Filed 1/17/17 P. v. Moore CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. RAPHAIEL A. MOORE, Defendant and Appellant.	B264855 (Los Angeles County Super. Ct. No. NA097665)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed.

Lenore De Vita, 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, Michael R. Johnsen and Wyatt E. Bloomfield, Deputy Attorneys General, for Plaintiff and Respondent.

Raphaiel Moore appeals from a judgment entered after a jury found him guilty of two counts of carjacking, two counts of corporal injury to a former spouse, and one count of possession of a firearm by a felon. After Moore admitted prior conviction allegations, the trial court sentenced him to 28 years and eight months in state prison. Moore challenges the sufficiency of the evidence supporting the carjacking convictions and the admission of prior, uncharged conduct, among other contentions on appeal. Finding no reversible error, we affirm.

BACKGROUND

Moore and his wife, Armanda Smith (the victim) were estranged at the time of the offenses charged in this case (November-December 2013). They had been in a relationship for six years and had two children together. In August 2013, Smith and Moore separated. The prosecution presented evidence of Moore's domestic abuse of Smith and infidelity over the years. In October 2013, Smith filed for divorce. In November 2013, Smith leased a Toyota Solara that was involved in the carjacking incidents. Moore's name did not appear on the lease. There is no evidence indicating Smith used any funds from Moore to finance the lease. Smith never gave Moore permission to drive the Solara.

November 26, 2013 Incident of Carjacking and Corporal Injury to Smith

About 6:15 p.m. on November 26, 2013, Smith exited her apartment to retrieve something from her car (the Toyota Solara). Smith noticed Moore standing nearby. Moore no longer lived at the apartment, but some of his property was still stored there. According to Smith's trial testimony, Moore pointed a semiautomatic gun at her. Smith ran, but Moore caught her.

Smith sprayed Moore with mace, and Moore tackled her to the ground. While lying on top of her, Moore angrily yelled, "'I'm gonna kill you, bitch.'" Moore struck Smith in the face with closed fists. She covered her face with her arms as Moore continued to strike her. Smith's mother ran outside when she heard Smith screaming and observed the struggle between Moore and Smith.[1]

Moore "pried" Smith's keys and cell phone out of her hands. He ran to Smith's Toyota Solara and climbed inside. Smith also ran to her car, stood behind it, and shouted at Smith not to take her car. Moore started the engine. Smith's mother pounded on the hood of the car, admonishing Moore not to drive into Smith. Moore made eye contact with Smith, and then backed the car into her, striking her leg before she "jumped out of the way." Moore drove out of the apartment complex.

Smith reported the incident to a security guard at the apartment complex and to the police.[2] She later sought medical treatment for her injuries (bruising and soreness on her leg and arm).

Later in the evening on November 26, 2013, Moore contacted Smith on her mother's cell phone. He apologized and told Smith he would return the car. He drove it back that evening and parked it at the apartment complex.

---

[1] Smith's mother testified at trial.

[2] The security guard testified at trial. He reviewed security footage from the apartment complex, which showed Moore entering the gated complex at 5:59 p.m., when a girl let him in through a pedestrian gate.

December 1, 2013 Incident of Carjacking and Corporal Injury to Smith

About 6:40 p.m. on December 1, 2013, Smith observed Moore holding a semiautomatic gun when she exited her Toyota Solara with her seven-year-old nephew, after returning to her apartment complex. Smith fled, dialing 911 and screaming at Moore to stay away from her as she ran.[3] She placed her car keys and cell phone in her bra to hide them from Moore. Moore caught her and threw her to the ground. He climbed on top of her and struck her in the chest and arms with closed fists. Smith shouted at Moore to get off of her. Smith's nephew ran into the apartment and reported to his mother, Smith's sister, that Moore had struck Smith.[4]

Moore retrieved Smith's car keys and ran to the Toyota Solara. Smith stood up and ran after him. When Smith's sister exited the apartment, she observed Smith attempting to take the keys back from Moore. Moore entered the car. Smith stood behind the car and repeatedly told Moore not to take the car. According to Smith's trial testimony, Moore started the engine and backed the car into Smith, striking her leg.[5] Moore drove away. Smith again called the police. She later sought medical

---

[3] An audio recording of Smith's 911 call was played for the jury.

[4] Smith's nephew and sister testified at trial.

[5] Smith's nephew testified at trial that Smith jumped onto the trunk of the car and fell off when Moore drove away.

treatment for her injuries (a sprained arm and contusions on her leg).

