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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL O. BOULDIN, Defendant and Appellant.	B233415 (Los Angeles County Super. Ct. No. PA066489)

APPEAL from a judgment of the Superior Court of Los Angeles County, Harvey Giss, Judge. Affirmed as modified.

Carol S. Boyk, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle, Michael C. Keller, and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Michael O. Bouldin appeals from the judgment entered upon his jury conviction of two counts of inflicting corporal injury on a cohabitant and one count of assault by means of force likely to produce great bodily injury. Defendant contends the court abused its discretion in admitting evidence of property damage and uncharged conduct not involving domestic violence. He argues the court aligned itself with the prosecution in examining witnesses, and his conviction of two counts of inflicting corporal injury violated double jeopardy.

We find no reversible error. The judgment is modified to impose and stay the enhancement on count 2 reflected in the minute order and abstract of judgment and to grant defendant an additional day of custody credits. As modified, the judgment is affirmed.

FACTUAL AND PROCEDURAL SUMMARY

On December 25, 2009, defendant pushed his girlfriend Hollie Stupar down onto the ground during an argument outside her home, where he also lived intermittently. Stupar's head hit the pavement and started bleeding. Defendant then kicked Stupar on her left side around her kidney.[1] Stupar had a pre-existing condition known as adult polycystic kidney disease, in which a kidney is filled with cysts. Stupar suffered a hemorrhage around her left kidney and was admitted to intensive care in critical condition. The bleeding was caused by substantial blunt force trauma to the kidney rather than a spontaneous rupture of a cyst.

[1] At trial, Stupar said she did not want to see defendant go to prison and was declared a hostile witness. She testified she did not recall telling hospital staff and police that defendant kicked her even though her statements had been documented. Defendant similarly testified he did not remember telling the interviewing officer that he kicked Stupar. His version of events was that he pushed Stupar and they both went down, and that he told the paramedics that he kicked her because he did not know how to describe that he tripped on her.

Defendant was charged with two counts of corporal injury to a cohabitant (counts 1 and 3) (Pen. Code, § 273.5, subd. (a))[2] and one count of assault by means of force likely to produce great bodily injury (count 2) (§ 245, subd. (a)(1)). As to counts 1 and 2, it was also alleged that defendant personally inflicted great bodily injury upon Stupar (§ 12022.7, subd. (e)). A jury found him guilty as charged and found the additional allegations true. He was sentenced to the upper term of four years on all three counts, with a mid-term enhancement of four years for personal infliction of great bodily injury as to count 1. The sentences on counts 2 and 3 were stayed under section 654.

Appellant's notice of appeal was untimely, but we granted him relief from default.

DISCUSSION

I

Evidence Code section 1109, subdivision (a)(1) allows the admission of prior uncharged acts of domestic violence against a criminal defendant charged with an offense involving domestic violence, provided the uncharged acts are admissible under Evidence Code section 352. The jury in this case was allowed to hear testimony about defendant's prior acts of domestic violence against his estranged wife Jessica Bouldin in 2006[3] and against Stupar in June 2009. Defendant does not challenge this testimony. But he argues that the court violated his right to a fair trial in admitting evidence of his assault on Stupar's two housemates during the June 2009 incident. He also challenges the admission of evidence about property damage.

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[2] Unless specified otherwise, all statutory references are to the Penal Code.

[3] Jessica Bouldin testified that, in 2006, defendant pushed and pinned her to the floor during an argument, then placed her in a chokehold when she tried to leave with their newborn baby. A few months later, defendant pulled a diaper bag from Jessica's shoulder with such force that she fell and struck her forehead on a bathtub. The two separated after this incident and were in divorce proceedings at the time of trial. Jessica had obtained a restraining order against defendant in March 2009 because she felt he was threatening her.

The challenged testimony was as follows: In June 2009, Stupar shared an apartment with Griselda DeLeon and DeLeon's boyfriend, Bryan Gleason. The mattress, with which Stupar moved in, was ripped. She explained that defendant had vandalized it during a fight.

