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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DAVID WAYNE TAYLOR, Defendant and Appellant.	B268607 (Los Angeles County Super. Ct. No. VA136687)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed.

Alan S. Yockelson, 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, Shawn McGahey Webb and Ilana Herscovitz, Deputy Attorneys General, for Plaintiff and Respondent.

On September 1, 2014, defendant David Wayne Taylor (Taylor) shot his adult son, Michael Taylor (Michael). At trial, Taylor argued he acted in self-defense. A jury convicted Taylor of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b))[1] and being a felon in possession of a firearm (§ 29800, subd. (a)(1)). He appeals, arguing the trial court erred in excluding evidence of Michael's arrest for misdemeanor spousal battery and denying a motion for mistrial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 2, 2015, an information charged Taylor with attempted murder (§§ 664, 187, subd. (a); count 1), assault with a semiautomatic firearm (§ 245, subd. (b); count 2), and being a felon in possession of a firearm (§ 29800, subd. (a)(1); count 3). The information further alleged that Taylor had personally discharged a firearm, causing great bodily injury (§§ 12022.53, subds. (b) - (d)), and had suffered three prior serious felony convictions (§§ 667, subds. (b) - (j) & 1170.12). Taylor pled not guilty and denied the special allegations.

At trial, Michael testified that he rarely saw Taylor when he was growing up. In 2004, when Michael was 20 years old, he initiated contact with Taylor and they began to see each other regularly. They spoke on a weekly basis and never argued.

In August 2014, Taylor's nephew passed away. Family members, including Michael, gathered at Taylor's house to mourn. On September 1, 2014, Michael had been drinking alcohol and started crying and "breaking down." He "fe[lt] drunk" and when he went outside to take a walk, Taylor asked

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

him " 'what's wrong?' " Michael told Taylor he was "breaking down" and "need[ed] some time to [him]self." Taylor "stop[ped] him" and said he needed Michael "to be strong for [him] because [he couldn't] take it." Michael responded, " 'I need you to help me. I need you to wrap your arms around me. If you can't do that, just leave me alone right now.' "

When Michael started to "walk away," Taylor tried to "hold [him] there" by grabbing the front of Michael's shirt. Michael repeatedly told him to let go, and "after the third time . . . [Michael] thr[e]w [Taylor] over the hood" of a car. Taylor slid to the ground, then "got up ready to fight" with "his hands up." Michael also put his "hands up ready to fight." At that point, Taylor pulled a gun out of his waistband and shot Michael in the abdomen.

Michael "stumbled out of the yard" and into the street, where he collapsed facing down. When he rolled over, he saw Taylor standing above him. Taylor placed a bullet in the chamber of his gun and put the gun to Michael's head. Michael said, " 'Daddy, are you going to kill me? I'm your son.' " "[T]hat's when the police and ambulance started coming," and Taylor ran off.

Michael was taken to the hospital and was in a coma. The bullet damaged his liver and spinal nerve, and he was operated on three times. He had to learn to use his right leg again, and was out of work for six months. He testified that he still suffers from severe physical pain from the injury, as well as from emotional trauma.

Deputy Sheriff Jay Brown testified that, on September 2, 2014, he arrested Taylor in connection with Michael's shooting.

When asked if he had any injuries, Taylor indicated he was not injured. Brown also did not observe any injuries on Taylor.

Detective Antonio Garcia testified that, on September 3, 2014, he interviewed Taylor in jail. Taylor said that, on September 1, 2014, he was at home with his family, including Michael, during the day, and then went out in the evening. The next day, a friend told Taylor that Michael had been shot and had identified Taylor as the shooter.

Taylor denied shooting Michael. Detective Garcia said he was going to the hospital to interview Michael, and asked Taylor if he thought Michael would identify Taylor as the shooter. Taylor said no, " 'because motherfuckers are always getting shot at where I live. It doesn't matter what day or place . . . or who is around and when the police ask them they always say, "I didn't see anything. I don't know anything. I didn't hear anything." ' " The detective asked Taylor, "Is that what Michael is going to tell me . . . that he didn't hear or see anything not because [you weren't] the one who shot him because that's what he is supposed to say like everybody." Taylor "ma[de] a motion with his left hand making his hand in the shape of a gun" and said, "back in the day . . . when I was blasting motherfuckers . . . people would rat out if they saw you but nowadays they don't say anything."

