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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WARREN LESLEY BAUER, Defendant and Appellant.	E043523 (Super.Ct.No. RIF132943) OPINION

APPEAL from the Superior Court of Riverside County. J. Thompson Hanks, Judge. Affirmed.

Andrew E. Rubin and Beatrice C. Tillman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia, Janelle Marie Boustany, Raquel M. Gonzalez and Lilia E. Garcia, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Warren Lesley Bauer appeals his conviction for stalking in violation of Penal Code section 646.9, subdivision (c)(2). He argues the evidence is insufficient to support the jury's verdict. He also contends the trial court abused its discretion by admitting evidence of prior bad acts that were prejudicial to his defense.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged with one count of willfully, unlawfully, maliciously, and repeatedly harassing and making a credible threat against the victim with the intent to place the victim in reasonable fear of her safety in violation of Penal Code section 646.9. At trial, the victim testified she and defendant lived in the same apartment complex and met there in September 2006. Shortly thereafter, defendant became ill and the victim spent time at his apartment and took care of him. This situation led to a romantic relationship involving physical intimacy and an exchange of apartment keys. The romantic relationship only lasted approximately seven to nine days. When the victim ended the relationship, defendant made a number of telephone calls to the victim that she considered threatening. As a result, she telephoned the police, and at the victim's request, a police officer warned defendant to leave the victim alone. However, defendant continued to telephone the victim and left several messages on her voice mail, which led to defendant's arrest and prosecution.

DISCUSSION

A. Sufficiency of the Evidence

Defendant argues the evidence presented at trial does not show he harassed the victim or made a credible threat that would cause a reasonable person to fear for her safety. He claims the victim's fear was unreasonable under the circumstances.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) "On appeal, we must accept that part of the testimony which supports the judgment." (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 830.)

Defendant was charged with stalking in violation of Penal Code section 646.9, which states in pertinent part, as follows: "Any person who . . . maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking. . . ." (Pen. Code, § 646.9, subd. (a).) "For the purposes of this section, 'harasses' means engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and

that serves no legitimate purpose." (Pen. Code, § 646.9, subd. (e).) "Credible threat" is defined as "a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety . . . , and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat. . . ." (Pen. Code, § 646.9, subd. (g).)

In our view, the record discloses sufficient evidence of a credible threat that would cause a reasonable person to be fearful for her personal safety. The victim testified defendant had become obsessive during their very brief romantic relationship. As the relationship developed, she felt she could not get away. She said he followed her everywhere. If she went home, he would go with her. If he went back to his own place, he wanted her to be there. Defendant also revealed to the victim he had previously been in trouble with the law; he had been accused of raping or assaulting another woman, and had spent time in custody as a result.

One day when they were at defendant's apartment, defendant's brother came over. The brother was drunk and was using profanity so the victim decided to go back to her own apartment. Defendant then went to her apartment and opened her door, apparently with the key she had given him. She was in bed and pretended to be very sick. He apologized for his brother's behavior. She told him to leave, and he did, but he called

her. He told her he knew a lot about her through some papers he found in her car and said, "I have two words for you, and that is good-bye." He then hung up the phone but called back later to repeat the same message to her and to tell her she was not the person he thought she was. She said, "Please don't call me again or I'll call the police."

The same day, defendant continued to call and leave messages on the victim's voice mail. She was afraid and thought the messages were threatening, so she called the police. A police officer came to her apartment and listened to the messages. The officer testified the victim told him defendant called her cell phone and her home phone "27 to 30 times during the course of that afternoon." He listened to approximately five messages, but did not have time to listen to all of them. The messages he listened to "seemed to be somewhat menacing." He also said the victim was very upset, scared, and "was actually shaking" while he talked with her. She gave the officer her key to defendant's apartment and asked him to talk to defendant. The officer testified he went to defendant's apartment at the victim's request and told defendant "he needed to take his house key, consider the relationship over. She didn't want to see him anymore. She was scared of him, and it would be in his best interests to stay away." However, after the officer returned the key to defendant, defendant left a business card on the victim's door with a note written on the back saying, "Please return my key or I will call the police." The victim said the note made her feel "[v]ery shook up to the point where [she] didn't want to be at home." She was afraid he might try to get into her place, because she recalled defendant pointing out several times that she had a habit of leaving her sliding glass door ajar and it would be easy for someone to climb up on her balcony and get into

her apartment. She believed this was his way of telling her he knew of a way to get into her apartment.