On June 24, 2009, DeLeon and Gleason saw defendant shake and push Stupar during an argument outside the apartment. DeLeon and Stupar then went inside to check on Stupar's children, who were upset. Defendant, who had started walking to his car, turned around and walked back to the apartment. Gleason told him to leave or he would call the police, and the men argued. DeLeon attempted to separate them by pushing defendant, who pushed her back with such force that she hit her head against a wall. Gleason tackled defendant, and during the fight defendant threw Gleason to the ground, held him in a chokehold, and hit him in the head. Before walking away, defendant slammed DeLeon's cell phone onto the ground.[4]

Aside from the damage to DeLeon's cell phone and Stupar's mattress, there also was testimony that, before he pushed and kicked Stupar on December 25, 2009, defendant had punched a hole in her bedroom wall.

At a pretrial conference, defense counsel objected to the admission of the assault on DeLeon and Gleason under Evidence Code section 352. During trial, defense counsel objected to testimony about the hole in Stupar's bedroom wall on grounds of relevance, foundation, and the leading nature of the question. The court overruled the objections subject to a motion to strike, which defense counsel did not make. Defense counsel did not object to testimony about damage to the mattress.

On appeal, defendant's sole argument is that none of this evidence was admissible under Evidence Code section 1109 because it did not involve domestic violence, and the court should not have considered at all whether it was admissible under Evidence Code

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[4] Stupar testified that, after this incident, her ex-husband obtained a restraining order prohibiting defendant from being around the children. DeLeon and Gleason were under the impression that there was a restraining order against defendant at the time of the incident.

section 352. This argument is, first of all, forfeited because none of the objections in the trial court was on the ground that the evidence was inadmissible because it did not constitute domestic violence under Evidence Code section 1109. (See Evid. Code, § 353, subd. (a); *People v. Partida* (2005) 37 Cal.4th 428, 433 [ground not cognizable on appeal if no specific objection was made on it].) Additionally, the argument is incorrect because it does not take into account that the Evidence Code borrowed the broad definition of domestic violence of the Family Code.

Evidence Code section 1109, subdivision (d)(3) defines "domestic violence" as having "the meaning set forth in Section 13700 of the Penal Code. Subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, 'domestic violence' has the further meaning as set forth in Section 6211 of the Family Code, if the act occurred no more than five years before the charged offense."

Section 13700, subdivision (b) defines "domestic violence" as "abuse" against "a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship." Subdivision (a) defines "abuse" to mean "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another."

Family Code section 6211 expands the definition of "domestic violence" to include "abuse" against a relative or a child of a party. The Family Code defines "abuse" to include "any behavior that has been or could be enjoined pursuant to Section 6320." (Fam. Code, § 6203, subd. (d).) Family Code section 6320, subdivision (a) in turn authorizes the court to enjoin a party from "molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, making annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other

party, and, in the discretion of the court, on a showing of good cause, of other named family or household members."

In *People v. Ogle* (2010) 185 Cal.App.4th 1138, the court reasoned that Evidence Code section 1109 made admissible acts of domestic violence within the broad definition of the Family Code. (*Id*. at p. 1144.) As a result, it held that stalking was an act of domestic violence within the meaning of Evidence Code section 1109 since stalking is a behavior that could be enjoined under Family Code section 6320. (*Id*. at pp. 1140–1141.) More recently, in *People v. Kovacich* (2011) 201 Cal.App.4th 863, the court applied the same reasoning to statements about the defendant's abuse of the family dog, which could be enjoined under Family Code section 6320, subdivision (b). (*Id*. at pp. 894–895.)