Dawaine Taylor (Dawaine), Taylor's son and Michael's half-brother, testified for the defense. Dawaine testified that in the late afternoon on September 1, 2014, he and Michael were drinking alcohol when Michael and Taylor got into an argument. Michael was upset that Taylor had been "more of a father" to Taylor's deceased nephew than he had been to Michael. Michael "slapped" a beer out of Taylor's hand, grabbed him by the collar,

and then "tossed" Taylor on the hood of a car. Taylor then walked away, and Dawaine and Michael went looking for him.

Approximately two hours later, Michael encountered Taylor again and asked him " 'where have you been?' " When Taylor did not answer, Michael "head-butted" him and pushed him into a screen door. Taylor hit his head on the door and then "stepped out of the way." Michael approached Taylor crying and with his fists clenched. Taylor then pulled out a gun and Dawaine jumped between Taylor and Michael. When Michael continued to approach Taylor, Taylor told Dawaine to "move" and then shot Michael. Michael crawled out to the street and Taylor followed him. Then "somebody came running back in and told [Dawaine] [Taylor] [wa]s going to kill [Michael]." Dawaine ran out to the street and yelled "hey." He then saw Taylor walk away.

The jury found Taylor guilty of assault with a semiautomatic firearm and being a felon in possession of a firearm, and found the special allegations true. The jury also found Taylor not guilty of attempted murder.[2] Taylor waived trial on the prior convictions and stipulated to the truth of the strike and serious felony conviction allegations. The court heard and denied the defense mistrial motion.

The court sentenced Taylor to 52 years in prison on the conviction for assault. As to the conviction for being a felon in

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[2] As to count 1, the jury found Taylor not guilty of attempted murder, but guilty of attempted *in*voluntary manslaughter. However, the law does not recognize attempted involuntary manslaughter as a crime. (See *People v. Broussard* (1977) 76 Cal.App.3d 193, 197.) The trial court determined there had been an error in the verdict form and entered the verdict of not guilty as to count 1.

possession, the court sentenced Taylor to a concurrent term of 40 years to life. Taylor filed a timely notice of appeal.

CONTENTIONS

Taylor makes two claims of error on appeal: (1) the trial court prejudicially erred in prohibiting him from impeaching Michael with evidence that Michael had been arrested for misdemeanor spousal battery; and (2) the trial court abused its discretion by denying Taylor's motion for a mistrial.

As we now discuss, we find no prejudicial error.

DISCUSSION

1. *The Trial Court Did Not Err in Excluding Evidence of Michael's Arrest for Misdemeanor Spousal Battery.*

(a) Factual background.

Prior to trial, defense counsel moved for discovery of a police report evidencing Michael's arrest on October 13, 2015, for misdemeanor spousal battery (§ 243, subd. (e)(1)). Defense counsel urged that the police report was relevant to demonstrate Michael's aggressive tendencies. The court denied the request after reviewing the report, stating that "I don't think this is relevant at all."

During cross examination, Michael testified that he had never "hit or assaulted a female," and that other than the confrontation with his father, he had not hit "anybody ever" since he was a child. Following this testimony, defense counsel renewed his request to be provided a copy of Michael's police report and to be permitted to impeach Michael with it. The court denied the request, finding the police report "is not relevant."

(b) Analysis.

Taylor contends the trial court prejudicially erred in excluding the evidence of Michael's arrest for misdemeanor

spousal battery and, specifically, in prohibiting him from impeaching Michael with evidence of that arrest. As we now explain, there was no error.

