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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT EARL JAMES, Defendant and Appellant.	F057974 (Super. Ct. No. VCF207805) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Michael J. Hersek, State Public Defender, Alexander Post, Deputy Public Defender, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Clifford E. Zall, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I.B., I.C., and II. of the Discussion, and the Disposition.

Evidence Code section 1109 allows for the admission of evidence of a defendant's commission of prior acts of domestic violence as propensity evidence when the defendant is accused of "an offense involving domestic violence."[1] In the published portion of our opinion we find that "an offense involving domestic violence" may include the crime of burglary.

Defendant, Robert Earl James, was convicted of first degree burglary after he broke down the door of a woman he had formerly lived with (K.M.). The trial court admitted evidence of a prior instance of domestic violence against the victim and evidence of a prior act of domestic violence against one of defendant's former girlfriends (J.F.). Defendant claims the trial court erred in admitting the evidence of the prior act of domestic violence against J.F. He also claims the trial court erred when it modified the instruction regarding propensity evidence. We affirm.

Facts

K.M. knew defendant for approximately six years; they lived together during a portion of this time. On February 23, 2008, defendant and K.M. spent some time together at his house. K.M. had been drinking and using methamphetamine. She and defendant engaged in consensual sex. Defendant began acting funny and K.M. left.

K.M. was at home when her friend, Rasheed, called. K.M. left to pick him up and the two returned to her house. K.M. continued to drink and use methamphetamine. At approximately 1:00 a.m. on February 24, 2008, K.M. heard defendant beating on the door. It was loud and sounded like he was going to knock the door down.

K.M. went into the bedroom to call 911. The tape of K.M.'s call to 911 was played for the jury. K.M. identified the caller's voice as her voice and she identified the male voice as the voice of defendant.

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[1] All future code references are to the Evidence Code unless otherwise noted.

In the call K.M. stated to the dispatcher that her "ex old man" was at her door trying to beat the door down. She identified the defendant as the person at the door. K.M. said defendant was beating on the door; then said he was coming through the door. A male could be heard stating more than once, "I'm gonna fuck your ass up." K.M. was screaming and sobbing and imploring the dispatcher to please hurry up. When asked where defendant was, K.M. replied that she did not know, then repeatedly said, "He's here." When asked if it was defendant, she said yes. When asked again where defendant was, K.M. replied that she did not know. She said he got into her house. After a short period of time, she said he was gone.

K.M. testified that she was in the bedroom with Rasheed, the bedroom had French doors that did not lock, defendant tried to enter and Rasheed held the door shut, defendant broke the glass in one of the doors, turned the handle and pushed the door open, and the bottom hinge was pulled out of the wall. K.M. further testified that the front door's trim was broken, the chain was pulled out of the wall, the latch was broken off, and it looked like the door had been kicked in.

The next morning when K.M. prepared to take Rasheed home, she discovered she had three flat tires on her car. The tires had a lot of holes in them and one tire had a metal implement sticking out from it. K.M. reported this to the police. Later that same afternoon, while K.M. was looking at her tires, a car drove by with defendant as a passenger. Defendant said to K.M., "I could have just as easily put those holes in your head." K.M. again called the police. (Defendant was acquitted of vandalism.)

K.M. testified to a prior incident of domestic violence that occurred in September of 2005. Defendant came to her home in the early afternoon, poked a hole in her screen door, and tried to unlock the door. K.M. tried to push the door shut, but defendant was able to push the door open. Once defendant got inside the house, he grabbed K.M. by her arm and threw her to the ground. It hurt when he threw her to the ground and her arm subsequently was hurt and had a scratch. The police officer, who responded to the call

from K.M., said that she was crying and very upset, she had a slight redness to her arm and had what looked like a fingernail scratch, and the screen door to her house was removed from the frame.

J.F. testified that on March 21, 2002, when she was living with defendant, they had an argument because she would not let defendant use the car. Defendant backhanded her, causing swelling to her eye. She tried to use the telephone to call someone, but defendant pulled the cord out of the wall. She was treated at the hospital for her injuries.

Defendant was convicted of first degree burglary. He admitted he suffered a prior serious felony conviction that qualified as a strike and served a prior prison term. He was sentenced to prison for the mitigated term of two years, doubled to four years because of the strike. An additional five-year term for the prior serious felony conviction and a one-year term for having served a prior prison term were added to defendant's sentence, for a total term of 10 years in prison.

