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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD EDWARD GRAVES, JR.,

Defendant and Appellant.

F049345

(Super. Ct. No. F05905053-5)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. William Kent Hamlin, Judge.

Larry L. Dixon, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Stan Cross, Assistant Attorney General, David A. Rhodes and Clayton S. Tanaka, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Ronald Edward Graves of corporal injury to a spouse with a prior violation (Pen. Code, § 273.5, subd. (e), count 1),<sup>1</sup> false imprisonment by

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\* Before Vartabedian, Acting P.J., Wiseman, J., and Cornell, J.

<sup>1</sup> Further statutory references are to the Penal Code.

violence (§ 236, count 2), and misdemeanor resisting (§ 148, subd. (a)(1), count 3). Graves admitted two prior prison term enhancements (§ 667.5, subd. (b)). The court sentenced Graves to a prison term of seven years as follows: the five-year upper term for count 1, plus two years for the prison priors; the three-year upper term for count 2, which was stayed pursuant to section 654; and credit for time served on count 3. Graves appeals contending the trial court abused its discretion by admitting evidence of prior domestic abuse and erred by imposing the upper term in violation of *Blakely v. Washington* (2004) 542 U.S. 296. We will affirm.

### **FACTS AND PROCEDURAL HISTORY**

On July 4, 2005, Nina McNeil called her mother, Evelyn,<sup>2</sup> who had recently married Graves. Graves answered the phone sounding “very upset.” In the background, Nina could hear Evelyn crying and saying her face was swollen and he would not let her leave. Nina hung up, called 911, and called her mother back. Evelyn was still crying; Nina heard Graves say, “That’s what you get.” Nina drove to Evelyn’s apartment and found Evelyn sitting on the front porch. Her face was swollen. Evelyn told Nina that Graves had hit her face several times.

Fresno Police Officer Brandon Wiemiller was called to the scene. When he arrived, medical personnel were treating Evelyn. The left side of her face was swollen and the skin above her lip was torn. There were abrasions on her elbows and knee and discoloration on her chest. There were old cut marks on her wrists but nothing to indicate recent injury. Evelyn told Wiemiller that she and Graves had been drinking. When she told Graves she wanted out of the relationship, he replied, “you’ve turned against me,” and hit her. Graves punched her face several times as she was attempting to leave. When

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<sup>2</sup> The victim and appellant share the same last name. She is referred to as Evelyn; he as Graves.

he heard the police had been called, he left with his nine-year-old daughter, who was also in the apartment.

Officers found Graves and his daughter several miles away on bicycles. They were riding to the nearby residence of the child's mother. Graves did not immediately comply with the officer's directives to stop and to get on the ground.

By the time of trial, Evelyn had reconciled with Graves. She testified that Graves had not struck her. He had attempted to restrain her because she was cutting her wrists-- something she had done before when she was upset. She had been drinking heavily and her injuries resulted from several falls she took that day.

#### ***Prior Domestic Abuse Evidence***

Rebecca Cain had an off and on again relationship with Graves between 1994 and 2001. On several occasions when he had been drinking, they argued and he beat her. She suffered black eyes, "busted lips," broken toes, and finger and "stomach" injuries. In 2001, Graves beat her and attempted to choke her but released her when her daughter Monay, who witnessed at least part of the altercation, threatened him with a rolling pin. Monay, who was 18 when she testified, confirmed the details of her mother's 2001 beating.

#### ***Defense***

Graves did not present any evidence. In closing, he argued that Evelyn's statements to the investigating officers were not credible. The jury should believe her trial testimony that Graves did not hit her; she had injured herself by falling.

### **DISCUSSION**

#### ***Prior Abuse Evidence***

Graves contends the court abused its discretion by admitting the testimony about his previous domestic abuse. We disagree.

Evidence Code section 1109, subdivision (a)(1) provides: "(a)(1) Except as provided in subdivision (e) or (f), 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.”

In determining whether to admit such evidence, the trial court must consider whether the probative value of the evidence is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, confusing the issues, or misleading the jury. (Evid. Code, § 352; *People v. Soto* (1998) 64 Cal.App.4th 966, 983.) The trial court has broad discretion in making that determination and its exercise of discretion will not be disturbed on appeal except on a showing the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

In weighing probative value against prejudicial effect, trial judges must consider such factors as the nature, relevance, and possible remoteness of the prior abuse evidence; the degree of certainty of its commission; 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 offenses, or excluding irrelevant though inflammatory details surrounding the offense. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917; *People v. Poplar* (199) 70 Cal. App. 4th 1129, 1139.)

Applying that standard, we find no abuse of discretion. The trial court found the prior offense very similar to the charged offense, not unduly inflammatory, and not terribly remote. Further, the testimony would be brief so there would be no undue consumption of time and, because the two victims were easily distinguishable, there would be no confusion of issues.

Graves asserts the challenged evidence was irrelevant, unnecessarily cumulative, and inflammatory. Specifically, testimony regarding the 2001 offense was unnecessary because, despite Evelyn's recantation, other prosecution witnesses testified that Graves had abused her and an expert on Battered Women's Syndrome explained Evelyn's changed story. Thus, the 2001 evidence was not necessary for corroboration. Moreover, because the evidence was cumulative, it was not very probative.

We disagree. Rebecca and Monay's testimony describing Graves's prior domestic violence was no more inflammatory than the prosecution witnesses' testimony describing Evelyn's abuse and injuries. There was no probability of confusing the jury with the evidence of prior acts of domestic violence. The testimony required only 32 pages of trial transcript. Finally, the evidence was highly probative. There was no direct evidence that Graves had abused Evelyn. The investigating officers, Evelyn's daughter Nina, and Nina's friend all testified that Evelyn told them that Graves had hit her. However, at trial, Evelyn gave various excuses for reporting a beating to those witnesses and testified that Graves had not hit her; she had injured herself falling because she was intoxicated. In contrast, Rebecca and Monay offered direct testimony that Graves had beaten Rebecca in a manner similar to that which Evelyn initially reported and the beatings caused similar injuries to both victims.

Because we conclude there was no abuse of discretion, we need not consider whether the ruling prejudiced Graves or deprived him of a fair trial. Further, Graves's contentions that admitting such evidence violates his right to due process and a fair trial and that Evidence Code section 352 is not a "realistic safeguard" in protecting his due process rights were rejected in *People v. Falsetta*, *supra*, 21 Cal.4th at pages 917-918.

### ***Sentencing Error***

Graves contends that imposition of the upper term violated his right to a jury trial and due process under *Blakely v. Washington*, *supra*, 542 U.S. 296. As Graves concedes,

the California Supreme Court rejected this argument in *People v. Black* (2005) 35 Cal.4th 1238. Accordingly, the trial court did not err in imposing the upper term.

**DISPOSITION**

The judgment is affirmed.