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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. JAMES EDWARD THOMAS, Defendant and Appellant.	B268188 (Los Angeles County Super. Ct. No. MA065601)

APPEAL from a judgment of the Superior Court of Los Angeles County. Daviann L. Mitchell, Judge. Affirmed.

Cynthia L. Barnes, 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, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, and Heather B. Arambarri, Deputy Attorney General, for Plaintiff and Respondent.

James Edward Thomas appeals from the judgment entered following a jury trial in which he was convicted of one count of infliction of corporal injury on a girlfriend within seven years of a prior conviction for the same offense (Pen. Code,[1] § 273.5, subd. (f)(1)), and one count of assault by means likely to produce great bodily injury (§ 245, subd. (a)(4)). In a subsequent court trial on appellant's prior convictions, appellant sought to reduce one of his prior felony convictions alleged as a prior prison term enhancement (§ 667.5, subd. (b)) to a misdemeanor under Proposition 47. Refusing to rule on appellant's request, the court found the prior felony conviction allegation to be true and imposed the one-year enhancement.

Appellant contends the improper admission of evidence regarding three prior uncharged acts of domestic violence requires reversal. Appellant further argues that the trial court erred by failing to rule on appellant's motion pursuant to Proposition 47, refusing to reduce his prior felony conviction to a misdemeanor, and imposing the one-year prior prison term enhancement on the basis of that prior conviction. We disagree and affirm.

FACTUAL BACKGROUND

About 3:00 in the afternoon on March 17, 2015, appellant's girlfriend, Regina W., drove appellant's car through the garage door of a home on 17th Street in Lancaster. Becky Hoyle, a neighbor, heard the crash and went outside to investigate. Hoyle saw Regina walk out of the garage away from the crashed vehicle

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[1] Undesignated statutory references are to the Penal Code.

and down the driveway. Although the collision had caused significant damage to the garage door and the car's airbags had deployed, Regina appeared to have no visible injuries from the accident.

Five to ten minutes later, a red truck or SUV pulled up in front of the house where the collision had occurred. Appellant got out of the passenger side and walked toward the garage. He then turned and said to Regina, " 'You f'g bitch, what did you do to my car?' " He walked down the driveway to Regina and repeatedly punched her in the face with both fists until she fell to the ground on her hands and knees. Appellant then struck several blows to Regina's upper body while she was on the ground before walking up the driveway to examine the damage to the car. Regina got up and followed appellant to the garage.

As Hoyle watched, appellant came around to the passenger side of the car where Regina was standing and began punching her again. Regina put up her hands to protect her face, and appellant repeatedly hit her on the back and side of her head and around her upper back and shoulders until she fell down. Hoyle took pictures with her cell phone as appellant continued his assault on Regina.

When appellant stopped hitting her, Regina stumbled down the driveway to the street. Hoyle walked her around the corner and helped her to sit down on the curb. Hoyle noticed injuries to Regina's face she had not seen before the assault. Regina's lip was split and bloody, her eyebrow was split, her nose was bleeding, the left side of her face was swollen, her eye was starting to swell, and there was blood on her shirt. Hoyle took pictures of Regina's injuries with her cell phone.

The sheriff's deputy dispatched to the location found appellant near the car that had gone through the garage door.

The deputy noted blood on one of the sleeves of appellant's shirt, but saw no blood inside the vehicle.

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion in Admitting Evidence of Prior Acts of Domestic Violence by Appellant

A. *Prior acts of domestic violence*

The trial court admitted evidence of three prior acts of domestic violence by appellant toward his former girlfriend, Marissa E., with whom he had lived from February 2009 to March 2011.

On March 29, 2010, appellant choked Marissa with his hands during an argument. Nearly a year later, on February 22, 2011, Marissa and a friend were in the kitchen of the residence appellant shared with Marissa. Appellant overheard Marissa talking on the phone and began yelling at her. He grabbed her around the neck, threw her up against the wall, and then dragged her by her hair across the floor. At Marissa's request, her friend called the police. Appellant suffered a conviction for felony spousal assault as a result of the February 22 incident.

