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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL HARDEN, Defendant and Appellant.	B277261 (Los Angeles County Super. Ct. No. BA428299)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig E. Veals, Judge. Affirmed.

Jerry Smilowitz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Michael Harden appeals from a 23-year prison sentence following his convictions for first degree residential robbery and misdemeanor possession of a smoking device. He contends he was denied a fair trial due to assertedly inadmissible evidence of prior bad acts. Specifically, he contends that the trial court should have given an instruction limiting admissibility of the evidence, that his trial counsel was ineffective for failing to seek a mistrial or curative instruction, and that the court failed to conduct an adequate hearing to determine whether any juror overheard a conversation between witnesses relating to prior bad acts. For the reasons set forth below, we find no reversible error. Accordingly, we affirm.

STATEMENT OF THE CASE

A jury convicted appellant of first degree residential robbery (Pen. Code, § 211; count 1) and misdemeanor possession of a smoking device (Health & Saf. Code, § 11364.1, subd. (a)(1); count 2). As to count 1, the jury also found that appellant personally used a deadly and dangerous weapon, to wit, a knife (Pen. Code, § 12022, subd. (b)(1)). Appellant admitted having suffered two prior "strikes" within the meaning of the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(j), 1170.2, subds. (a)-(d)), and having served seven prior prison terms (§ 667.5, subd. (b)).

After hearing argument on appellant's *Romero* motion to strike the two strikes,[1] the court partially granted the motion

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

with respect to one of the two strikes. The court then sentenced appellant to a total of 23 years in state prison.

Appellant timely appealed.

STATEMENT OF THE FACTS

A. *Prosecution Case*

1. *Victim's Testimony*

Theresa Harden[2] is the mother of appellant and Peter Harden. Theresa testified that in August 2014, she was living with both sons. She was 86 years old and appellant was 53 at the time. On August 13, 2014, at around 3:00 a.m., appellant entered Theresa's bedroom, holding a small knife in his right hand. Appellant told Theresa he needed money. She informed him that she had only a small amount of money, which she needed to purchase her medication. Appellant responded, "'Well, I don't got no patience. I'm going to get violent.'" He then ripped the phone off the wall and threw a portable television at the window. Theresa said, "Oh, no, Michael," and threw a $20 bill on the floor. Appellant picked up the bill and left.

Theresa walked out to the living room and noticed Peter sitting there. She told him to call 911. Peter called 911, and Theresa spoke with the 911 operator about the incident. She told the 911 operator that appellant had "put a knife on me" and was "threatening me with the knife."[3] Several minutes later, appellant returned. After observing that the knife he had been

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[2] As the witnesses share the same last name, to avoid confusion we refer to them by their first name.

[3] The 911 call was played for the jury.

holding was lying on the coffee table, appellant asked Theresa if she had called the police. When she answered in the affirmative, he stated, "'I told you not to call the police.'" Appellant then took the knife and put it into a drawer in the kitchen. Theresa told Peter to take out the knife and put it back on the coffee table. Appellant then left the house, and shortly afterward, the police responded to the 911 call. Theresa described the incident, telling the officers that appellant had threatened to kill her.

Theresa testified that appellant had repeatedly asked her for money. She had given him some money the previous day (August 12). She also testified that appellant had threatened her in the past for money, but that the instant incident was the first time he had used a knife to threaten her.

On cross-examination, Theresa acknowledged that appellant had a drug problem which had affected her life over the past 30 years. On several occasions when appellant needed drugs, he became upset and broke items. When appellant was high on drugs, he would often threaten to kill her. Although she was fearful of appellant during those times, she never called the police. Theresa acknowledged telling appellant at the time of the current incident that she would get him help for his drug problem, and that she hoped he would get help after going to jail.

On further cross-examination, after defense counsel asked about any prior threats by appellant, Theresa volunteered that appellant had previously used a knife to stab and "almost kill a woman." She provided no further details. Defense counsel then asked how many times prior to that night Theresa had seen appellant use a knife. She responded: "Michael took a butcher knife and put [it] to my throat and told me he was going to kill me. I didn't want to say it, but he did. That's why that night I

was scared." She admitted not calling the police after that prior incident. Theresa also stated she had not told the police or the district attorney about this incident because "I didn't want to get him [into] trouble."

On redirect, Theresa provided additional details about the prior incident involving appellant. She stated that about two months before the current incident, she was in the kitchen when appellant entered, high on drugs. He asked her for money. When she responded that she was "'depressed'" and felt like "'screaming,'" he opened a drawer, took out a butcher knife, put it to her throat, and said, "'I will give you something to scream about. I'll kill you.'" Later that day, appellant apologized for the incident. Theresa clarified that the knife never touched her neck. She also explained she did not call the police because she did not want appellant to get into more trouble, as he was already on probation.

