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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.

CORNELL COOPER BROWN,

Defendant and Appellant.

2d Crim. No. B153455
(Super. Ct. No. MA022297)
(Los Angeles County)

Cornell Cooper Brown appeals from the judgment entered following his conviction by jury of making a terrorist threat, false imprisonment by violence, and misdemeanor battery on a domestic partner. (Pen. Code, §§ 422, 236, 243, subd. (e)(1).) The jury found true allegations that appellant had used a deadly weapon in the commission of the felony offenses. It also found true allegations of four prior prison terms (Pen. Code, § 667.5, subd. (b)) and one prior serious or violent felony conviction within the meaning of California's "Three Strikes" law. (Pen. Code, §§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i).) Appellant was sentenced to state prison for 10 years, 8 months.

Appellant contends that the trial court erroneously (1) admitted expert testimony on battered women's syndrome (BWS); (2) instructed the jury pursuant to CALJIC No. 17.41.1; and (3) imposed a consecutive eight-month sentence for

false imprisonment. We modify the judgment to stay execution of the sentence for false imprisonment and affirm the judgment as modified.

Facts

Victim's Testimony

Kimberly Pipes had been dating appellant "on and off" for 11 years. On April 17, 2001, she was living with him and was in love with him. That day, Pipes and appellant had an argument. Appellant hit Pipes with his hand in the lower stomach. The blow did not hurt her. He pulled her by the arm into the bedroom and "made" her lie on the bed.

Pipes lay in bed with appellant until he fell asleep. She then left the residence. She did not leave because she was afraid of him. She was angry and "was trying to just get away"

After leaving, Pipes telephoned 911 and said she wanted the police "to come get [appellant]." When deputy sheriffs arrived, Pipes told them that appellant had hit her in the stomach. She also said that she believed she was pregnant. She falsely accused appellant of pointing a knife and a fork at her. She denied saying that appellant had threatened to cut her with the knife. She admitted saying that appellant had grabbed her around the neck, but this accusation was also false.

After the incident, Pipes visited appellant in jail and "talked to him on the phone numerous times." Appellant told Pipes that he loved her, and "he promise[d] to make the relationship better[.]" Pipes continued to love appellant.

Before April 17, 2001, Pipes and appellant had argued, but appellant had never hit her.

Deputy Sheriff's Testimony

Deputy James Wheeler responded to Pipes' 911 call. Pipes told him that she had "been assaulted by her boyfriend." Appellant "grabbed her by the neck" and "dragged her into the master bedroom," where he "threw her on the bed." With a steak knife in one hand and a barbecue fork in the other, appellant

threatened to cut her if she left. Appellant said, "I don't want you having my baby." He then punched her in the stomach. Appellant "grabbed [Pipes] by the neck again and threw her on the bed and held her down, prevent[ing] her from leaving." Pipes "was very afraid of him." She complained of pain in her abdomen.

Expert Testimony

Jeri Darr qualified as an expert on domestic violence. According to Darr, victims of domestic violence are typically hesitant "to come forward and escape abuse." After the "initial incident" of domestic violence, there generally is "anywhere between 24 and 48 hours where victims will be truthful about what occurred because they're still angry, they're still scared." After 48 hours, "it is not uncommon for them to change their mind." "It's been estimated in research within the domestic violence field . . . that a victim will leave and return to her abuser on the average of three to five times before [she] decide[s] to separate permanently" The victim returns because "there's a hope that things are going to get better and . . . there's a tremendous amount invested in relationships." In 80 to 85 percent of the cases, victims "actually recant at some point in the process." "Almost every victim . . . will minimize [her] experience. They can have black eyes, severe bruising, broken bones, and say . . . he just . . . pushed me around" A victim may suffer from BWS after only one incident of physical abuse.

The Expert Testimony On BWS Was Relevant And Admissible

Evidence Code section 1107, subdivision (a),¹ permits the admission in a criminal action of expert testimony on BWS, "except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge." (*Ibid.*) Section 1107, subdivision (b), requires

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

the proponent of the expert testimony to establish "its relevancy and the proper qualifications of the expert witness."²

Appellant contends that Darr's testimony on BWS was irrelevant because the evidence showed only one incident of abuse. Appellant relies on *People v. Gomez* (1999) 72 Cal.App.4th 405.