On March 5, 2011, appellant again choked Marissa with his hands. A sheriff's deputy responding to the family disturbance call observed injuries to both Marissa and appellant, and determined that a mutual fight had occurred. However, based on the nature of the injuries, the deputy concluded that appellant had been the dominant aggressor in the fight.

B. ***The trial court properly admitted evidence of appellant's prior acts of domestic violence under Evidence Code section 1109.***

In a prosecution for a domestic violence offense, Evidence Code section 1109 permits the admission of evidence of the defendant's prior acts of domestic violence to show the defendant's propensity to commit such crimes, subject to the limitations of Evidence Code section 352.[2] (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1233; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1024.) The legislative history of Evidence Code section 1109 "reflects the legislative judgment that in domestic violence cases, as in sex crimes, similar prior offenses are 'uniquely probative' of guilt in a later accusation." (*People v. Johnson* (2010) 185 Cal.App.4th 520, 532.) Proponents of the legislation argued that "evidence of other acts is important in domestic violence cases because of the typically repetitive nature of domestic violence crimes, and because of the acute difficulties of proof associated with frequently uncooperative victims." (Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1876 (1995–1996 Reg. Sess.) June 25, 1996, pp. 6–7; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1333.)

Evidence Code section 1109, subdivision (a) creates a presumption in favor of the admissibility of evidence of a

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[2] With exceptions not relevant here, Evidence Code section 1109, subdivision (a)(1) provides: "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

defendant's prior acts of domestic violence. (*People v. Johnson*, *supra*, 185 Cal.App.4th at p. 539.) Thus, a trial court considering admission of such "propensity" evidence may not exclude it as unduly prejudicial per se, but must engage in a careful weighing process under Evidence Code section 352. (*People v. Falsetta* (1999) 21 Cal.4th 903, 916–917.)

In general, Evidence Code section 352 allows the trial court to exercise its discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "Prejudicial" in this context is not synonymous with "damaging," however. (*People v. Williams* (2013) 58 Cal.4th 197, 270.) Rather, " ' "[t]he 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues." ' " (*Ibid.*; *People v. Eubanks* (2011) 53 Cal.4th 110, 144 [" ' "the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors" ' "].) " 'Evidence is substantially more prejudicial than probative [citation] [only] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citation].' (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)" (*People v. Eubanks*, *supra*, 53 Cal.4th at p. 144.)

In addition, when conducting an analysis under Evidence Code section 1109, the court must consider such factors as the nature of the evidence, its "relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main

inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other [acts of domestic violence], or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917; see also *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138 [discretion to admit evidence of other acts of domestic violence under Evidence Code sections 352 and 1109].)

We review the trial court's admission of evidence under Evidence Code section 1109 for abuse of discretion. (*People v. Johnson*, *supra*, 185 Cal.App.4th at pp. 531, 539.) "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125; *People v. Williams*, *supra*, 58 Cal.4th at pp. 270–271.) Indeed, a trial court's " ' " 'decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." ' " [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.' (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)" (*People v. McDowell* (2012) 54 Cal.4th 395, 429–430.)

In ruling that evidence of appellant's prior acts of domestic violence was admissible in this case, the trial court carefully weighed the probative value of each incident against its potential

prejudicial impact and explained its reasoning for admitting the evidence.

The court noted that because the March 29, 2010 choking incident did not result in visible injuries to Marissa, the evidence of that occurrence was less inflammatory than the current offense, and its probative value was not overborne by undue prejudice. In ruling the evidence of the February 22, 2011 incident admissible, the trial court declared that the evidence was not "even close to" being " 'so prejudicial as to render the trial fundamentally unfair.' " The court found the evidence particularly probative because of the presence of independent witnesses in that case. Given that the victim in the present case never cooperated in the investigation, was hostile toward law enforcement, and had refused to appear in court to testify, the trial court properly concluded that the witnesses to the February 2011 assault would corroborate appellant's pattern of abusive behavior which, it noted, was the very reason the Legislature had enacted section 1109. Finally, the court found the evidence of the March 5, 2011 incident to be sufficiently similar in character to the present offense to warrant admission under Evidence Code section 1109.