2. *Other Percipient Witness's Testimony*

Appellant's brother, Peter Harden, provided testimony consistent with Theresa's. Peter testified that on August 12, 2014, he went to sleep around 11:00 p.m. At around 2:30 a.m., he woke to the sound of appellant entering their mother's bedroom. He then heard appellant and Theresa speaking. Peter went into the living room and sat on the couch. He saw appellant exit the kitchen with a small knife and enter Theresa's bedroom. Peter heard appellant saying the word "money"; Theresa saying she didn't have any money; appellant making threats; and Theresa finding some money to give appellant. After appellant left, Peter entered the bedroom to check on Theresa. He saw a knife on the floor, picked it up and placed it on the coffee table. Peter assisted Theresa in calling 911. Later, after appellant had stored the

knife away in the kitchen, Peter retrieved the knife and placed it back on the coffee table.

3. *Other Evidence*

Los Angeles Police Officer Andrew Romero testified that he and his partner responded to the Harden residence that morning. At the scene, Theresa told him that at around 3:00 a.m., she was in her bedroom when appellant entered and asked her for money. After Theresa stated she was tired of giving appellant money to support his cocaine addiction, appellant became angry and ripped the phone cord out of the bedroom wall. Appellant then went into the kitchen, armed himself with a knife, came back and stated, "'If you don't give me money, I'm going to kill you.'" Theresa stated she was afraid for her life so she gave appellant $20.

Officer Romero observed a small knife on the coffee table and recovered it. He also spoke with Peter, who provided a similar account of the incident.

The officers conducted a search of the surrounding neighborhood and located appellant about 100 yards from the Harden residence. As they attempted to detain appellant, he fled, but was apprehended after a short pursuit. A glass narcotic pipe containing an off-white residue was found in appellant's front pants pocket. The parties stipulated that the residue was cocaine base.

B. *Defense*

Appellant neither testified nor presented an affirmative defense case.

DISCUSSION

A. *Evidence of Prior Uncharged Acts*

During Theresa's cross-examination, she volunteered testimony that appellant had previously stabbed a woman, almost killing her. In response to defense counsel's question whether appellant had ever threatened her with a knife prior to the current incident, Theresa testified that appellant had done so about two months prior. She elaborated on this incident during redirect. Defense counsel did not move to strike or seek an admonition or curative instruction, and the trial court did not give, sua sponte, a limiting instruction about the evidence. Appellant now contends he was denied a fair trial because Theresa's testimony should have been subjected to an Evidence Code section 402 hearing to determine its admissibility under Evidence Code sections 352 and 1101.[4] He argues that the statements were inadmissible character evidence, as they were more prejudicial than probative.

Under section 1101, "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (§ 1101, subd. (a).) However, section 1101 does not prohibit "the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, . . .) other than his or her disposition to commit such an act." (§ 1101, subd. (b).) "[T]o be admissible, evidence of other crimes must be

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[4] All further statutory citations are to the Evidence Code, unless otherwise stated.

relevant to some material fact in issue, must have a tendency to prove that fact, and must not contravene other policies limiting admission, such as Evidence Code section 352." (*People v. Malon*e (1988) 47 Cal.3d 1, 18.) Under section 352, the trial court "in its discretion may 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."

As an initial matter, we conclude that appellant has forfeited this claim of error. Under section 353, subdivision (a), "[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." (§ 353, subd. (a); see *People v. Valdez* (2012) 55 Cal.4th 82, 130 ["defendant's argument under Evidence Code section 1101 is not cognizable on appeal because he failed to object on this basis at trial"]; *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1193 ["A party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court"].) Because trial counsel failed to move to strike Theresa's statements given on cross-examination or object to questions on the subject matter during redirect, appellant's arguments based on sections 352 and 1101 are not cognizable on appeal.

Additionally, we reject appellant's contention that the trial court should have given, sua sponte, an instruction limiting the admissibility of the evidence pursuant to *People v. Collie* (1981)

30 Cal.3d 43 (*Collie*). In *Collie*, the defendant was convicted of first degree attempted murder of his wife. (*Id*. at p. 49.) On appeal, the defendant argued that "the trial court should have instructed the jury *sua sponte* on the limited admissibility of evidence of previous assaults he allegedly committed on his wife." (*Id*. at p. 63.) Our Supreme Court rejected the claim, holding that generally, "the trial court is under no duty to instruct *sua sponte* on the limited admissibility of evidence of past criminal conduct." (*Id*. at p. 64.) The court noted, however: "There may be an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose. In such a setting, the evidence might be so obviously important to the case that *sua sponte* instruction would be needed to protect the defendant from his counsel's inadvertence." (*Ibid*.) This is not such an extraordinary case. Evidence of prior bad acts was not a dominant part of appellant's trial. Rather, the testimony of the victim (Theresa) and the other percipient witness (Peter) describing the robbery was central to the prosecution's case. Moreover, evidence of prior bad acts was highly relevant to Theresa's fear of appellant. In short, the trial court did not err in not giving, sua sponte, a limiting instruction.

