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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RUBEN EDWARD HERNANDEZ, JR.,

Defendant and Appellant.

2d Crim. No. B230012
(Super. Ct. No. F446529)
(San Luis Obispo County)

Ruben Edward Hernandez, Jr. appeals a judgment following conviction of making criminal threats, false imprisonment by violence, violating a court order with a prior conviction of violating the same order, violating a family law court order with a prior conviction of violating a court order, and dissuading a witness from testifying, with findings of a prior serious felony and strike conviction. (Pen. Code, §§ 422, 236, 166, subd. (c)(4), 273.6, subd. (d), 136.1, subd. (a)(2), 667, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)¹ We reverse and remand for resentencing regarding count 6 (dissuading a witness from testifying), but otherwise affirm.

FACTS AND PROCEDURAL HISTORY

Hernandez and L. were married for 14 years and had three children together. Their relationship was fraught with domestic violence and on three occasions,

¹ All further statutory references are to the Penal Code unless stated otherwise.

Hernandez was convicted of assaulting L. or inflicting injury on her. At times, L. obtained court restraining orders against Hernandez.

In the evening of November 3, 2009, L. picked up Hernandez when he was released from confinement following his recent conviction for spousal battery. Earlier that day, she requested the trial court to amend an existing restraining order to permit her to communicate with him. Despite their abusive relationship, L. and her children required financial and care-giving assistance from Hernandez. L. described their stormy relationship as a "way of life."

L. brought alcohol when she met Hernandez outside the jail, and they consumed it throughout the evening. The couple met their son S. at his friend's home, and they eventually went to the home of an acquaintance, Tina Burke. There, Hernandez and L. argued, and L. struck Hernandez. The argument escalated and Hernandez slapped L., causing her to fall to the street, injuring her jaw and leg. Neither Hernandez nor S. would assist L. in rising from the ground. L. did not summon police assistance because she "didn't always call the police on [Hernandez] when [she] should have."

L. and Hernandez left, drove around, and eventually parked in the parking lot of the Arroyo Grande police station. Hernandez suddenly attacked L., pulled her hair, twisted her neck, and pushed her head against the truck seat. He stated: "I'm going to kill you," and "You are going to die tonight." L. was fearful because she knew Hernandez had been convicted of manslaughter. Hernandez then suddenly released L., and he slumped back in the seat.

L. drove away and stopped near a motel. There, Hernandez pulled a 10-inch long knife and motioned as if he were going to stab himself. L. grabbed the knife, tossed it outside, and drove to a convenience store where she asked the clerk to summon police. Police officers arrived and eventually arrested Hernandez for committing acts of domestic violence. They also arrested L. for driving under the influence of alcohol.

Several days prior to her testimony at the preliminary examination, Hernandez wrote L. and stated: "I'm scared and looking at ten years," and "I need a no

show, then it is all good for me." At the preliminary examination, Hernandez looked at L. and made a gesture with his hand across his mouth, as though he was zipping his lips. L. believed that he was asking her not to testify against him.

S. testified that his mother was crying and intoxicated that evening. He stated that he saw her push and slap his father, who did not respond to her attack. Burke also testified and stated that although L. struck Hernandez, he did not respond.

Expert Testimony Regarding Battered Women

Susan Haas-Clark, a longtime marriage and family therapist who has counseled victims of domestic violence, testified that domestic violence has a cycle of three phases: the tension-building phase, the explosion phase, and the honeymoon phase. She opined that domestic violence victims sometimes use drugs or alcohol to "numb the pain." Clark stated that the victims stay in abusive relationships for several reasons, including their low self-esteem, financial and emotional dependence on the abuser, and the hope that the relationship will improve. She conceded that abuse victims sometimes assault their abusers.

Conviction and Sentencing

The jury convicted Hernandez of making criminal threats, false imprisonment by violence, violating a court order with a prior conviction of violating the same order, violating a family law court order with a prior conviction of violating a court order, and dissuading a witness from testifying. (§§ 422, 236, 166, subd. (c)(4), 273.6, subd. (d), 136.1, subd. (a)(2).) It could not agree on count 1, alleging infliction of corporal injury resulting in a traumatic condition pursuant to section 273.5, subdivision (a).² In a separate proceeding, the trial court found that Hernandez suffered a prior serious felony and strike conviction for voluntary manslaughter in 1974, and that he had

² During deliberations, the jury requested the trial court to further explain "traumatic condition." The court referred the jury to the instructions already given. Later, the jury stated that it could not agree upon count 1. The court declared a mistrial concerning that count and later dismissed it.

been convicted of violating prior court orders. (§§ 667, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)

The trial court sentenced Hernandez to a prison term of 13 years, including a doubled two-year term for making criminal threats (count 2), a doubled two-year consecutive term for dissuading a witness from testifying (count 6), and a five-year term for the prior serious felony conviction. The court imposed but stayed sentence for the remaining counts pursuant to section 654. It also imposed a \$2,600 restitution fine and a \$2,600 parole revocation restitution fine (stayed), ordered victim restitution, and awarded Hernandez 537 days of presentence custody credit.