Discussion

I. Admission of Prior Acts of Domestic Violence

A. Burglary as a Crime Involving Domestic Violence

"Evidence of prior criminal acts is ordinarily inadmissible to show a defendant's disposition to commit such acts. [Citation.] However, the Legislature has created exceptions to this rule in cases involving sexual offenses [citation] and domestic violence [citation]." (*People v. Reyes* (2008) 160 Cal.App.4th 246, 251 (*Reyes*).)[2]

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[2] Sections 1108 and 1109 are "complementary portions of the same statutory scheme." (*People v.* Brown (2000) 77 Cal.App.4th 1324, 1333.) Section 1108, which allows admission of evidence of uncharged sexual offenses, and section 1109, allowing admission of evidence of uncharged domestic violence, are "virtually identical," and cases which have interpreted section 1108 have been relied upon to resolve similar issues involving section 1109. (*People v. Johnson* (2000) 77 Cal.App.4th 410, 417; *People v. Johnson* (2008) 164 Cal.App.4th 731, 739.)

Section 1109 states that, subject to exceptions not applicable here, "in 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." (§ 1109, subd. (a).)

Defendant argues section 1109 was intended to permit the use of prior acts of domestic violence only in prosecutions of offenses involving domestic violence. On this claim he is correct; section 1109 allows the admission of prior acts of domestic violence when "the defendant is accused of an offense involving domestic violence."

Defendant continues his argument and claims that because burglary is not an offense that inherently involves domestic violence, it does not qualify as an offense "involving domestic violence" and, thus, admission of prior acts of domestic violence may not be admitted in a burglary prosecution under any circumstances.

Domestic violence is defined in Penal Code section 13700. "'Domestic violence' means abuse committed against [a qualified individual.]" (Pen. Code, § 13700, subd. (b).) "'Abuse' means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another." (Pen. Code, § 13700, subd. (a).)

Although burglary is not, in every instance, an offense involving domestic violence, under the facts of this case the crime of burglary was an offense "involving domestic violence." Defendant broke down the door of K.M., a person with whom he had a dating relationship, and repeatedly made threatening remarks towards her. His actions placed K.M. in reasonable apprehension of imminent serious bodily injury to herself. Thus, his actions, which resulted in his conviction for burglary, involved domestic violence.

In support of his argument, defendant attempts to distinguish the principles set forth in the case of *People v. Story* (2009) 45 Cal.4th 1282 (*Story*). In *Story*, the

defendant was charged with first degree murder. He was tried on a theory of felony murder with rape and burglary as the underlying felonies. The burglary was based on the defendant's entering the victim's apartment with the intent to commit rape. (*Id*. at p. 1291.) The trial court admitted evidence of four other sexual assaults committed by the defendant under sections 1101 and 1108 [the counterpart to 1109]. (*Story, supra,* at p. 1289.) The Supreme Court framed the issue as follows: "Section 1108's language makes clear that it 'is limited to the defendant's *sex offenses,* and it applies only when he is charged with committing *another sex offense*.' (*People v. Falsetta* (1999) 21 Cal.4th 903, 916 [(*Falsetta*)].) Thus, the question before us is whether, under the circumstances of this case, defendant was 'accused of a sexual offense' within the meaning of section 1108." (*Id.* at p. 1291.) The court found that it was particularly probative for the jury to learn the defendant's history of sexual assaults in determining what happened in the victim's home the night the defendant strangled her. (*Id.* at p. 1293.) The Supreme Court found support for its conclusion in the case of *People v. Pierce* (2002) 104 Cal.App.4th 893. In *Pierce,* the appellate court held that assault with the intent to commit rape was a crime involving conduct proscribed by the sex offenses listed in section 1108, although it was not specifically listed as a sexual offense under section 1108.[3] (*Story, supra,* 45 Cal.4th at p. 1293.) The Supreme Court concluded "that section 1108 applies at least when the prosecution accuses the defendant of first degree felony murder with rape … or with burglary based on the intent to commit rape (or other sex crime), [as] the underlying felony." (*Id.* at p. 1294.)

Defendant contends the reasoning employed by the *Story* court compels the opposite result when propensity evidence is offered in a case such as this one. In particular, he claims the underlying basis for the court's holding in *Story* was that, in

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3 Assault with intent to commit rape was subsequently added to section 1108 as a crime involving sexual conduct. (*Story, supra,* 45 Cal.4th at p. 1293.)

order to prove a murder occurred during the course of committing a rape, the prosecution necessarily had to prove a rape occurred. Thus, he argues, allowing propensity evidence regarding prior sexual offenses fits within the parameters of the Evidence Code because proving the commission of a rape is an essential and coequal component to proving murder during the course of a rape. Defendant asserts here that the commission of an offense involving domestic violence was not a predicate offense to the commission of burglary.