Finally, any error in admitting Theresa's statements was harmless. (See *People v. Malone*, *supra*, 47 Cal.3d at p. 22 [erroneous admission of other crimes-evidence reviewed under *People v. Watson* (1956) 46 Cal.2d 818].) Appellant does not contest that the prior similar incident involving Theresa was relevant to demonstrate, among other things, intent. As to Theresa's statement that appellant had previously stabbed

another woman, that reference was fleeting and the evidence probative to show Theresa's fear was reasonable. In any event, the evidence of appellant's guilt was overwhelming. With respect to the robbery, appellant's own family members testified that he had demanded money from Theresa, had threatened to kill her with a knife, and had taken $20 from her. With respect to the misdemeanor possession of drug paraphernalia, appellant does not dispute that a smoking device containing cocaine base was found on his person. Thus, it is not reasonably probable that the result would have been more favorable to appellant had evidence of the prior bad acts been excluded.

B. *Ineffective Assistance of Counsel*

Appellant next asserts his trial counsel was ineffective for failing to move for a mistrial or seek a curative instruction following Theresa's statements relating to his alleged prior acts. "'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.]'" (*People v. Gamache* (2010) 48 Cal.4th 347, 391.)

As to counsel's representation, "[a] reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." (*People v. Gamache*, *supra*, 48 Cal.4th at p. 391.) Here, it is reasonable to conclude that trial counsel did not object to Theresa's statement that appellant had previously stabbed a woman because he did not want to draw further attention to that

comment. (See, e.g., *People v. Ghent* (1987) 43 Cal.3d 739, 773 ["Counsel may well have tactically assumed that an objection or request for admonition would simply draw closer attention to the prosecutor's isolated comments."].) Indeed, Theresa provided no further details about that alleged act. As to counsel's failure to object to Theresa's statement that appellant had previously threatened her with a butcher knife, it is reasonable to conclude that counsel did not object because he wanted to use that testimony to bolster the defense case. Theresa's statement contradicted her prior trial testimony that the first time appellant threatened her with a knife was during the current incident on August 13. Theresa also conceded that she had never told anyone about the prior incident until trial. More important, Theresa's testimony about the prior incident could be used to undermine her claim that she was fearful of appellant, as she did not call the police after that incident and continued living with appellant. Indeed, in closing argument, appellant's counsel relied on the prior incident to argue that Theresa was not afraid of appellant during the current incident.

As to prejudice, appellant has not demonstrated a reasonable probability that counsel's failure to move for a mistrial or seek a curative instruction undermines confidence in the jury's verdict. As noted, evidence of appellant's guilt was overwhelming. Two percipient witnesses testified to the robbery, and there was uncontradicted evidence that appellant possessed a smoking device. Accordingly, we reject appellant's ineffectiveness claim.

C. *Jurors' Potential Exposure to Witnesses's Hallway Conversation*

Finally, appellant contends the trial court erred in failing to conduct an adequate hearing to determine whether any juror overheard a conversation between Theresa and Peter relating to appellant's prior acts.

1. *Relevant Factual Background*

After Peter testified on direct, outside the jury's presence, the prosecutor informed the judge that his investigator had overheard Theresa and Peter speaking in the hallway about alleged bad acts appellant had committed, including stabbing a woman and shooting a "boy." The investigator had advised Theresa and Peter to stop talking. The prosecutor stated that although there were jurors in the hallway, "[m]y understanding is they were not in close proximity, and I do not have any information that any juror heard any of the content of those communications . . . ."

The court asked the parties, "Do you want me to inquire if any of them heard?" Defense counsel responded that his concern was "not necessarily whether you should inquire whether or not they [the jurors] heard. I'm not really caring about that. The problem is she cannot discuss her testimony with a potential witness . . . ." The court stated: "Okay. I can just generally inquire if any of the jurors have heard any discussion from anyone regarding this case outside of this courtroom?" Defense counsel replied, "That's fine."

After the jury was recalled, the trial court asked, "at any time, has any of you heard anyone have any discussion about this case outside of the courtroom?" The court then observed: "I'm getting negative indications from all of you. You are shaking

your heads no. Okay. Anyone who would say yes? Okay. No one."

2. *Analysis*

"[A] juror's inadvertent receipt of information that had not been presented in court falls within the general category of 'juror misconduct.' [Citations.] Although inadvertent exposure to out-of-court information is not blameworthy conduct, as might be suggested by the term 'misconduct,' it nevertheless gives rise to a presumption of prejudice, because it poses the risk that one or more jurors may be influenced by material that the defendant has had no opportunity to confront, cross-examine, or rebut." (*People v. Nesler* (1997) 16 Cal.4th 561, 579.) When confronted with a claim of juror misconduct, the trial court must conduct an inquiry sufficient to determine the facts. (*People v. Adcox* (1988) 47 Cal.3d 207, 253.) Here, the trial court questioned the jurors and determined that no juror overheard the conversation between Theresa and Peter. As no juror overheard the conversation, there was no possibility that the jury's verdict was improperly based on that conversation. Defense counsel did not object to the court's procedure or argue that it was inadequate to resolve the misconduct claim. On this record, we conclude the court's inquiry was sufficient to resolve the issue, and the failure to make additional inquiry was not error. (Cf. *People v. DeSantis* (1992) 2 Cal.4th 1198, 1235 [in case involving allegation that jurors may have overheard a witness in hallway, trial court did not err in failing to hold a hearing where there was "nothing in the record to suggest that any material matter was overheard," and trial counsel did not "request a hearing or even . . . engage in a colloquy with the court regarding the matter"].)

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.