Defendant is thus mistaken in suggesting that there is no authority for the application of Evidence Code section 1109 to behavior that could be enjoined under Family Code section 6320. Such behavior constitutes domestic violence under the Family Code. (See *People v. Brown* (2001) 96 Cal.App.4th Supp. 1, 39–40 [smashing windows of wife's car was act of domestic violence under Family Code].) The challenged evidence in this case involved testimony about defendant's assault on Stupar's household members, DeLeon and Gleason, and his destruction of personal property (a mattress and a cell phone), behaviors that may be enjoined under Family Code section 6320, subdivision (a). The evidence was admissible under Evidence Code section 1109, subject to balancing under Evidence Code section 352. Thus, contrary to defendant's assertion, the trial court was required to weigh the probative value of the evidence and did not err in doing so. Additionally, to the extent that defendant engaged in violent behavior in Stupar's presence, as when he punched a hole in her bedroom wall during an argument or when he fought with her housemate, who refused to let him follow her into the apartment after his assault on her, such behavior constituted domestic violence even under section 13700, subdivision (a) to the extent it placed Stupar "in reasonable apprehension of imminent serious bodily injury."

Defendant does not contend that the court abused its discretion by the manner in which it balanced the probative nature of the evidence against its prejudicial effect.

Rather, he argues his trial was fundamentally unfair because his assaults against DeLeon and Gleason and destruction of property do not constitute domestic violence within the meaning of Evidence Code section 1109. Because this assumption is incorrect, defendant has not established that a reversible error occurred.

II

Defendant argues that the trial court exhibited bias in favor of the prosecution when it frequently participated in the examination of witnesses. We are not convinced.

A court commits misconduct if it persistently makes discourteous and disparaging remarks so as to discredit the defense or if it engages in protracted adversarial examination of witnesses that creates the impression it is allying itself with the prosecution. (*People v. Santana* (2000) 80 Cal.App.4th 1194, 1206–1207.) The propriety of the court's conduct is determined in light of the content of what is said and the surrounding circumstances. (*People v. Cash* (2002) 28 Cal.4th 703, 730.)

Defendant's opening brief lists sixteen places in the reporter's transcript where the court intervened in the examination of witnesses, four of which occurred during defendant's examination and eight during his cross-examination. Defendant provides no details or context for all but three of these interventions. The fact that the court frequently participated in the examination of witnesses, without more, is insufficient to establish judicial misconduct since "[a] trial court has both the discretion and the duty to ask questions of witnesses, provided this is done in an effort to elicit material facts or to clarify confusing or unclear testimony. [Citations.]" (*People v. Cook* (2006) 39 Cal.4th 566, 597.)

In addition, a timely objection is generally necessary to preserve a claim of judicial misconduct for appellate review, unless the objection would have been futile. (*People v. Cash*, *supra*, 28 Cal.4th at p. 730.) Defendant contends that, because defense counsel's objection to the court's asking DeLeon a leading question was summarily overruled, any further objection would have been futile. Defendant does not provide the complete context for the court's intervention in that instance, which resulted in more than one objection and led to a jury admonition.

Our review of the record shows that, on cross examination, defense counsel asked DeLeon a series of leading, at times argumentative, questions about the assault on her and Gleason in June 2009, repeatedly insisting that she give a "yes or no" answer. After defense counsel asked DeLeon whether she knew "what business Bryan [Gleason] even had . . . speaking to my client that night; yes or no," the prosecutor objected. The court overruled the objection, explaining that a "yes or no" answer did not preclude either side from developing DeLeon's testimony, and that the district attorney could still ask questions about the subject matter. Defense counsel objected to the court's advising the district attorney what to do.

