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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 EIGHT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JESSE ARCEO,<br><br>Defendant and Appellant. | B234699<br><br>(Los Angeles County<br>Super. Ct. No. BA369359) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Rand Rubin, Judge. Affirmed.

Randy S. Kravis for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant appeals from his conviction of two counts of criminal threats.[1] He contends: (1) he was denied due process and a fair trial by the admission of evidence concerning uncharged acts and (2) he received ineffective assistance of counsel as a result of his trial attorney's failure to object to the admission of gang evidence and to the dual use of facts at sentencing. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### *A. People's Case*

#### 1. December 18, 2009 (Count 2)

Defendant and Stephanie A. became romantically involved in 2006 and in October 2009 Stephanie gave birth to defendant's son. For about a year before the baby was born, Stephanie lived with defendant in the home of his mother, Adela F. Defendant's sister, Claudia F., and her four children also lived there. Stephanie moved out of the house sometime prior to December 18, 2010. On that date, Stephanie acceded to defendant's request that she meet him in a nearby park. Stephanie brought the baby with her to the meeting. At trial, the only thing Stephanie remembered about the meeting was that they argued and she walked away. But a neighbor, Patricia H., called the police after she saw defendant try to take a baby out of Stephanie's arms and hit Stephanie in the jaw.

When interviewed by Los Angeles Police Officer Steven Franssen a few months later, Stephanie said she met defendant in the park to end their relationship. Defendant

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[1] All undesignated statutory references are to the Penal Code.

Defendant was charged by amended information with three counts of making criminal threats (§ 422); an enhancement for personal use of a deadly weapon (§ 12022, subd. (b)(1)) was alleged as to count 1 and one for personal use of a handgun (§ 12022.5, 12022.53, subd. (b)) was alleged as to count 2. A jury trial convicted defendant of counts 1 and 3, and found true the deadly weapon enhancement on count 1, but found defendant not guilty of count 2. Defendant was sentenced to four years in prison. He timely appealed.

said he would kill Stephanie if she tried to leave him and lifted his shirt to show Stephanie a gun in his waistband. Defendant pushed Stephanie as she tried to leave.

At trial, Stephanie admitted arguing with defendant that day, but denied he threatened or assaulted her; he did not show her a gun. The police let defendant go because "nothing happened."

2. January 15, 2010 (Count 3)

Sometime during the week of January 15, 2010, defendant called Stephanie and told her, "if you leave me, I'll kill you and I'll chop you into pieces." Several days later, Stephanie went to the police station to report the incident. She told Officer Jahaziel Andrade that defendant, a member of the Harpies Gang, was calling her constantly, threatening her and "tagging" his gang name around her home. Stephanie said she was afraid that he would kill her. To Andrade, Stephanie seemed genuinely afraid.

When interviewed about the incident by Officer Franssen a few months later, Stephanie said defendant had been making threatening phone calls to her, including one in which he threatened to kill her and chop her up. When she saw the gang graffiti around her home, she believed defendant had done it to intimidate her. Defendant had hit her multiple times in the past and she was afraid he would kill her.

At trial, Stephanie admitted going to the police station and telling Officer Andrade that defendant threatened her, but claimed her statement was not true. Stephanie explained that she made the accusation and got a restraining order against defendant because she was angry with him for cheating on her. In April 2010, Stephanie wrote to defendant in jail asking him to forgive her for lying to the police.

3. March 22, 2010 (Count 1)

At 7:30 a.m. on March 22, 2010, Nora Z. went to Adela's home to pick up Claudia's four girls to take them to school. When Nora arrived, Adela asked for her help because defendant had been hitting her and he had a machete. Nora heard defendant yelling at Adela, demanding money. Nora told defendant she was not afraid of him and

would hit him if he hurt Adela. When defendant ran upstairs holding the machete, Nora called the police and told them she was very afraid that defendant would do something violent if the police did not come. Before the police arrived, Nora took the girls to school; when she came back to the house 15 minutes later, the police were there.