Most significantly, defendant continued to make calls to the victim's cell phone and to leave messages on her voice mail after the police officer warned defendant to leave the victim alone. In other words, knowing the victim was afraid and no longer interested in pursuing the relationship, defendant continued to act obsessively and unreasonably toward her given the circumstances. Understandably, the victim testified she was afraid because she was unsure what he might do to her. The victim testified that because she was fearful, she gave her cell phone to an ex-boyfriend for a few days so he could take the calls. He gave her the phone back when the calls finally stopped. She also stayed with her ex-boyfriend until she was able to move out of the apartment.

A second police officer was assigned to conduct a follow-up investigation. He interviewed the victim again. The second police officer also listened to some messages defendant left on the victim's cell phone. The officer testified that the victim was still concerned for her safety at this time. He and the victim listened to the cell phone messages together. While the messages played, the victim was visibly shaking and scared. The officer further testified the victim became more agitated, began tearing up, and was "terrified" as they listened to the messages.

The second police officer recorded the messages from the victim's voice mail on a digital recorder, and the jury listened to the recordings during trial. Defendant attempts to diminish the content of these additional messages. He believes they are not evidence of harassment or a credible threat that would cause a reasonable person to be fearful. He

also belittles the victim's fear, calling her "a skittish woman" who overreacted to his simple attempts to find out why she had broken off the relationship and to wish her luck. However, these messages had a bitter, hostile, sarcastic tone. Although somewhat veiled, the messages did include what a reasonable person would consider a threat given the circumstances.

In the first message, it appears defendant's threat is to become involved in the child custody battle the victim was having with her ex-husband by providing the court with what might be harmful information to the victim's case. In pertinent part, defendant stated as follows in the first message played to the jury: "[The victim] has spent night with one between such and such date and such and such date, I would hate the fact that the court might do that. Ohhh, geez, and then [the victim] decides to shut off the process and sleep for two days? I'd like to even quote that, so see you in court . . . . You think you're that good? Don't think so, and that's not a threat. That's a fact, so if you think you can sleep in a bed for two days claiming, oh geez, my dad's an alcoholic. [Defendant's] brother comes over, he's an alcoholic. You're not all that innocent, so, . . . so don't play innocent with me, so, hello, you've got me on your wrong side." In addition, defendant's statement that "you've got me on your wrong side," suggests defendant intended to get even with her for breaking off the relationship.

In the second message, defendant said, "explain to me like you would explain to, to police, what I did wrong." Then, in the third message, defendant said, "I'm waiting for the police to show up. If you are going to do that, better be soon." These two messages suggest the victim had better call the police soon, because he intended to come after her

seeking revenge. The remaining messages also include veiled threats of revenge. Because the messages were preserved and played during trial, the jury had the benefit of actually hearing the tone of defendant's voice while these messages were being communicated to the victim's voice mail. As a result, the jury was in a better position to determine whether a reasonable person would perceive the messages as intimidating, credible threats. Indeed, in closing argument, the prosecutor encouraged the jury to consider not only the content of the messages "but how he says it." Thus, based on our review of the record, the jury could reasonably conclude the messages were credible threats made with the intent to frighten the victim and to cause her to be fearful of her personal safety. Given the circumstances, the jury could also reasonably conclude the victim's fear was reasonable. We therefore reject defendant's contention there is insufficient evidence to support the jury's verdict.

B. <u>Prior Acts Evidence</u>

Defendant challenges the admissibility of testimony by a former girlfriend and his adult daughter about three incidents of prior bad acts. Defendant contends the trial court erred in admitting the testimony of these two women under Evidence Code sections 1101, 1109, and 352, because it was highly prejudicial propensity evidence. He also argues admission of this evidence, combined with the trial court's instruction allowing the jury to consider it, was so prejudicial it violated his right to due process and a fair trial.

The first prior incident involved a former girlfriend who was also defendant's neighbor at the time they were dating. She said defendant was verbally abusive to her over an extended period of time. When they would get together, he would drink a lot and

become verbally abusive, so she would leave. He left threatening phone messages causing her to be concerned about her safety. One morning she found wine glasses broken on her back porch. On another morning, she found her patio furniture had been thrown on the other side of the fence. As a result, she obtained a restraining order against him. The phone calls intensified after she broke off the relationship and he would sometimes call her 15 or 20 times a day. In phone messages, he called her names, said he pulled her phone records and credit report so he knew everything about her; he threatened to harm her relationship with her employer, and threatened to come after her with a gun.

Defendant's 27-year-old daughter testified about the other two prior acts. The first incident took place in approximately 1993, when she was 11 or 12 years old. She was with her parents in the kitchen when they started arguing. Her father dragged her mother out of the room by her arm, and she heard her mother say, "Let go of me." When her mother was out of view, she heard her mother screaming, "You're hurting me."