After a few more questions that established Gleason and defendant did not know each other, defense counsel asked DeLeon whether she knew "of any reason, yes or no, that Bryan might have to challenge Michael [defendant] to a fight that evening." DeLeon denied that Gleason challenged defendant to a fight. Defense counsel insisted on a "yes or no" answer, and DeLeon answered "no." The court sustained its own objection, told defense counsel that he was "trying to get her into a corner with an answer that has no meaning at all," and asked DeLeon, "Was Bryan attempting to keep the defendant out of the house where the two children and Hollie were that night?" DeLeon answered affirmatively. Defense counsel objected to the court's question. The court noted the objection and invited defense counsel to follow up on DeLeon's answer. Defense counsel asked DeLeon whether she answered "yes" because the court suggested the answer. DeLeon responded that what the court said was right. Defense counsel retorted that the court was not giving the answer. The court advised defense counsel not to argue with the witness.

After a short recess, the court admonished the jury that it did not favor either side. The court stated the admonition was necessary in light of defense counsel's suggestion that it favored the district attorney.

While the leading question the court asked DeLeon may have been an infelicitous attempt to curb defense counsel's argumentative questioning, it was not misconduct. On direct examination, DeLeon had indicated that she believed there was a restraining order

prohibiting defendant from being around Stupar's children. She had also stated that Stupar and the children were in the apartment, and that defendant was coming towards them when Gleason told him to leave. Thus, the single leading question the court asked DeLeon did not suggest any new answer to her that favored the prosecution. Contrary to defendant's suggestion, the court's use of Gleason's first name in the question did not indicate bias since defense counsel referred to Gleason by his first name as well.

The court's reaction to the entire incident does not suggest that further objection would have been futile. On the contrary, the court appears to have been sensitive about any appearance of impropriety its comments and questions may have had.

Defendant provides detail for only two other instances of alleged judicial misconduct. He argues that, during defendant's examination, the court delved into an unrelated series of questions that suggested defendant was guilty of attempting to joyride in Stupar's car. The record does not support this argument.

Defendant testified that, on December 25, 2009, he waited for Stupar to come home. When she arrived, they argued because she was late and because she had found a condom wrapper in the car. Defendant then testified that he tried to drive off, Stupar stopped him, and then took the car keys out of the car. The court intervened to ask defendant several questions, in response to which defendant clarified that he had arrived at Stupar's place on foot, but the car which Stupar drove belonged to both of them and was the same car where the condom was found. Defense counsel then asked a series of questions that elicited defendant's version of events—that after Stupar got the keys out of the car, she ran back to him and grabbed him by the shoulders, he pushed her off, she fell, and he tripped and fell on top of her. At that point, the court intervened again with questions about the car. The court asked whose car Stupar had come in, and defendant first responded that the car belonged to both of them and then said that it was more Stupar's car. The court asked whether, when defendant went to the car, he was going to "drive away in her car." Defense counsel objected to the pronoun "her," and the court rephrased the question, asking defendant whether he was going to "drive away in that car." On cross-examination, the court asked some additional questions, suggesting that

there was still some confusion about how defendant knew Stupar had initially left the keys in the car.

Taken in context, these questions indicate nothing more than the court's desire to clarify defendant's testimony about the car. They did not disparage defendant or exhibit bias toward the prosecution. The court only referred to the car as "her car" because defendant said he had bought it for Stupar. We see no subtext in the fleeting use of this pronoun.

The other line of questioning defendant identifies as objectionable occurred on cross-examination. Defendant claimed that, when moving out of their apartment, Stupar initially agreed that he would get the mattress, and he began to cut it because he wanted to throw it away. The court asked a series of six questions to clarify why defendant thought he needed to cut up the mattress in order to throw it away. It asked defendant whether he intended to cut up the mattress into little pieces, to which defendant responded that he "was going to," but "never got that far." The court then restated its question, asking defendant whether he intended to "cut the mattress into little—going to like reduce it to like a thousand pieces and get rid of it slowly." Defendant explained that he was going to cut it into "[t]wo or three sections," to which the court responded, "I see." The court's last question was prompted by defendant's stated intent to cut the mattress into little pieces and appears to have been meant to clarify what he meant by "little." There was no objection to this line of questioning, nor does it establish that the court meant to discredit defendant.

The examples to which defendant draws our attention do not demonstrate judicial misconduct or resulting unfairness in the trial.