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The proponent of proffered testimony has the burden of establishing its relevance, and evidence is properly excluded "when the proponent fails to make an adequate offer of proof regarding the relevance or admissibility of the evidence." (*People v. Morrison* (2004) 34 Cal.4th 698, 724.) " 'The trial court has broad discretion both in determining the relevance of evidence and in assessing whether its prejudicial effect outweighs its probative value.' (*People v. Horning* (2004) 34 Cal.4th 871, 900.)" (*People v. Jones* (2011) 51 Cal.4th 346, 373.) We review a trial court's exclusion of evidence as irrelevant for abuse of discretion. (*People v. Mickel* (2016) 2 Cal.5th 181, 219; *People v. Clark* (2011) 52 Cal.4th 856, 892.)

In the present case, Taylor urges that the evidence of Michael's arrest for misdemeanor spousal battery was relevant to impeach Michael's testimony that he had never hit anyone other than Taylor. Taylor argues that "[a]s a star witness, Michael tried to paint himself as a person who never fought and never hit a soul. Evidence regarding the October 13 arrest and altercation leading to the arrest would put Michael and his testimony in an entirely different light in front of the jury."

The problem with Taylor's contention is that we cannot determine on the present record whether Michael's October 13 arrest involved "fighting" with or "hitting" anyone. As our Supreme Court has explained, " '[a] battery is *any* willful and

unlawful use of force or violence upon the person of another.' (§ 242.) '*Any* harmful or offensive touching constitutes an unlawful use of force or violence' under this statute. [Citation.] 'It has long been established that "*the least touching*" may constitute battery. In other words, force against the person is enough; it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave a mark.' [Citations.]" (*People v. Shockley* (2013) 58 Cal.4th 400, 404–405, italics added.)

Because "the least touching" may constitute battery, Michael's arrest for misdemeanor battery does not have a "tendency in reason" to prove that Michael hit or fought with anyone, or to impeach his testimony to the contrary. Because the record does not indicate whether the arrest report showed Michael had hit anyone, he has not shown this evidence was inconsistent with Michael's testimony. The trial court therefore did not abuse its discretion by excluding evidence of Michael's arrest as irrelevant.[3]

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[3] Significantly, defendant does not contend on appeal either that the prosecutor was required to disclose the police report under *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] or that the trial court erred in failing to order the prosecution to make the police report available to defense counsel. Nor, on this record, could defendant successfully do so. (See *People v. Zaragoza* (2016) 1 Cal.5th 21, 52 [no demonstration of *Brady* error where defendant failed to show that the evidence allegedly withheld was favorable and material: "[Defendant] hypothesizes that favorable inferences might have been discovered if the defense had viewed the tape. But speculation that favorable and material evidence might be found does not establish a violation of *Brady*."].)

2. *The Trial Court Properly Denied Taylor's Mistrial Motion*

Taylor argues the trial court abused its discretion in denying his motion for a mistrial based on the erroneous admission of character evidence. We conclude the trial court did not abuse its discretion and any error was harmless.

"[A] trial court should grant a mistrial only if the defendant will suffer prejudice that is incurable by admonition or instruction. [Citation.] A trial court has considerable discretion in its assessment of incurable prejudice. [Citation.]" (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 291–292.) We review the trial court's ruling denying a mistrial for abuse of discretion. (See *People v. Bolden* (2002) 29 Cal.4th 515, 555.)

Here, over defense objection, the prosecution cross-examined Dawaine about whether he knew Taylor had committed robberies and an assault with a deadly weapon:

"[Prosecution]: And you have testified that your father he is a peaceful guy?

"[Dawaine]: Peaceful from what? When I have been coming around, yes, he has changed. [¶] . . . [¶]

"[Prosecution]: In your experience at the defendant's home was it normal [—] just do people carry handguns?

"[Dawaine]: No.

"[Prosecution]: Now, are you aware that the defendant—

"[Defense]: Your honor, I'm going to object on 402 grounds. [¶] . . . [¶] The defense has to open the door to this issue not the D.A.

"[The Court]: No; overruled. Go ahead. [¶] . . . [¶]

"[Prosecution]: Are you aware that your father has committed two robberies?

"[Dawaine]: No.

"[Prosecution]: Are you aware that he has committed an assault with a deadly weapon?

"[Dawaine]: No.