The second incident took place years later, sometime in 2001 or 2002. The daughter explained that her mother died when she was 13 or 14 years old. Her father started drinking after her mother passed away. She lived with her father for awhile and then went to live in a foster home, where she stayed until she was 19. She did go to see her father, but eventually stopped having any contact with him for awhile after that because of the way he treated her. She started contacting him again by telephone when she was 23 years old. At first, he was nice to her, but the contacts always ended in arguments. The last time she spoke with him, she said he threatened to kill her. She

moved, changed her telephone number, and has not talked with him since that time. Based on her experiences with him in the past, she believed the threat was real.

In oral argument prior to trial, defendant argued these prior acts should be excluded because (1) they were not similar enough to the charged offense, (2) they were more prejudicial than probative, and (3) they were too remote. After oral argument on the admissibility of these prior acts, the trial court stated as follows: "If you had the 1993 incident standing alone, I would sustain your objection. The reason I went through this is I wanted to point out there's an ongoing—it wasn't an incident years and years past and then this incident. This is a continuing process, it appears to me, of the way he deals with women and it's abusive, and because it occurred over and over—four years is the biggest gap in here, and I'm covering—what?—14 years or so. And because of that, that's why I think that it's not more prejudicial than probative. I think it certainly is prejudicial. He wouldn't want to introduce it if it wasn't, but I don't think it's more prejudicial than probative because of the sequencing."

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. (*People v. Geier* (2007) 41 Cal.4th 555, 585.) Evidence Code section 1101, subdivision (b), permits the admission of evidence of uncharged misconduct when it is "relevant to establish some fact other than the person's character or disposition," such as motive or intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) To be relevant to the issue of intent, "the uncharged misconduct must be sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." [Citations.]' " (*Id*. at p. 402.) " '[W]hen the other crime evidence is admitted solely for

its relevance to the defendant's intent, a *distinctive* similarity between the two crimes is often unnecessary for the other crime to be relevant. Rather, if the other crime sheds great light on the defendant's intent at the time he committed that offense it may lead to a logical inference of his intent at the time he committed the charged offense if the circumstances of the two crimes are substantially similar even though not distinctive.' " (*People v. Demetrulias* (2006) 39 Cal.4th 1, 16-17.)

Here, defendant did not deny making the telephone calls to the victim but claimed his intent in leaving the messages on the victim's voice mail was to find out why the victim ended the relationship. In closing arguments, defense counsel argued defendant was "perplexed" because the victim never explained why she no longer wanted to see him so he just wanted to ask her why and to wish her luck. Defendant has taken the same position on appeal. The prosecution acknowledged in closing arguments that the threats in the voice mail messages played for the jury might not be "too overt" if you considered just the words themselves. The prosecutor therefore encouraged the jury not only to listen to the tone of defendant's voice, but to consider the significance of the similarities in the prior threats. The prosecutor further argued defendant knew he could not be "too overt" in making his threats to the victim in this case, because he knew he had to admit the charges made against him in the prior case involving the ex-girlfriend. In other words, defendant's intent in making the calls to the victim was a central issue in the case. The testimony by defendant's daughter and his ex-girlfriend about his prior threats against them was therefore highly probative and admissible under Evidence Code section

1101, subdivision (b), because it tended to disprove the defense theory on the central issue in the case.

In reaching our conclusion that the challenged acts were admissible under Evidence Code section 1101, subdivision (b), on the issue of intent, we reject defendant's argument that the acts were not particularly probative on this issue because they did not involve the same type of relationship. We disagree. All three incidents involved women in relatively close relationships, and shared a common thread—using physical force or threatening language in an abusive manner to create fear and establish control.

Citing *People v. Zavala* (2005) 130 Cal.App.4th 758 (*Zavala*), defendant also argues that stalking under Penal Code section 646.9 does not fall within the definition of "domestic violence" as that term is defined in Evidence Code section 1109. He therefore contends the challenged testimony was improperly admitted under section 1109, and the jury was improperly instructed that it could infer from his prior acts that he has a propensity to commit domestic violence offenses. He claims this improper instruction lowered the prosecution's burden of proof and prejudiced his defense. We disagree.

As in this case, the defendant in *Zavala* was charged with stalking in violation of Penal Code section 646.9. Pursuant to Evidence Code section 1109, the trial court admitted evidence of defendant's prior, uncharged acts against the victim and instructed the jury it could use the evidence to infer a propensity to commit domestic violence offenses. (*Zavala*, *supra*, 130 Cal.App.4th at pp. 770, fn. 6, 771.) The appellate court concluded it was error for the trial court to have instructed the jury in this manner as to the stalking offense, because stalking did not fall within the definition of "domestic

violence." (*Id*. at p. 771.) However, the appellate court found the error was harmless. (*Ibid*.) *Zavala* is not helpful to our analysis, because it is unclear why the appellate court concluded that the stalking offense at issue in that case did not fall within the definition of "domestic violence" under Evidence Code section 1109. In any event, our review of Evidence Code section 1109 confirmed that the stalking offense alleged in this case does fall within the definition of "domestic violence."