III

Defendant challenges his conviction of two counts of inflicting corporal injury on a cohabitant under section 273.5. Subdivision (a) of that section makes it a felony to willfully inflict upon a cohabitant corporal injury resulting in a traumatic condition. In *People v. Johnson* (2007) 150 Cal.App.4th 1467 (*Johnson*), the court held that a defendant may be convicted of multiple violations of section 273.5 for inflicting multiple

injuries during a single course of conduct. (*Id*. at p. 1477.) The court found substantial evidence in the record that the defendant committed successive acts of violence against the victim, which supported each conviction. (*Ibid*.)

Defendant acknowledges that the evidence in this case is sufficient to find that defendant caused the laceration on Stupar's head by pushing her down and separately caused the internal bleeding by kicking her. But he contends the jury could not make these findings because, in closing, the prosecutor argued that the same act of pushing was the basis for the charges in count 1 and count 3.

Initially, we note that the substantial evidence test is not based on how the prosecutor sums up the evidence in closing argument, but on whether the record "discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt . . . ." (*Johnson*, *supra*, 150 Cal.App.4th at p. 1477.) The court in *Johnson* held that a violation of section 273.5 is complete "upon the willful and direct application of physical force upon the victim, resulting in a wound or injury." (*Ibid*.) The evidence in this case was that defendant first pushed Stupar to the ground, causing her head to bleed, which completed one violation of section 273.5. His second violation of section 273.5 was not completed until he kicked Stupar, causing internal bleeding.

The prosecutor argued that count 1 was based on defendant's pushing and kicking Stupar, causing her internal bleeding, while count 3 was based on his pushing her, causing a laceration on her head. The prosecutor did not suggest that both violations were completed when defendant pushed Stupar. The kicking was what completed the violation charged in count 1. Thus, defendant is incorrect that he was convicted twice for the same act of pushing Stupar.

IV

On count 1, defendant received a mid-term four-year enhancement under section 12022.7, subdivision (e) for "personally inflict[ing] great bodily injury under circumstances involving domestic violence in the commission of a felony." The reporter's transcript does not show that the trial court imposed the same great bodily

injury enhancement on count 2. Yet the minute order and the abstract of judgment reflect that a four-year enhancement was imposed and stayed along with the sentence on that count. Since the court's oral pronouncement of a sentence, rather than its entry in the minute order and abstract of judgment, constitutes the judgment (*People v. Mesa* (1975) 14 Cal.3d 466, 471), we asked the parties to address the effect of the court's omission.

Counts 1 and 2 were based on the same set of facts, and the jury found true the enhancement allegation as to both counts. We agree with the parties that the trial court may be presumed to have intended to impose the same mid-term enhancement under section 12022.7, subdivision (e) on both these counts, but inadvertently imposed it only on count 1. (See *People v. Alford* (2010) 180 Cal.App.4th 1463, 1473.) The enhancement on count 2 must be stayed because the sentence on that count was stayed under section 654. (*People v. Guilford* (1984) 151 Cal.App.3d 406, 411.)

The parties agree that defendant is entitled to one more day of actual custody credits. Defendant was arrested on December 25, 2009. He was sentenced on September 22, 2010. His custody credits were calculated as 271 days. Under section 4019, he was entitled to credits for all days in custody, including the first and last days. (*People v. Bravo* (1990) 219 Cal.App.3d 729, 735.) He should have received credits for 272 days in custody.

DISPOSITION

We modify the oral pronouncement of judgment to reflect, as to count 2, the imposition and stay of a four-year enhancement under section 12022.7, subdivision (e). Since the abstract of judgment already reflects this enhancement, it need not be corrected on this count. We also modify the judgment to give defendant an additional day of actual custody credits for a total of 272 days of such credits and a total of 312 days of credits for time served. We direct the trial court to correct the number of credits on the abstract of judgment and to forward the corrected abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.