In the days following the December 1, 2013 incident, Smith and Moore exchanged messages on Facebook. Moore stated that he would return the car to her by parking it outside his grandmother's house. He did.

On December 5, 2013, officers arrested Moore outside the apartment of a woman he had been dating since August 2013. The woman's father granted officers permission to search the family's apartment. Officers recovered a loaded, semiautomatic .25-caliber handgun from a closet in the woman's bedroom. They also recovered a duffle bag containing Moore's California identification card from the same bedroom. The woman and her father told officers they had never seen the gun before. At trial, Smith testified that the recovered gun looked like the one Moore brought to her apartment on November 26 and December 1, 2013.

Moore called his girlfriend from jail on the day of his arrest. She informed him that officers found the gun at her apartment. Moore replied, "Oh my god," and asked her why her father had allowed them to search the home. She responded, "Because, he didn't think nothing was in there. And I feel so stupid. I should have never let them search it, because you don't live there." An audio recording of this call was played for the jury.

Verdicts and Sentencing

The jury found Moore guilty of two counts of carjacking (Pen. Code, § 215, subd. (a); counts 1 & 4),[6] two counts of corporal injury to a former spouse (§ 273.5, subd. (a); counts 3 & 5), and

---

[6] Statutory references are to the Penal Code unless otherwise indicated.

one count of possession of a firearm by a felon (§ 29800, subd. (a)(1); count 6).[7] The jury found Moore not guilty of making criminal threats against Smith on November 26, 2013. (§ 422, subd. (a); count 2.) The jury also found not true the allegations in the information that Moore personally used a handgun within the meaning of section 12022.53, subdivision (b), during commission of the carjackings.

Moore admitted prior conviction allegations set forth in the information. The trial court sentenced him to 28 years and eight months in state prison: the upper term of nine years on count 1, doubled to 18 years under the "Three Strikes" law; one-third the middle term on count 4, or 20 months, doubled to 40 months under the Three Strikes law; one-third the middle term on count 6, or eight months, doubled to 16 months under the Three Strikes law; plus a consecutive five-year term for the prior serious felony enhancement (§ 667, subd. (a)(1)); and a consecutive one-year sentence for the prior prison term enhancement (§ 667.5, subd. (b)). The court imposed and stayed sentences on counts 3 and 5.

DISCUSSION

Sufficiency of the Evidence Supporting the Carjacking Convictions

Using CALCRIM No. 1650, the trial court instructed the jury, in pertinent part:

"The defendant is charged in Counts 1 and 4 with carjacking.

"To prove that the defendant is guilty of this crime, the People must prove that:

---

[7] Moore stipulated that he had been convicted of a felony and the stipulation was read to the jury.

"1. The defendant took a motor vehicle that was not his own;

"2. The vehicle was taken from the immediate presence of a person who possessed the vehicle;

"3. The vehicle was taken against that person's will;

"4. The defendant used force or fear to take the vehicle or to prevent that person from resisting;

"AND

"5. When the defendant used force or fear to take the vehicle, he intended to deprive the other person of possession of the vehicle either temporarily or permanently."

Moore contends there is insufficient evidence supporting the carjacking convictions because the prosecution failed to prove Moore "had no ownership interest in the car." His challenge to the sufficiency of the evidence fails for the reasons explained below.

In reviewing a challenge to the sufficiency of the evidence, "the reviewing court's task is to determine whether, in light of the whole record viewed in the light most favorable to the prosecution, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt." (*People v. Felix* (2009) 172 Cal.App.4th 1618, 1624.) We ""'must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'"" (*People v. Smith* (2005) 37 Cal.4th 733, 739.) "The credibility of witnesses and the weight accorded the evidence are matters within the province of the trier of fact." (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207.) "'An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise.'" (*People v. Halvorsen* (2007) 42 Cal.4th

379, 419.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Substantial evidence presented at trial (and the logical inferences to be drawn from that evidence) demonstrates: In August 2013, Smith and Moore separated. On October 11, 2013, Smith filed for divorce, and her mother served Moore with divorce papers on October 18, 2013. In mid-November 2013, Smith leased the Toyota Solara. Moore's name did not appear on the lease. He did not give Smith money to finance the car. Smith never gave Moore permission to drive the Solara. Smith and Moore were not living together on the dates of the crimes charged in the information. Thus, substantial evidence establishes, on November 26, 2013 (count 1) and December 1, 2013 (count 4), Moore "took a motor vehicle [the Solara] that was not his own." (CALCRIM No. 1650.)