"Under Evidence Code section 1109, evidence of a prior act of domestic violence is admissible to prove the defendant had a propensity to commit domestic violence when the defendant is charged with an offense involving domestic violence." (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1114.) However, the trial court has the discretion to exclude any such evidence under Evidence Code section 352 if it is more prejudicial than probative. (*Rucker*, at p. 1114.) For the purposes of Evidence Code section 1109, " '[d]omestic violence' has the meaning set forth in Section 13700 of the Penal Code. Subject to a hearing conducted pursuant to [Evidence Code s]ection 352 . . . 'domestic violence' has the further meaning as set forth in Section 6211 of the Family Code, if the act occurred no more than five years before the charged offense." (Evid. Code, § 1109, subd. (d)(3).) Here, defendant's daughter and ex-girlfriend both testified to incidents that occurred within five years of the charged offense.[1]

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[1] Although defendant's daughter also testified about an incident between defendant and her deceased mother that would have occurred more than five years prior to the charged offense, the daughter's testimony about this incident was relevant to the daughter's state of mind in relation to defendant's more recent threat against her. Because it provided context for the more recent threat, we cannot conclude it was error for the court to admit this testimony under Evidence Code section 1109. Moreover, as

Under Penal Code section 13700, subdivision (b), "domestic violence" includes "abuse committed against . . . [a] person with whom the suspect has had a dating . . . relationship." Penal Code section 13700, subdivision (a), defines "[a]buse" as "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." Section 6211 of the Family Code defines "domestic violence" and "abuse" more broadly. Under section 6211 of the Family Code, domestic violence or abuse can be perpetrated against a spouse, a child of a party, other relatives, or "[a] person with whom the respondent is having or has had a dating . . . relationship." (Fam. Code, § 6211, subd. (c).) In addition, "abuse" under Family Code section 6211 includes not only acts that "place a person in reasonable apprehension of imminent serious bodily injury" but also encompasses "any behavior that has been or could be enjoined pursuant to [Family Code s]ection 6320." (Fam. Code, § 6203, subds. (c), (d).) Acts that may be enjoined under Family Code section 6320 include stalking, threatening, harassing, telephoning, and disturbing the peace of the other party. (Fam. Code, § 6320, subd. (a).) Accordingly, we disagree with defendant's contention Evidence Code section 1109 does not apply because he was not charged with an offense involving "domestic violence." In our view, the challenged testimony was admissible under Evidence Code sections 1101 and 1109, and the jury was properly instructed on the use of this evidence.

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outlined above, this evidence was also admissible under Evidence Code section 1101, subdivision (b), on the issue of intent.

We also reject defendant's remaining arguments that the admission of the challenged testimony should have been excluded because it was more prejudicial than probative and was so prejudicial it violated his right to due process and a fair trial. "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.)

Evidence Code section 352 provides a safeguard against the possible undue prejudice arising from the admission of prior acts evidence by requiring the trial court to "engage in a careful weighing process" by considering such factors as the nature of the act, its relevance and reliability, possible remoteness, the likelihood of confusing, misleading, or distracting jurors, its similarity to the charged offense, the burden on the defendant in defending against the uncharged acts, and the availability of less prejudicial alternatives. (*Falsetta*, *supra*, 21 Cal.4th at pp. 916-917.) Although domestic violence evidence that is admissible under Evidence Code section 1109 may be excluded under Evidence Code section 352 if it is more prejudicial than probative, we cannot conclude on the record before us that there was any viable basis for doing so. " ' "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' " ' " (*People v. Rucker*, *supra*, 126 Cal.App.4th at p. 1119.) For the reasons outlined above, the challenged testimony had substantial probative value on issue of defendant's intent. Defendant's intent was the central issue in the case. The challenged

testimony was directly relevant to the defense theory of the case, which was that defendant was simply trying to find out why the victim ended their relationship. All three incidents involved relatively recent events and came from sources independent of the evidence concerning the charged offense. All of the incidents included a common thread because they tended to show defendant has a propensity to use threats in an attempt to control women. None of the incidents described in the testimony was particularly inflammatory in comparison to the charged offense. The evidence against defendant was strong even without the challenged testimony. Finally, the jury was given appropriate limiting instructions on the use of this evidence to prevent any potential prejudice. We presume the jury followed these instructions. (*People v. Gray* (2005) 37 Cal.4th 168, 217.)

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

McKINSTER
J.