Officers Alex Ramirez and Davin Stovell responded to the 911 call at Adela's home. Adela told Ramirez that defendant angered easily and was uncontrollable. That day, he had banged on her door and threatened to bring pit bulls into the house and to destroy property. But Adela denied that defendant threatened to kill her and that he had a machete. Stovell recovered a 36-inch machete from under the mattress in defendant's bedroom. Defendant locked himself in the basement but after police broke down the door, he surrendered without incident.

The next day, Adela told Detective Eloy Ochoa that defendant had been using drugs and became upset when Adela would not give him money to buy more drugs. Defendant grabbed a machete and threatened her. She locked herself in her room while defendant yelled and threatened her. Adela wanted to get psychological help for defendant. She said defendant had a short temper and became violent easily.

At trial, Adela denied that defendant threatened her with a machete and denied telling police that he had done so. She claimed that they had a little argument over money for school books. She denied that defendant angered easily and that she told police he did, or that he was so violent he should be in jail. Adela had never seen defendant violent with Claudia or her daughters.

4. Evidence of Uncharged Misconduct on June 20 and 23, 2008

Over defendant's objection, evidence of two uncharged incidents in June 2008 was admitted into evidence. On June 23, Officer Robert Leary responded to a domestic violence call at Adela's home. A neighbor told Leary and his partner that he observed a male Hispanic dragging a female Hispanic into Adela's house. As officers approached, Adela came running out of the house screaming that defendant was inside with the victim. When defendant opened the door in response to officers knocking, he was

holding Stephanie around the neck and chest. The officers separated them. Stephanie told the officers that she and defendant were fighting over money; when defendant yelled at her, she ran outside but defendant followed her, forced her back into the house and threw her onto a sofa. Defendant's mother called 911. The officer saw bruises on Stephanie's arm. At trial, Stephanie and Adela both testified that they could not recall the incident.

About one week later, Claudia called the police to report that defendant assaulted her with a deadly weapon on June 20 (three days before the incident with Stephanie). Defendant told Officer Ochoa that defendant argued with Claudia after she failed to do something about her children crying. Stephanie told the officers that she did not remember defendant arguing with Claudia, assaulting Claudia, or that Stephanie had to intercede to stop the fight.

*B. Defense Case*

Claudia denied having a violent confrontation with defendant on June 20. She maintained that defendant did not use drugs, did not have guns, did not associate with gang members and had never been violent with Claudia or her children. Claudia's oldest daughter testified that defendant had never been violent with her.

## DISCUSSION

*A. Evidence of the June 20 and June 23 Incidents Was Admissible*

Defendant contends evidence of the incidents on June 20 and June 23, which were not charged as offenses, was inadmissible under Evidence Code sections 1101 and 1109 because it was more prejudicial than probative. We disagree.

To prove the crime of criminal threat, the prosecution must establish not only that the defendant willfully threatened to commit a crime which will result in death or great bodily injury to another person, but also that the threat actually caused the person threatened to be in sustained fear for his or her own safety, or the safety of another, and

that such fear was reasonable under the circumstances. (*People v. Velazquez* (2011) 201 Cal.App.4th 219, 229.) The parties' history is a relevant circumstance. (*People v. Mosley* (2007) 155 Cal.App.4th 313, 324.)

With certain exceptions, Evidence Code section 1101, subdivision (a) makes evidence of specific instances of a person's conduct inadmissible to prove his or her conduct on a specified occasion. Two statutory exceptions to the inadmissibility of evidence under section 1101, subdivision (a) are relevant here: section 1101, subdivision (b) and section 1109, subdivision (a)(1).

Evidence Code section 1101, subdivision (b) makes evidence of prior acts admissible to prove "some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . . ) other than his or her disposition to commit such act." This list of facts is by way of example only, other facts may also be proved by prior acts. (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1373.) Admissibility under section 1101, subdivision (b) depends on the materiality of the facts sought to be proved, the tendency of the uncharged acts to prove those facts, and the existence of any rule or policy requiring exclusion of the evidence. (*People v. Lindberg* (2008) 45 Cal.4th 1, 22 (*Lindberg*).)