Moore argues the "prosecutor failed to prove that the vehicle, obtained during marriage, was not community property." Smith testified she leased the car without making a down payment. There is no evidence indicating Smith put any community property funds into the Solara. "The earnings and accumulations of a spouse . . . after the date of separation of the spouses, are the separate property of the spouse." (Fam. Code, § 771.)

There is substantial evidence in the record from which the jury could have reasonably concluded beyond a reasonable doubt that Moore took a motor vehicle that was not his own on November 26 and December 1, 2013. Moore does not challenge

the sufficiency of the evidence supporting the other elements of the carjacking convictions.

The Trial Court's Response to the Jury's Inquiry About Community Property

During deliberations, the jury submitted the following written questions to the trial court: "How was the Toyota Solara purchased? Did Raphaiel contribute to the purchase? Would it be considered 'community property?' Did he have any legal claim to the car as of 11/26/13?" After commenting to the parties, "There is no evidence any of [Moore's] money was used to purchase [the Solara]," the trial court informed the jury: "Community property has no application to this case whatsoever. So you're not to consider, quote, community property." In response to the first two questions, the court ordered a readback of certain portions of Smith's testimony. In response to the final question, the court told the jury, "You decide ownership. I can't tell you that."

Moore "asserts community property is a type of ownership and the jury should have been allowed to consider that factor in determining if the People proved [Moore] took a car that was not his own." We disagree that the court should have encouraged the jury to speculate the Solara was community property in the absence of any evidence that Smith used community property funds to finance the car lease. Given this lack of evidence, Moore's claim he was entitled to jury instructions on the issue of community property fails.

Moore also argues that the court "prevented" the jury "from considering any other evidence as to the element of ownership" by informing the jury: "[W]e'll read a portion of the testimony that we believe is relevant to your questions, and then you decide

what the facts are." Moore asked that the readback of Smith's testimony include the portion demonstrating that, in the divorce papers she filed, she indicated Moore's income was $378 per month. The court denied this request, stating: "There is no evidence that [Moore] contributed any money towards the payment of the lease." Again, the court did not err in declining to allow the jury to speculate that the car was community property in the absence of substantial evidence supporting that theory.

Admission of Evidence of Uncharged Conduct (Evid. Code, § 1101, subd. (b))

Moore contends the trial court abused its discretion in admitting evidence of his prior, uncharged conduct, pursuant to Evidence Code section 1101, subdivision (b).

Under Evidence Code section 1101, evidence of an uncharged crime is inadmissible to prove a defendant's disposition to commit a charged crime, but is admissible "to prove some fact" relevant to the charged crime, such as "motive, opportunity, intent, preparation, plan, knowledge, [etc.]." (Evid. Code, § 1101, subd. (b).) "To be admissible to show intent, 'the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance.'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1194.) The "probativeness of other-crimes evidence on the issue of motive does not necessarily depend on similarities between the charged and uncharged crimes, so long as the offenses have a direct logical nexus." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 15.) The trial court must exclude the proffered evidence, however, if its probative value is "substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of

confusing the issues, or of misleading the jury." (*People v. Cole*, *supra*, 33 Cal.4th at p. 1195, citing Evid. Code, § 352.) We review the trial court's admission of evidence for abuse of discretion. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1195.)

The trial court allowed the prosecution to present evidence of Moore's prior, uncharged criminal threats toward Smith's former boyfriend and vandalism of Smith's mother's car, accepting the prosecutor's argument that the evidence was relevant to "show that [Moore] has a pattern of criminal conduct towards people around [Smith] to try and maintain control over [Smith]" because she "would not get back together with him."

Specifically, the prosecution presented evidence that, on April 6, 2007, during a break in Moore and Smith's relationship, Moore pursued Smith's boyfriend, Brian Sneed, in a car chase and threatened to kill him. According to Sneed's trial testimony, when he arrived at Smith's apartment that day, Moore was outside arguing with Smith' mother, demanding to see his daughter. Smith was inside her apartment. Moore and Sneed made eye contact. Sneed decided to get back in his car. Then he saw Moore quickly walk to a car and enter the driver's side. Sneed "sped off," hoping to avoid Moore, but Moore pursued him in "a cat-and-mouse [car] chase for about five, ten minutes," until Sneed was forced to stop at a red light behind other cars. Moore exited his car, knocked on the passenger window of Sneed's car, and ordered Sneed to roll down his window so they could talk. Sneed declined. Moore angrily told him, "'I just want to let you know if you come near my girl or my kid again, I'm gonna kill you.'" Sneed feared for his life, believing Moore could carry out the threat. When the traffic began moving, Sneed made a turn and Moore continued to pursue him. After a couple of minutes,

Sneed drove onto the freeway and was able to "break free of [Moore]."