Hernandez appeals and contends that: 1) the prosecution did not establish that he violated a valid restraining order issued in a prior prosecution (count 4); 2) the trial court erred by permitting certain expert testimony regarding battered women; and 3) the trial court misapprehended its discretion to sentence him to a term served concurrently for count 6.

DISCUSSION

I.

Hernandez argues that the prosecution did not establish that he violated a *valid* protective order in violation of section 166, subdivision (c)(4) (count 4). He points out that the protective order states it was issued as a condition of probation, although the trial court did not grant him probation in the prior domestic violence prosecution. (*People v. Hernandez* (Super. Ct. San Luis Obispo County, 2009, No. M438169.)

Hernandez has forfeited this issue because he did not object to or challenge the validity of the protective order in the trial court. (*People v. Gonzalez* (1996) 12 Cal.4th 804, 818-819.) The prosecutor presented evidence that in the prior prosecution, Hernandez pleaded guilty to violating section 273.5. Subdivision (i) of that section permits the sentencing court to issue a restraining order against the defendant: "This protective order may be issued by the court whether the defendant is sentenced to state prison, county jail, or if imposition of sentence is suspended and the defendant is placed

on probation." Although the trial court in the prior prosecution used an incorrect form (for probationers) to issue the restraining order, this does not render the order unauthorized for purposes of the forfeiture rule and appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

II.

Hernandez contends that the trial court erred by permitting expert witness Haas-Clark to testify regarding matters outside the legally permissible scope of battered women's syndrome evidence. (Evid. Code, § 1107, subd. (a) [expert testimony regarding intimate partner battering and its effects is inadmissible "to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge"].) He points to her expert testimony that men are often perpetrators of domestic violence, that they tend to lose control and not refrain from injuring the victim, and that children may be forced to side with one parent. Hernandez claims the error denied him a fair trial because the victim was the only witness to the acts against her. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [error resulting in a miscarriage of justice].)

Certain of the testimony to which Hernandez now objects was elicited on cross-examination by defense counsel and was admissible as evidence of the general nature of intimate partner battering. Moreover, Haas-Clark testified that women are batterers as well as victims.

In any event, the trial court instructed with CALCRIM No. 850 ("Testimony on Intimate Partner Battering and Its Effects: Credibility of Complaining Witness"). That instruction stated: "You have heard testimony from Sue Haas-Clark regarding the effect of intimate partner battering. [¶] Her testimony about intimate partner battering is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not [L.'s] conduct was not inconsistent with the conduct of someone who has been abused, and in evaluating the believability of her testimony." We presume that jurors are intelligent

persons capable of understanding and following the court's instructions. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1321.)

III.

Hernandez argues that the trial court misunderstood its discretion to sentence him to a prison term to be served concurrently, rather than consecutively, for count 6, dissuading a witness. We agree.

Prior to sentencing, the prosecutor filed a written sentencing memorandum stating that the sentence in count 6 "must run consecutive to the sentence imposed in Counts 2 through 5." In imposing sentence, the trial judge stated that the sentence for count 6 "by law must be served consecutively to the term imposed for count 2."

Section 1170.15 states: "Notwithstanding subdivision (a) of Section 1170.1 which provides for the imposition of a subordinate term for a consecutive offense of one-third of the middle term of imprisonment, if a person is convicted of a felony, and of an additional felony that is a violation of Section 136.1 . . . and that was committed against the victim of . . . the first felony, . . . the subordinate term for each consecutive offense that is a felony described in this section shall consist of the full middle term of imprisonment for the felony *for which a consecutive term of imprisonment is imposed . . .*" (Italics added.) Section 1170.15 applies "when a defendant is convicted of a felony (the 'first felony') and also convicted of dissuading or attempting to dissuade the victim of, or a witness to, the first felony from reporting or giving testimony regarding the first felony." (*People v. Evans* (2001) 92 Cal.App.4th 664, 669.)

The plain language of section 1170.15 indicates that a sentencing court has discretion to impose either a concurrent sentence or a consecutive sentence where a defendant is convicted of one felony and a violation of section 136.1 against the same victim. Section 1170.15 does not require the trial court to impose a consecutive term. The section is implicated only when the court chooses a consecutive sentence for a conviction of section 136.1. In that event, the sentence must be the full middle term, not one-third the middle term, as required by section 1170.1, subdivision (a). Thus, the trial

court here misunderstood its sentencing discretion and believed that it was required to impose a consecutive full middle term on count 6.

We reverse and remand for resentencing. On remand, the trial court should exercise its discretion and sentence Hernandez either concurrently or consecutively regarding count 6, and to state reasons for imposing a consecutive sentence, if that is its choice. The judgment is otherwise affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Michael L. Duffy, Judge
Superior Court County of San Luis Obispo

Bruce Zucker, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer, Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.