We do not agree with defendant's interpretation of *Story*. As previously set forth, the court in *Story* held that prior sexual offenses were admissible in a murder prosecution when a burglary based on the intent to commit rape was the underlying felony. In *Story*, the crime of burglary was considered to be a sexual offense for purposes of section 1108 based on defendant's alleged intent when he committed the burglary. It was Story's intent that defined the character of the burglary as a sexual offense. (*Story, supra,* 45 Cal.4th 1282.) Here, the burglary was based on the intent to commit an act of domestic violence. It is defendant's intent that makes the burglary an offense "involving" domestic violence.

Evidence of prior criminal conduct, in the form of prior acts of domestic violence, is admissible under section 1109 to prove a crime when the proof of the crime requires as an integral part, actions "involving domestic violence." Because the People sought to prove defendant's intent when he entered K.M.'s house was to commit domestic violence, the burglary here was an offense "involving domestic violence." Although the crime of burglary is not a crime of domestic violence on its face, the trial court properly found that under the facts of the case, the burglary was a qualifying offense allowing the People to seek to present propensity evidence under section 1109.

B. Admission of Prior Acts of Domestic Violence Pursuant to Section 1101

Defendant continues his argument by stating that because the only relevancy the domestic violence incident had to the burglary charge would be to the question of his

intent at the time of entry, the admission of prior acts to prove intent is governed solely by section 1101, subdivision (b), which specifically governs intent, not section 1109. He also contends the evidence was inadmissible under section 1101, subdivision (b), because there was insufficient similarity between the uncharged act and the charged act to prove intent. We disagree.

Section 1109, subdivision (a)(1), specifically states, "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." Sections 1108 and 1109 were enacted to expand the admissibility of propensity evidence in sexual assault and domestic violence cases respectively, and were intended to relax the evidentiary restraints of section 1101. (See *Falsetta, supra,* 21 Cal.4th at p. 911; *People v. Wilson* (2008) 166 Cal.App.4th 1034, 1046-1047.) Having found the evidence was admissible under section 1109, we need not discuss its admissibility under section 1101.

C. Admission of Prior Acts of Domestic Violence Pursuant to Section 352

Defendant argues the admission of the prior domestic violence incident was more prejudicial than probative and should have been excluded under section 352. The trial court has discretion to exclude evidence admissible under section 1109 if the prejudicial effect of the evidence substantially outweighs its probative value. (*Story, supra,* 45 Cal.4th at pp. 1294-1295.) In admitting prior-crime evidence, "trial judges must consider such factors as its nature, 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 [domestic violence offenses], or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta, supra,* 21 Cal.4th at p. 917.) A trial court's ruling admitting evidence of prior acts of domestic

violence is reviewed for abuse of discretion. (*People v. Kelly* (2007) 42 Cal.4th 763, 783.)

We disagree with defendant's characterization of the J.F. incident as "uniquely emotional and incendiary" and "central" to the prosecution's case. The trial court sanitized the J.F. incident, disallowing evidence that, after ripping the phone cord from the wall, defendant wrapped it around J.F.'s neck and choked her with it, and refusing to allow presentation of evidence that defendant beat J.F. so badly that she soiled herself during the attack. In addition, the court only allowed evidence that J.F. sought treatment at the hospital and excluded evidence regarding the nature of her injuries. Thus, the court removed the most "emotional and incendiary" aspects of the J.F. incident. The testimony of the J.F. incident was extremely brief. The evidence was relevant to show defendant had a propensity to abuse women that he had relationships with and was, thus, relevant to his intent when he entered K.M.'s home. In addition, the evidence was relevant to support K.M.'s credibility. The trial court did not abuse its discretion when it admitted evidence of the J.F. incident.

II. Instructions Regarding Propensity Evidence

The People moved in limine to admit testimony concerning defendant's prior acts of domestic violence against K.M., J.F., and another individual (M.H.). The evidence was offered to prove intent (§ 1101, subd. (b)) and to demonstrate defendant's propensity to commit domestic violence (§ 1109), thereby establishing that he burglarized K.M.'s home.

Defendant moved to exclude all evidence of defendant's prior acts of domestic violence, arguing that the earlier incidents and the charged conduct lacked sufficient similarity to establish identity or a common plan or scheme (§ 1101), and claiming the probative value of this evidence was substantially outweighed by its prejudicial effect (§ 352).