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."[2] Under section 1109, subdivision (a)(1), both charged and uncharged acts of domestic violence are admissible to show a defendant's propensity to commit such crimes. (*People v.*

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[2] In Evidence Code section 1109, "domestic violence" has the meaning set forth in Penal Code section 13700, subdivision (b), which defines domestic violence to include abuse committed against a cohabitant or former cohabitant. "Abuse" means intentionally or recklessly placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another (Pen. Code, § 13700, subd. (a)) and "cohabitant" means two unrelated adults who live together, for a substantial period of time (Pen. Code, § 13700, subd. (b)).

*Brown* (2011) 192 Cal.App.4th 1222, 1232-1233 (*Brown*).) It is well settled that admission of evidence pursuant to sections 1101, subdivision (b) and 1109, subdivision (a)(1) does not violate a defendant's due process and equal protection rights. (*People v. Foster* (2010) 50 Cal.4th 1301, 1335 [§ 1101, subd. (b)]; *Brown*, at p. 1233, fn. 14 [§ 1109, subd. (a)(1)].)

Under both Evidence Code section 1101, subdivision (b) and section 1109, subdivision (a)(1), the trial court is required to do the balancing test required by section 352. In other words, it must determine whether the probative value of the evidence "is substantially outweighed by the probability the evidence will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury." (*Brown*, *supra*, 192 Cal.App.4th at p. 1233; see also *Lindberg*, *supra*, 45 Cal.4th at p. 23.) " '[A] court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing function under section 352.' [Citation.]" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1285.)

In *People v. Ogle* (2010) 185 Cal.App.4th 1138 (*Ogle*), the defendant was convicted of, among other things, criminal threats. On appeal, he challenged admission of evidence of past misconduct. The court found evidence that the defendant had previously stalked the victim was "indisputably admissible under [Evidence Code] section 1101, subdivision (b) for the nonpropensity purpose of proving [the defendant's] intent and the sustained nature of his victim's fear, both of which were elements of the charged criminal threats offense." (*Id*. at p. 1143.) Concluding that stalking was a form of domestic violence, the court found the evidence was also admissible under section 1109. (*Ogle*, at p. 1144.)

We review the trial court's determination that evidence is admissible under both Evidence Code sections 1101 and 1109 for abuse of discretion. We will not disturb the exercise of discretion except upon a showing that it was exercised in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.

(*Lindberg*, *supra*, 45 Cal.4th at p. 23 [§ 1101]; *Brown*, *supra*, 192 Cal.App.4th at p. 1233 [§ 1109].)

Here, prior to trial, the People filed a written motion seeking to introduce evidence of four prior acts of misconduct by defendant, including the incidents on June 20 and June 23, on the grounds that such evidence was admissible under Evidence Code section 1101, subdivision (b) to prove the victims' reasonable fear as well as defendant's intent, and that such evidence was more probative than prejudicial under section 352. At the hearing on the motion, the trial court observed that section 1109 seemed more applicable. It concluded that evidence of the June 20 and 23 incidents, and one other incident, "is exactly the type of evidence allowed under [section] 1109. I don't think the prejudicial impact outweighs the probative value. [¶] And we will give the jury instructions as to what they can use this evidence for, not to indicate that the defendant has a bad nature." Revisiting the issue a few days later, the trial court found the June 20 and 23 incidents admissible under section 1101, subdivision (b) as probative of defendant's intent, but found the third incident inadmissible under section 352. We find no error.

Under *Ogle*, *supra*, 185 Cal.App.4th 1138, evidence that on June 23 defendant grabbed Stephanie around the neck and forced her into the house after they argued about money, was admissible under Evidence Code section 1101, subdivision (b) because it tended to prove that defendant's threats actually caused Stephanie to be in sustained fear for her own safety and that such fear was reasonable under the circumstances. The June 23 incident was also admissible under section 1109 as a prior incident of domestic violence. The June 20 incident in which defendant assaulted his sister with a deadly weapon was not admissible as a prior act of domestic violence under section 1109, because his sister was not a cohabitant within the meaning of the domestic violence statutes. However, because Stephanie was present and had to intervene to stop defendant from assaulting his sister, the evidence was admissible under section 1101, subdivision (b) as nonpropensity evidence that tended to prove the elements of sustained and reasonable fear as to Stephanie.