The *Gomez* court noted: "In making a determination of *relevancy*, the [trial] court must first decide whether the evidence in the particular case supports a contention that the [victim] was a battered woman. Expert testimony on battered woman syndrome is *irrelevant* unless there is a sufficient factual basis for the fact that [the victim] was a battered woman.' [Citation.]" (*People v. Gomez, supra*, 72 Cal.App.4th at pp. 415-416.) The *Gomez* court concluded that, as a matter of law, the evidence does not support a contention that the victim was a battered woman where there has been only one violent incident without evidence of other abuse. (*Id.*, at p. 416-417.) In these circumstances, the court held that expert testimony on BWS is always irrelevant and inadmissible. (*Ibid.*) The court reasoned: "[B]attered women's syndrome is a series of characteristics which appear in women who have been abused physically and psychologically over a period of time. [Citation.] A single violent incident, without evidence of other physical or psychological abuse, is not sufficient to establish that a woman suffers from

² Section 1107 provides: "(a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge. [¶] (b) The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness. Expert opinion testimony on battered women's syndrome shall not be considered a new scientific technique whose reliability is unproven. [¶] (c) For purposes of this section, 'abuse' is defined in Section 6203 of the Family Code and 'domestic violence' is defined in Section 6211 of the Family Code or acts defined in Section 242, subdivision (e) of Section 243, or Section 262, 273.5, 273.6, 422, or 653m of the Penal Code. [¶] (d) This section is intended as a rule of evidence only and no substantive change affecting the Penal Code is intended. [¶] (e) This section shall be known, and may be cited as, the Expert Witness Testimony on Battered Women's Experiences Section of the Evidence Code."

battered women's syndrome." (*Ibid.*) The *Gomez* court cited our Supreme Court's definition of BWS in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1083-1084: "[T]he [*Humphrey*] court recognized that '[b]attered women's syndrome 'has been defined as 'a series of common characteristics that appear in women who are abused physically and psychologically over an *extended period of time* by the dominant male figure in their lives.' " [Citations.]" (*People v. Gomez, supra*, 72 Cal.App.4th at p. 416.)

Gomez was criticized in *People v. Williams* (2000) 78 Cal.App.4th 1118. The *Williams* court concluded: "There is nothing in . . . section 1107 to suggest that the Legislature intended that a batterer get one free episode of domestic violence before admission of evidence to explain why a victim of domestic violence may make inconsistent statements about what occurred and why such a victim may return to the perpetrator." (*Id.*, at p. 1129.) The *Williams* court observed that the result in *Gomez* was "at odds" with the expert testimony in that case. (*Ibid.*) The expert testified " 'that about 80 percent of the time a woman who has been "initially assaulted" by a boyfriend, husband or lover will recant, change or minimize her story. This recanting does not happen only after there has been a continuing pattern of abuse. *In fact, depending on the severity of the incident, it is more likely to occur after a first incident.*' " (*Ibid.*, quoting from *People v. Gomez, supra*, 72 Cal.App.4th at p. 411.) The expert further testified: "A woman will react in this manner more commonly after the first event because she really wants to believe that the person who committed the act of violence is not the man she is in love with." (*People v. Gomez, supra*, 72 Cal.App.4th at p. 414.)

The *Williams* court distinguished *People v. Humphrey, supra*, 13 Cal.4th 1073. It noted that the issue in *Humphrey* was whether evidence of BWS was admissible "to establish self-defense to a charge of homicide. . . . In that light, it is reasonable to require that the alleged victim/defendant establish a history of abuse." (*People v. Williams, supra*, 78 Cal.App.4th at p. 1130.) On the other

hand, such a requirement is not reasonable when evidence of BWS is offered to explain recantation by a victim of domestic violence. (*Ibid.*)

We find the reasoning of *Williams* persuasive. By ruling that a single violent incident can never trigger BWS without evidence of other abuse, the *Gomez* court usurped the trial court's authority to determine relevancy on a case by case basis. "The trial court retains broad discretion in determining the relevance of evidence. [Citation.]" (*People v. Garceau* (1993) 6 Cal.4th 140, 177.) Furthermore, the *Gomez* court's ruling is unsupported by the record in that case. The expert in *Gomez* testified that a behavior pattern characteristic of BWS -- recanting and minimizing the event -- is most pronounced after the first incident of domestic violence.