A hearing was held on February 10, 2009, regarding the admission of the prior acts. The court found the M.H. incident was too remote in time and ruled that it was not admissible. After initially ruling the J.F. incident was not admissible because it was too prejudicial, the court reconsidered and found the evidence was admissible in a sanitized form, excluding its most prejudicial aspects. The evidence was allowed pursuant to sections 1108 [1101] and 1109.[4]

The People sought to admit the September 2005 incident against K.M. to show intent under section 1101, and propensity under section 1109. Defendant objected. The court ruled this incident was admissible.

The J.F. incident was revisited during trial and the court again ruled the evidence, in its abbreviated form, was admissible under both Evidence Code sections. The two incidents were testified to at trial, as previously set forth.

The court and counsel discussed the jury instructions that would be read to the jury. In discussing CALCRIM No. 852, the instruction regarding evidence of uncharged domestic violence to prove propensity, the court stated its concern regarding the sentence in the instruction that read, "'If you decide the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic [violence].... [¶] …Based on that decision, also conclude the defendant was likely to commit and did commit burglary as charged.'"

Defense counsel indicated he wanted that portion of the propensity instruction stricken and the court agreed. The court went on to state that as part of the propensity instruction it was going to instruct the jury, "if you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to

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[4] Defendant agrees that the context of the record indicates the court meant to say sections 1101 and 1109.

consider with all the other evidence" and then strike the remainder of the instruction which provides: "It is not sufficient by itself to prove that the defendant is guilty of [charged offense-burglary]. The People must still prove [each charge] beyond a reasonable doubt." The court stated it was striking this portion because the instruction did not refer to burglary at any other time. Defense counsel agreed to this modification to the instruction. In addition, based on a request by defense counsel, the court struck the sentence advising the jury not to consider the evidence for any other purpose except the limited purpose of determining defendant's intent.

Discussions turned to what the district attorney was going to argue during her closing argument to the jury. Defense counsel objected to the district attorney's proposed course of action of arguing the J.F. incident both as propensity evidence and as evidence of intent and claimed the J.F. incident did not meet the similarity requirements for admission as evidence of intent.[5]

The court determined that "the safer route to take and to have a cleaner record is to just argue to the jury that the [J.F.] incident can be used for his propensity to commit domestic violence acts, and you can certainly use the prior incident with the alleged victim [K.M.] in this case for intent purposes. Rather than arguing that [J.F.] incident, they can use that for intent. They can use it for propensity to commit domestic violence. And it may seem like it's a distinction without much of a difference, but I think to have a cleaner record you should argue it in that way."

The court instructed the jury on how to evaluate evidence of prior acts of domestic violence to prove intent pursuant to CALCRIM No. 375 as follows:

> "The People presented evidence the defendant committed other offenses, such as a violation of Penal Code Section 243(e)(1), battery against a person with whom the defendant has a dating relationship, and

[5] Although the record states that this comment was made by the trial judge, it is clear that it was defense counsel who made this statement.

Penal Code Section 273.5, which is infliction of corporal injury on a cohabitant or former cohabitant that were not charged in this case.

"You may consider this evidence only if the People have proved by preponderance of the evidence that the defendant, in fact, committed the uncharged offenses. Proof by preponderance of the evidence is different than the burden of proof which is the proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

"If the People have not met this burden, you must disregard this evidence entirely. If you decide that the defendant committed the uncharged offenses, you may, but are not required, to consider that evidence for the limited purpose of deciding whether or not the defendant acted with the intent to apply force likely to cause great bodily harm or cause a traumatic condition in this case.

"Do not consider this evidence for any other purpose except for the limited purpose of determining intent for burglary. Do not conclude from this evidence that the defendant had a bad character or is disposed to commit crime. If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider, along with all the other evidence. It is not sufficient by itself to prove the defendant is guilty of burglary. The People must still prove each element of the charge beyond a reasonable doubt."

The court instructed regarding evidence of uncharged domestic violence to prove propensity pursuant to CALCRIM No. 852:

"The People presented evidence that the defendant committed evidence that was not charged in this case, specifically Penal Code Section 273.5 and a violation of Penal Code Section 243(e)(1). Domestic violence means abuse committed against an adult by a person who is dating or dated the defendant. Abuse means intentionally or recklessly causing or attempting to cause bodily injury or placing another person in reasonable fear of imminent serious bodily injury to himself or herself. You may consider this evidence only if the People have proved by preponderance of the evidence the defendant, in fact, committed the uncharged domestic violence.