On April 21, 2007, just after midnight, Moore called Smith and asked to meet her. Although they were still estranged, Smith agreed to meet him outside her apartment. After he arrived, Moore took Smith's cell phone out of her hand, indicating he wanted to contact Sneed. When he did not return the phone, Smith reported the taking to the police.

About one hour after he took the phone, Moore placed a call to Sneed from Smith's cell phone. After Sneed answered the call, Moore angrily shouted, "'If you don't stay away from me and my girl and my kid, I'm gonna kill you.'" He repeated the threat two additional times. He also told Sneed that he belonged to a gang based in Compton and indicated he knew where Sneed lived and worked. Sneed hung up the phone, fearful that Moore would carry out the threat. Moore immediately called Sneed five or six more times before Sneed disconnected his telephone (a landline). Sneed woke up his father, a captain with the Los Angeles County Sheriff's Department, and explained the situation. Sneed's father instructed him to plug in the phone. It immediately rang. Sneed answered the call from Moore, who began threatening him again. Sneed handed the phone to his father.

According to the trial testimony of Sneed's father (Danny Sneed), when Sneed handed him the phone, he identified himself to Moore as an LASD captain. Moore told Sneed's father that he would kill Sneed if Sneed continued to see Smith. Moore was undeterred when Sneed's father told him he had committed a felony by threatening Sneed and queried whether he should send deputies to arrest Moore. Moore told Sneed's father, "'I'm a gangster. I know where he [Sneed] lives, and if he doesn't stop

seeing my girl, I'm gonna kill him.'" After continuing to make the same, repetitive threat, Moore ended the call.

The following morning, on April 22, 2007, Moore arrived outside the home of Smith's mother, using profanity and shouting about Smith and her mother not allowing him to see his daughter. According to Smith's mother, Moore jumped over a fence, with a long piece of steel in his hand, and slashed three of her tires before leaving the scene.

As he argued below, Moore asserts the evidence of the prior, uncharged conduct was not relevant to the charged offenses. We agree with the Attorney General that the evidence was relevant to show Moore's motive and intent in committing the charged offenses. When Moore and Smith were estranged, Moore engaged in a pattern of threatening, dangerous and violent behavior in order to intimidate Smith and frighten her back into a relationship with him and scare off anyone who threatened a reconciliation (e.g., a new boyfriend, Smith's mother).

To the extent the evidence was more prejudicial than probative or cumulative of other evidence tending to show Moore's pattern of engaging in threatening, dangerous and violent behavior when his relationship with Smith was in jeopardy (arguments Moore did not raise below in objecting to the admission of this evidence), any error in admitting this evidence was harmless. It is not reasonably probable that the outcome of trial would have been more favorable to Moore if the trial court had excluded this evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The other evidence supporting the convictions, including testimony from Smith, her mother and her nephew describing the charged offenses, was not weak.

Admission of Evidence of Uncharged Conduct Against a Former Girlfriend (Evid. Code, § 1109)

Moore contends the trial court abused its discretion in admitting under Evidence Code section 1109 evidence that Moore vandalized the car of a former girlfriend. Moore argues vandalism does not qualify as an act of domestic violence within the meaning of Evidence Code section 1109.

The evidence the prosecution presented at trial demonstrates that Krystal Scott was Moore's high school girlfriend. After Scott and Moore's dating relationship had ended, Scott made a police report that Moore had been harassing her because he was upset that she had a new boyfriend. According to a deputy sheriff's trial testimony, in the morning on October 7, 2004, he responded to the home of Scott's aunt after Scott called the police about Moore. Scott reported that Moore had been pounding on the door of her aunt's home. Scott "didn't want anything to do with him," so she did not open the door and she and her aunt went upstairs and looked out the window. Scott observed Moore approach her car, bend down, and make "a motion like he was slashing the tires." Later, when Scott went outside and inspected her car, she "found out all of her tires had been slashed." At trial, Scott testified that she did not recall the incident.

Moore argues this incident did not constitute a prior act of domestic violence within the meaning of Evidence Code section 1109 because there was no evidence indicating Moore placed Scott "in reasonable apprehension of imminent serious bodily injury to . . . herself, or another." (§ 13700, subd. (a) [defining "abuse" and "domestic violence" as used in Evidence Code section 1109].) We need not evaluate whether the incident constitutes

domestic violence because, to the extent the trial court erred in admitting the evidence under Evidence Code section 1109, the evidence was admissible under Evidence Code section 1101, subdivision (b), as evidence of prior, uncharged conduct tending to establish motive and intent. Like the incidents involving Smith's mother and former boyfriend, this incident involving Scott again demonstrated Moore's pattern of resorting to threatening and violent conduct when rejected by a former girlfriend.