Accordingly, we construe section 1107 as authorizing the admission of expert testimony on BWS based on a single incident of domestic violence without evidence of other abuse, provided that the testimony is relevant. Section 1107 subdivision (a) provides that admissible expert testimony includes "the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence" The statute draws no distinction between victims of a single incident of domestic violence and victims of multiple incidents. We also consider the 2000 amendment of section 1107, which added subdivision (e). (Stats. 2000, c. 1001 (S.B. 1944), § 1.) The subdivision provides: "This section shall be known, and may be cited as, the Expert Witness Testimony on Battered Women's *Experiences* Section of the Evidence Code." (Italics added.) The use of "Experiences" is consistent with a legislative intent to deemphasize the importance of the "syndrome" language in subdivision (a).³

³ In *People v. Humphrey*, *supra*, 13 Cal.4th page 1084, footnote 3, our Supreme Court noted that, although section 1107 uses the term "battered women's syndrome," "according to amici curiae California Alliance Against Domestic Violence et al., ' . . . the preferred term among many experts today is "expert testimony on battering and its effects" or "expert testimony on battered women's experiences." Domestic violence experts have critiqued the phrase "battered women's syndrome" because (1) it implies that there is one syndrome which all

It remains to determine whether Darr's expert testimony was relevant. " 'Evidence is relevant if it has *any* tendency in reason to prove or disprove a disputed fact at issue.' [Citations.]" (*People v. Kipp*, (2001) 26 Cal.4th 1100, 1123.) "We apply the deferential abuse of discretion standard when reviewing a trial court's ruling on a relevance objection. [Citations.]" (*Ibid.*) "A trial court abuses its discretion when its ruling 'fall[s] "outside the bounds of reason." ' [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 714.)

The trial court did not abuse its discretion in determining that Darr's testimony was relevant. Pipes' statements to the police supported a finding that she had been physically battered by appellant. Pipes' conduct after the battery supported a finding that she was suffering from BWS. She recanted, resumed her relationship with appellant while he was in jail, and professed her love for him. Moreover, Darr testified that a victim may suffer from BWS after only one incident of physical abuse. It was not unreasonable for the trial court to conclude that Darr's testimony on BWS had at least some tendency in reason to explain the motivation behind Pipes' recantation. (See *People v. Morgan* (1997) 58 Cal.App.4th 1210, 1215 [expert testimony on BWS "relevant and admissible to explain or offer a motive for [victim's] recantation and thereby reconcile inconsistencies in her testimony".]) "[A]s with any evidence, the jury [could] give this testimony whatever weight it deem[ed] appropriate in light of the evidence as a whole." (*People v. Humphrey, supra*, 13 Cal.4th at p. 1088.)⁴

battered women develop, (2) it has pathological connotations which suggest that battered women suffer from some sort of sickness, (3) expert testimony on domestic violence refers to more than women's psychological reactions to violence, (4) it focuses attention on the battered woman rather than on the batterer's coercive and controlling behavior and (5) it creates an image of battered women as suffering victims rather than as active survivors.' "

⁴ Pursuant to CALJIC No. 9.35.1, the trial court instructed the jury on the appropriate use of BWS evidence: "Evidence has been presented to you concerning battered women's syndrome. This evidence is not received and must not be considered by you to prove the occurrence of the act or acts of abuse which

*The Trial Court Did Not Err In Instructing the
Jury Pursuant To CALJIC No. 17.41.1.*

Pursuant to CALJIC No. 17.41.1, the trial court instructed the jury as follows: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of that situation."

Appellant contends that this instruction violated his constitutional right to a jury trial and to due process of law. The contention is without merit. After the filing of appellant's opening brief, our Supreme Court held that the giving of CALJIC No. 17.41.1 does not constitute constitutional error. (*People v. Engelman* (2002) 28 Cal.4th 436.)⁵ Moreover, appellant waived any claim of error because he failed to object to the instruction in the trial court. (*People v. Elam* (2001) 91 Cal.App.4th 298, 311.)

The Sentence For False Imprisonment Must Be Stayed

Penal Code Section 654 precludes "multiple punishments for a single act or indivisible course of conduct. [Citation.]" (*People v. Miller* (1977) 18 Cal.3d 873, 885.) A defendant's intent and objective generally determine whether a

form the basis of the crimes charged. [¶] Battered women's syndrome research is based upon an approach that is completely different from the approach which you must take to this case. The syndrome research begins with the assumption that physical abuse has occurred, and seeks to describe and explain common reactions of women to that experience. As distinguished from that research approach, you are to presume the defendant innocent. The People have the burden of proving guilt beyond a reasonable doubt. [¶] You should consider this evidence for certain limited purposes only, namely, that the alleged victim's or defendant's reactions, as demonstrated by the evidence, are not inconsistent with her having been physically abused, or the beliefs, perception or behavior of victims of domestic violence."