We find no abuse of discretion in the trial court's determination that the probative value of these three prior acts of domestic violence outweighed any possible prejudice, nor did the court's decision result in a miscarriage of justice. The three incidents of domestic violence involving one former girlfriend all occurred within a year of each other, and clearly demonstrated the sort of pattern of domestic abuse Evidence Code section 1109 was intended to expose. Moreover, we find no indication in the record that the evidence of these prior incidents—which was limited to the basic facts—involved an excessive consumption of

time, confused the issues, misled the jury, or created a substantial danger of undue prejudice.

II. The Trial Court Properly Refused to Rule on Appellant's Motion to Reduce His Prior Felony Conviction to a Misdemeanor Under Proposition 47. Further, the Court Did Not Err in Imposing a One-Year Enhancement for the Prior Prison Term.

A. *Relevant background*

The court trial on the prior conviction allegations took place on August 31, 2015. During those proceedings, appellant orally requested that the court reclassify his 2007 felony conviction for possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a); *People v. Thomas* (Super. Ct. L.A., 2007, No. MA037368)) as a misdemeanor pursuant to Proposition 47. The court refused to rule on the motion, stating that the application to reduce the felony to a misdemeanor was not properly before it. The court then found true all the prior conviction allegations within the meaning of Penal Code section 667.5, subdivision (b).

The parties agreed to continue probation and sentencing proceedings to October 5, 2015. Prior to sentencing, appellant filed a *Romero*[3] motion to strike his prior strike conviction in Los Angeles County Superior Court case No. PA0108107. The court denied the *Romero* motion and sentenced appellant to a term of 15 years in state prison, which included a one-year enhancement for the prior felony conviction in case number MA037368. The record contains no indication that appellant ever filed an

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

application in case number MA037368 to have his felony conviction redesignated as a misdemeanor in accordance with section 1170.18, subdivision (f).

B. *The trial court did not err in refusing to rule on appellant's motion to reduce his prior drug possession felony conviction to a misdemeanor under Proposition 47.*

Appellant contends the trial court erred in failing to rule on his motion to reduce the prior felony conviction in case number MA037368 to a misdemeanor. We disagree.

California voters approved Proposition 47 in the General Election on November 4, 2014. (*People v. Stylz* (2016) 2 Cal.App.5th 530, 533; *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) The initiative "reduced the penalties for certain drug- and theft-related offenses and reclassified those felonies as misdemeanors." (*People v. Zamarripa* (2016) 247 Cal.App.4th 1179, 1182.) The initiative allows a person who has completed a sentence for a felony that qualifies as a misdemeanor to have the felony conviction reduced to a misdemeanor in accordance with specified procedures under section 1170.18. (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1329.) Section 1170.18, subdivision (f)[4] permits a person who has completed his or her sentence to file "before the trial court that entered the judgment of conviction in

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[4] Section 1170.18, subdivision (f) states in full: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors."

his or her case" an application to redesignate the prior felony conviction as a misdemeanor. "Subdivision (*l*) further provides: "If the court that originally sentenced the petitioner is not available, the presiding judge shall designate another judge to rule on the petition or application."