We reiterate what we stated above regarding evidence of the other prior, uncharged conduct: To the extent the evidence was more prejudicial than probative or cumulative of other evidence tending to show Moore's pattern of engaging in threatening, dangerous and violent behavior when his relationship with Smith was in jeopardy, any error in admitting this evidence was harmless. It is not reasonably probable that the outcome of trial would have been more favorable to Moore if the trial court had excluded this evidence. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The other evidence supporting the convictions, including testimony from Smith, her mother and her nephew describing the charged offenses, was not weak.

Admission of 911 Call

Moore contends the trial court abused its discretion when it admitted evidence of a December 1, 2013 (the date of the second carjacking count) 911 call made by a man identified only as "Marcell." The prosecution sought to admit the call under the spontaneous statement objection to the hearsay rule. (Evid. Code, § 1240.) Moore objected to the admission of this evidence below, arguing that the call indicated Marcell had no personal knowledge of the events, but was reporting what others told him

as he relayed the information to the operator. The trial court ruled the evidence was admissible, commenting that there was "sufficient indication that all the callers [were] percipient and sufficiently detailed to be admissible." On appeal, Moore argues "there was insufficient foundation to admit the challenged 911 call under the spontaneous statement exception to the hearsay rule."

Under Evidence Code section 1240, "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

Based on the transcript of the 911 call that was played for the jury, Marcell called to report the December 1, 2013 incident. He told the operator, "this dude ah, took his girlfriend's keys and went into the house. I don't know what he took, but he took the car. And he got on." Marcell also told the operator that the man "chased [the woman] down." Marcell explained, "when I went to see them, they were on the floor wrestling or whatever, trying to get the stuff." The transcript demonstrates Marcell perceived the events he reported. He was not merely relaying information about events other persons had observed (although he did provide some additional details that others around him stated: the make of the car, whether the car was 2-door or 4-door).

Moore also argues on appeal that Marcell's statements were not spontaneous within the meaning of Evidence Code section 1240 because "a certain amount of time passed between the incident and Marcell's alleged observations. Marcell's was not the first 911 call to come in about this event. The first call

came in three full minutes before Marcell made his call. By the time Marcell made the call any emotional influence he might have been under from witnessing the event had dissipated." Below, Moore objected to the call based solely on Marcell's purported lack of percipient knowledge. He did not argue that Marcell's statements were not spontaneous. Accordingly, Moore forfeited this claim on appeal. (*People v. Kennedy* (2005) 36 Cal.4th 595, 612 ["When an objection is made to proposed evidence, the specific ground of the objection must be stated. The appellate court's review of the trial court's admission of evidence is then limited to the stated ground for the objection"], disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.)[8] Even if Moore had preserved this claim, we would reject his argument. The transcript indicates Marcell made the 911 call shortly after the events unfolded, while Smith was sitting outside talking to security personnel in her residential community. The "stress of excitement" from witnessing the events had not died down. (Evid. Code, § 1240.)

Lack of Admonishment of Smith's Support Person

Moore contends the trial court erred in failing to admonish a support person who accompanied Smith to the witness stand at trial, pursuant to section 868.5. Moore forfeited this claim because he did not object below. (*People v. Myles* (2012) 53

---

[8] Moore similarly forfeited his claim on appeal that "Marcell's statements contained multiple layers of hearsay" in that "Marcell's knowledge, at least in part, was based on what the unidentified male told him. To the extent the admission of information relayed to Marcell by other witnesses was in error, it was harmless. Marcell witnessed the events he reported and received only minor details from others.

Cal.4th 1181, 1214 ["Because defendant did not object when a victim-witness advocate accompanied [the victim] to the witness stand, he has forfeited that portion of his claim"].)

In any event, this contention lacks merit. Section 868.5, subdivision (b), requires the trial court to admonish the support person "to not prompt, sway, or influence the witness in any way" if the support person also is a witness at trial. (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1170-1171.) Moore does not dispute that Smith's support person was not a witness. Nor does Moore dispute the lack of prejudice in that there is no indication in the record that the support person prompted, swayed or influenced Smith in any way.[9]

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

LUI, J.

---

[9] Based on our resolution of the contentions Moore raises on appeal, we reject his claim that cumulative error requires reversal of his convictions.