"[The Court]: Remember what I said what the lawyers say is not evidence."

Shortly after this exchange, the court took a recess and acknowledged to the attorneys that it was error to allow the prosecution to question Dawaine about Taylor's past criminal conduct. Although character evidence may be offered by the prosecution to rebut evidence adduced by the defendant under Evidence Code section 1102,[4] here, the defense had not adduced evidence of Taylor's peaceful character. In open court, the court then proceeded to instruct the jury as follows: "Before we get to the next witness, remember, I told you what lawyers say is not evidence and I reminded you of that. That testimony is all stricken. That part is stricken."

After both parties rested, the court again instructed the jury not to consider counsel's statements as evidence, and not to consider any evidence that had been stricken.[5]

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[4] Evidence Code section 1102 provides, "In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character. [¶] (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)."

[5] The court instructed the jury as follows: "Statements made by the attorneys during the trial are not evidence. . . . [¶] A question is not evidence and may be considered only if it helps you to understand the answer. Do not consider for any purpose

After the jury returned a verdict, defense moved for a mistrial arguing, *inter alia*, the trial court improperly allowed the prosecution to ask Dawaine about Taylor's prior criminal convictions. The trial court denied the motion. Taylor now argues the court abused its discretion in denying the motion because "[t]he jury was tainted by a statement that [Taylor] had previously committed an assault with a deadly weapon, making it less likely for them to believe that [he] acted in self defense." He further argues that the trial court's admonition and instruction to the jury did not cure that prejudice.

It is undisputed the trial court erred in allowing the prosecutor to question Dawaine about Taylor's prior criminal conduct when the defense had not opened the door to such character evidence. However, following this line of questions, the court immediately instructed the jury that the attorney's questions were not evidence. In addition, shortly afterwards, the court struck the entire line of questioning. Finally, after closing argument, the court again instructed the jury not to consider counsel's statements as evidence and not to consider evidence that had been stricken.

Taylor argues that the court's actions did not cure the prejudice to him because the court did not immediately strike the prosecution's questions from the record, and the court's belated decision to strike the questioning was not clearly understood by the jury. However, even if the jury did not understand that the court had struck the improper questions from the record, the court clearly admonished the jury that counsel's questions were

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. . . any evidence that was stricken by the court. Treat it as though you never heard of it."

not evidence. We presume the jury followed the court's admonitions, and thus we find no error. (See *People v. Gonzales and Soliz*, *supra*, 52 Cal.4th at p. 292 [affirming trial court's denial of mistrial motion where the trial court struck the prejudicial testimony and properly admonished the jury]; see generally *People v. Waidla* (2000) 22 Cal.4th 690, 725 [jury presumed to follow court's instructions and admonitions].) We therefore conclude the trial court did not err in denying the motion for mistrial.

Furthermore, the error in allowing the prosecutor to question Dawaine about the prior assault was harmless beyond a reasonable doubt. Taylor argues that reference to a prior "assault with a deadly weapon" indicated to the jury that Taylor had "committed the same crime once before." However, the jury had already heard evidence that Taylor had shot other individuals. Detective Antonio Garcia testified that Taylor admitted upon his arrest that he had "blast[ed]" people "back in the day"—a statement Taylor made while he fashioned his hand into the shape of a gun and in response to a question about whether Michael would identify who shot him. Given Taylor's damaging admission he had shot other people, the prosecutor's suggestion that Taylor had "committed the same crime once before" was inconsequential. Accordingly, it is not reasonably probable that the jury would have reached a result more favorable to Taylor absent the prosecutor's improper questions. (See *People v. Welch* (1999) 20 Cal.4th 701, 749–750.) For this reason as well, we reject Taylor's argument that the prosecutor's error " 'so infused the trial with unfairness" ' " as to deny him due process. (*People v. Williams*, *supra*, 170 Cal.App.4th at pp. 637–638 [no violation of the defendant's right to due process where the

court found "it not reasonably probable that a more favorable result would have been obtained had the error not been committed. [Citation.]"].)

DISPOSITION

The judgment is affirmed.

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EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.