lynch*. Decided in 1972, *Lynch* cited a series of cases from other states applying a proportionality principle to life sentences for various crimes. (*Lynch, supra*, 8 Cal.3d at p. 423.) But *Lynch* did not address a Three Strikes sentence like appellant's here. Other courts in California have more recently explained, "a comparison of California's punishment for recidivists with punishment for recidivists in other states shows that many of the statutory schemes provide for life imprisonment for repeat offenders, and several states provide for life imprisonment without possibility of parole. California's scheme is part of a nationwide pattern of statutes calling for severe punishments for recidivist offenders." (*Cline, supra*, 60 Cal.App.4th at p. 1338; see *Sullivan, supra*, 151 Cal.App.4th at p. 573.) Even if California's scheme is

the most severe, that does not mean it is unconstitutional. The state is not required to "march in lockstep with other states in fashioning a penal code. It does not require 'conforming our Penal Code to the "majority rule" or the least common denominator of penalties nationwide.' " (*Martinez, supra*, 71 Cal.App.4th at p. 1516.) "We conclude, as have other courts when presented with essentially the same issue in similar contexts, that defendant has failed to establish his sentence is disproportionate when compared to recidivist statutes in other jurisdictions." (*Sullivan, supra*, at p. 573 [citing cases].)

DISPOSITION

The judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.