⁵ On the other hand, our Supreme Court directed that the instruction "not be given in trials conducted in the future." (*People v. Engelman, supra*, 28 Cal.4th at p. 449.)

course of conduct is divisible. "If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

Respondent concedes that the offenses of making a terrorist threat (Pen. Code, § 422) and false imprisonment by violence (Pen. Code, § 236) "were part of an indivisible course of conduct committed for the single purpose of preventing Pipes from leaving the location." Accordingly, we modify the judgment to stay execution of the consecutive eight-month sentence for false imprisonment. (See *People v. Beamon* (1973) 8 Cal.3d 625, 639-640.)

Disposition

The judgment is modified to stay execution of the consecutive eight-month sentence for false imprisonment by violence (count 3), such stay to become permanent upon the completion of the six-year sentence for making a terrorist threat (count 2). The modification reduces appellant's aggregate sentence to 10 years. In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections.

NOT TO BE PUBLISHED.

YEGAN, J.

I Concur:

GILBERT, P.J.

DISSENTING OPINION – PERREN, J.

I respectfully dissent.

Relying upon *People v. Williams* (2000) 78 Cal.App.4th 1118, 1129, the majority conclude that there is nothing in Evidence Code section 1107 requiring that "a batterer get one free episode of domestic violence before admission of evidence to explain why a victim of domestic violence may make inconsistent statements about what occurred and why such a victim may return to the perpetrator." I believe that this begs the question. The vice of such evidence lies with the fact that the jury must assume the occurrence to make the testimony of the expert relevant.

The decision whether to admit evidence about battered women's syndrome (BWS) must be made on a case-by-case basis, depending on relevancy. "In making a determination of *relevancy*, the court must first decide whether the evidence in the particular case supports a contention that the petitioner was a battered woman. Expert testimony on battered woman syndrome is *irrelevant* unless there is a sufficient factual basis for the fact that petitioner was a battered woman." (*People v. Gomez* (1999) 72 Cal.App.4th 405, 415-416.)

BWS may explain characteristics of women who have been abused physically and psychologically over a period of time. (*People v. Gomez, supra*, 72 Cal.App.4th at pp. 416-417, citing *People v. Humphrey* (1996) 13 Cal.4th 1073.) Here, as in *Gomez*, there was no evidence of an ongoing abusive relationship or that defendant battered the alleged victim previously. (*Id.* at p. 416.) "Although a woman may minimize or deny a single instance of violence or abuse, her denial does not mean she suffers from battered women's syndrome." (*Ibid.*)

Where there are no prior incidents of domestic violence, the jury must make a preliminary finding that the witness is a "battered woman" based on the evidence of the crime itself and the expert's opinion about BWS. As in *Gomez*, the expert in the instant matter testified that it is more likely that a victim will

recant or minimize the abuse *after the first incident*, especially if she intends to resume the relationship. (*People v. Gomez, supra*, 72 Cal.App.4th at pp. 411-412.) The prosecution emphasized this testimony in closing argument, arguing that the profiles of batterer and victim fit the facts and circumstances of this case.

BWS evidence may not be offered to prove that the event charged occurred, but only to explain the dynamics of the syndrome and to overcome "stereotyped impressions" about abused women. (*People v. Humphrey, supra*, 13 Cal.4th at pp. 1086-1088.) It does not present a problem for the jury to conclude that the victim has suffered from BWS when there is evidence of other, previous instances of abusive behavior in the relationship. Jurors can reasonably conclude that evidence about prior violence in the relationship aids in their understanding of "the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence" (Evid. Code, § 1107.) But where, as here, the charge itself is the only event upon which evidence of BWS is based, the reasoning becomes circular. In such a case, the jury must first find the preliminary fact of abuse to be true before it may consider BWS evidence. But, in so concluding, the trier of fact must already have decided that the accused committed the very act charged in the information.

I conclude, as did the court in *Gomez*, that a proper foundation for the admission of BWS evidence requires that the proponent demonstrate psychological or physical abuse over a period of time. (*People v. Humphrey, supra*, 13 Cal.4th at pp. 1083-1084; *People v. Gomez, supra*, 72 Cal.App.4th at pp. 416-417.) "A single violent incident, without evidence of other physical or psychological abuse, is not sufficient to establish that a woman suffers from battered women's syndrome." (*Gomez*, at p. 417.)

I would reverse and remand for a new trial.

NOT TO BE PUBLISHED.

PERREN, J.

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