"If you decide the defendant committed the uncharged domestic violence, you may but are not required to conclude that the defendant had -- you conclude from that evidence that the defendant was disposed or inclined to commit domestic violence. If you conclude that the defendant

committed the uncharged domestic violence, this conclusion is only one factor to consider along with all the other evidence."

During closing argument to the jury, the People discussed the J.F. incident and the prior incident involving K.M. The prosecutor told the jury it may consider this past violence to decide this case and then told them they could consider the 2002 incident (J.F. incident) as evidence of defendant's propensity to commit domestic violence and could consider the 2005 incident (K.M. incident) for his intent to commit the burglary charge as well as for propensity.

While describing the basis for a traumatic condition, the prosecutor again stated the J.F. incident could be considered to determine if defendant had the propensity to commit domestic violence and they may use the K.M. incident to determine defendant's intent when he broke into her home on the current occasion.

The prosecutor went on in her argument regarding intent and told the jury it could consider the 2002 J.F. incident; if the jury believed that it happened, "consider if that was his intent here." Defense counsel did not object to this portion of the prosecutor's argument.

In her rebuttal argument to the jury, the prosecutor concluded by stating, "You don't break down a locked door at someone's home at 1:00 in the morning unless you have a bad intent. And he's already committed acts of violence against women, committed acts of violence against [K.M.], committed acts of violence against [J.F.]."

As previously set forth, the court modified CALCRIM No. 852 by deleting the last portion of the instruction that told the jury evidence of the uncharged offenses "is not sufficient by itself to prove that the defendant is guilty of [charged offense-burglary]. The People must still prove [each charge] beyond a reasonable doubt."

Defendant faults the court for modifying CALCRIM No. 852 and claims by altering the instruction the court allowed the jury to infer guilt of burglary based on propensity evidence proven by a preponderance of the evidence, rather than by subjecting

the state's cause to proof beyond a reasonable doubt. Defendant contends this violated his constitutional due process right that guilt must be established beyond a reasonable doubt.

In the modified version of the instruction given here, the jury was told that if the People proved the prior crime evidence by a preponderance of the evidence it may conclude defendant was disposed or inclined to commit domestic violence and this was only one factor to consider along with all of the other evidence. We are required to review the record and instructions as a whole in determining whether it is reasonably likely the jury applied the challenged instruction in a way that violates the United States Constitution. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1297.)

The challenged instruction only allowed the jury to consider the evidence in determining whether or not defendant was disposed or inclined to commit domestic violence. His disposition to commit domestic violence was relevant to bolster K.M.'s credibility and to the question of whether he had the requisite intent when he entered K.M.'s home. Clearly, K.M.'s credibility is not an element of the offense of burglary, and utilizing the evidence to determine credibility does not affect or lower the People's burden of proof beyond a reasonable doubt. Regarding intent, the jury was instructed that, in utilizing evidence of other offenses in deciding whether defendant had the requisite intent, the evidence "is not sufficient by itself to prove the defendant is guilty of burglary. The People must still prove each element of the charge beyond a reasonable doubt."

Although ruling that the J.F. incident could be argued only as propensity evidence and not for determining intent, the court did not limit its instructions in this manner to the jury and the jury was unaware of this prohibition made by the trial court.[6] Thus, the jury

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[6] Defendant's challenge on appeal to the jury's use of the propensity evidence on the question of intent is based on his claim that the prior evidence did not have sufficient similarity for admission under section 1101 and that burglary was not a crime

was not misled to believe that any element of the charged offense could be satisfied solely by proof of uncharged offenses or by proof less than proof beyond a reasonable doubt. In addition, the jury was instructed that the People must prove the defendant guilty beyond a reasonable doubt and must prove each fact essential to the conclusion that defendant is guilty beyond a reasonable doubt. Reviewing the record and instructions as a whole, it is not reasonably likely the jury applied the instructions in a way that violated the United States Constitution by lowering the People's burden of proof.

Disposition

The judgment is affirmed.

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Detjen, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Kane, J.

"involving" domestic violence pursuant to section 1109. He does not claim that the propensity evidence was not relevant to his intent and, in fact, states that one of the purposes of the admission of the J.F. incident was for the prosecutor to prove that defendant entered K.M.'s home with the intent to commit some form of domestic violence. Thus, any confusion caused by the trial court's belated ruling that the People could not argue the J.F. incident as evidence of intent, does not affect the errors now raised on appeal.