Defendant's argument that the evidence was more prejudicial than probative is not persuasive. We do not agree that defendant's intent and Stephanie's fear were not material issues in dispute. Since Stephanie testified that nothing happened on any occasion, the People had to prove the fear element by circumstantial evidence, including these uncharged acts. Nor do we agree that the uncharged acts were more egregious than the charged offenses. There was evidence that on December 18, 2009, defendant had a gun and on March 22, 2010, he had a machete. This makes the charged crimes at least as violent, if not more so, than the uncharged misconduct. That defendant was not prosecuted for the June 20 and 23 incidents does not establish that the evidence was more prejudicial than probative; or otherwise the law would require proof of convictions rather than conduct. Finally, there is no doubt the trial court exercised its discretion because it excluded evidence of two prior acts.

*B. Defendant Did Not Receive Ineffective Assistance of Counsel*

Defendant contends he received ineffective assistance of counsel as a result of his trial attorney's failure to object (1) to evidence that defendant was a gang member and (2) to the use of a weapon (the machete) to both enhance and impose the high term sentence on count 1. We find no merit in these contentions.

"A cognizable claim of ineffective assistance of counsel requires a showing 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed . . . by the Sixth Amendment.' . . . '[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.' . . . To prevail on an ineffective assistance of counsel claim, a defendant must also establish counsel's performance prejudiced his defense. To establish prejudice, a defendant must demonstrate 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " (*People v. Jones* (2009) 178 Cal.App.4th 853, 859-860, citations omitted.) An attorney does not breach his professional standard of care by failing to make an objection that has little, if any

likelihood, of being sustained. (*People v. Anderson* (2001) 25 Cal.4th 543, 587; *People v. Zavala* (2008) 168 Cal.App.4th 772, 780.)

1. Evidence That Defendant Was a Gang Member

Defendant's argument that trial counsel was ineffective for failing to object to evidence that he was a gang member under Evidence Code section 352 is not persuasive. Here, the only evidence of defendant's gang membership was the police officers' testimony that Stephanie said defendant was tagging his gang name around her house to scare her. This was circumstantial evidence from which the fear element of the criminal threats charge could reasonably be inferred. Contrary to defendant's argument, the absence of direct evidence that Stephanie was afraid of defendant because he was a gang member does not make the circumstantial evidence less relevant. Under these circumstances, it is not reasonably probable that the trial court would have sustained any objection to the challenged evidence. Accordingly, defendant has failed to establish that trial counsel breached his professional standard of care by failing to object to the gang evidence.

2. Dual Use of Fact That Defendant Used a Weapon

We also find no merit in defendant's contention that his trial counsel was ineffective for failing to object to the use of a weapon to impose the high term on count 1 and as an enhancement on that count.

"The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law." (§ 1170, subd. (b).) But as long as at least one aggravating factor is established by means that satisfy the constitutional confrontation clause, the high term is proper. (*People v. Jones*, *supra*, 178 Cal.App.4th at p. 863, fn. 7.)

Here, defendant was sentenced to four years on count 1, comprised of the three-year high term for criminal threats, plus a consecutive one year for the personal use of a

deadly or dangerous weapon; plus a concurrent three-year high term on count 3. The trial court stated that it had considered the following circumstances: (1) the crimes involved great violence, threat of great bodily harm and other acts disclosing a high degree of cruelty, viciousness or callousness; (2) the defendant was armed with and used a weapon at the time of the commission of count 1; (3) the manner in which the crimes were carried out indicate premeditation; (4) the victims were particularly vulnerable; (5) the defendant was in a position of trust and confidence; and (6) the defendant has engaged in a pattern of violent behavior. While defendant is correct that weapon use alone could not support the high term because it was the basis of an enhancement, the trial court identified five other aggravating factors, any of which could support the high term.

**DISPOSITION**

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.