"Matters of statutory interpretation are questions of law subject to de novo review. [Citation.] ' " 'In construing a statute, our task is to determine the Legislature's intent and purpose for the enactment. [Citation.] We look first to the plain meaning of the statutory language, giving the words their usual and ordinary meaning. [Citation.] If there is no ambiguity in the statutory language, its plain meaning controls; we presume the Legislature meant what it said. [Citation.] . . . [Citations.] We examine the statutory language in the context in which it appears, and adopt the construction that best harmonizes the statute internally and with related statutes. [Citations.]" [Citation.] In addition, we may examine the statute's legislative history. [Citation.]' [Citation.] We apply the same basic principles of statutory construction when interpreting a voter initiative." (*People v. Zamarripa*, *supra*, 247 Cal.App.4th at p. 1183.)

The plain language of section 1170.18, subdivisions (f) and (*l*) compels us to the conclusion that the trial court properly refused to hear appellant's motion for relief under Proposition 47 during the court trial on the prior conviction allegations in this case. We read section 1170.18, subdivision (*l*)'s interchangeable use of the terms "court" and "judge" as requiring a person seeking relief under Proposition 47 to make his application before the sentencing judge in the same case in which he seeks the redesignation of his prior felony to a misdemeanor. That is, only the court that entered the judgment of conviction and imposed

sentence in a given case may order the reclassification of any conviction under Proposition 47 in that case.

Here, appellant failed to abide by the procedure required under section 1170.18, subdivision (f) by seeking to have his prior felony conviction redesignated as a misdemeanor during the court trial in a completely different case. Appellant had not filed any application for relief under Proposition 47 in the trial court that had entered the judgment for his 2007 felony conviction, and his oral request sought a ruling the trial court in this case simply had no authority to make. The mandate of section 1170.18, subdivision (f) is clear: In order to obtain the relief promised by Proposition 47, a person must bring an application before the trial court that entered the judgment of conviction in that case. Appellant's oral motion to the trial court in another case failed to meet this simple requirement.[5]

C. *The trial court did not err in imposing a one-year enhancement under section 667.5 for the prior felony conviction.*

Section 667.5, subdivision (b) requires the sentencing court to enhance a defendant's sentence by one year for "each prior

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[5] The fact that appellant made an oral rather than a written request for redesignation of his prior felony conviction has no bearing on our determination that the trial court properly refused to hear appellant's motion. In this regard, we agree with the conclusion of our colleagues in Division Two of this District in *People v. Amaya* (2015) 242 Cal.App.4th 972, 975, that section 1170.18 does not require a petition for relief under Proposition 47 to be in writing.

separate prison term" served for any felony.[6] Imposition of the enhancement requires "proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*People v. Tenner* (1993) 6 Cal.4th 559, 563.) If the sentencing court finds the prior prison term true under section 667.5, subdivision (b), the court has no discretion to stay the one-year enhancement, "which is mandatory unless stricken." (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.)

In the instant case, even if the trial court had concluded that appellant's 2007 felony conviction for possession of a controlled substance *should* be subject to reclassification as a misdemeanor under Proposition 47, the court had no discretion not to impose the enhancement, given that appellant satisfied all of the criteria under section 667.5, subdivision (b). We therefore conclude that because appellant's 2007 conviction remained a felony at the time of sentencing in this case, the trial court properly imposed the one-year enhancement under section 667.5, subdivision (b) for that prior felony conviction.[7]

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[6] The enhancement is subject to an exception (not applicable here) for a prior commitment "washout" period where the defendant has been free of custody and any further felony offenses for a period of five years. (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 743.)

[7] We do not address the question presented in *People v. Evans* (2016) 6 Cal.App.5th 894, 898 (review granted Feb. 22, 2017, S239635), whether, under *In re Estrada* (1965) 63 Cal.2d

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

LUI, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.

740, 748, Proposition 47 applies to section 667.5, subdivision (b) enhancements in judgments that have not yet become final. Nor do we confront the issue presented in *People v. Valenzuela* (2016) 244 Cal.App.4th 692 (review granted Mar. 30, 2016, S232900), whether the reduction of a felony to a misdemeanor pursuant to Proposition 47 prohibits a trial court from imposing a sentencing enhancement under section 667.5, subdivision (b) for the prior prison term served for that felony.