Court of Appeal, Third Appellate District - No. C086024

S269892

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

DANIEL LAWRENCE McGARRY, Defendant and Appellant.

The petition for review is denied.
The request for an order directing publication of the opinion is denied.

CANTIL-SAKAUYE

Chief Justice

APPENDIX A

Filed 6/18/21 P. v. McGarry CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DANIEL LAWRENCE MCGARRY, Defendant and Appellant.	C086024 (Super. Ct. No. 14F05046)

A jury found defendant Daniel Lawrence McGarry guilty of assault by force likely to cause great bodily injury. On appeal defendant contends (1) his counsel rendered ineffective assistance; (2) an instruction on self-defense was erroneous; (3) an instruction on the use of force likely to cause great bodily injury was also erroneous; (4) the jury was likely to have misinterpreted the instruction on actual injury; (5) his constitutional right to confrontation was violated; (6) a juror introduced prejudicial evidence from outside the record; and (7) two uncharged incidents of misconduct should not have been admitted.

Although defendant's fifth contention has merit, the error was harmless beyond a reasonable doubt. Accordingly, we will affirm the judgment.

BACKGROUND

Defendant attacked the victim, a customer at defendant's vehicle smog shop. Witnesses at trial included the victim, a mother and daughter who witnessed the assault,

several responding officers, defendant, an employee of defendant's smog shop, and a manager of a nearby tire store. Defendant said the victim was the aggressor and defendant acted in self-defense. Evidence of defendant attacking customers in 2012 and 2016 was also introduced at trial.

The victim testified that he took his sports utility vehicle for a smog check in 2014. When he returned that afternoon with his wife and children to pick up the vehicle, defendant told him it failed its smog test. The victim asked if he could get a discount because the test had taken longer than anticipated. Defendant looked unreceptive and appeared to grow upset. The victim testified that he could not remember if he had called defendant a name, but a responding officer who interviewed the victim testified that the victim reported calling defendant a douche. The victim was five feet five inches tall and weighed 198 pounds, whereas defendant was six feet five inches tall and weighed 240 pounds. As the victim glanced down to retrieve money from his wallet, he was hit multiple times. Defendant and the victim then grabbed each other. Defendant punched the victim once more in the head and walked off. Police arrived soon after. The victim was taken to the hospital by ambulance and had three chipped teeth along with bruising and swelling.

Other prosecution witnesses confirmed a possible douche comment and the attack by defendant. Defendant testified that he previously held a professional boxing license and was a bouncer for a number of years. Responding officers testified that the victim was bleeding but defendant was not injured. On cross-examination, an officer testified the victim reported trying to reach into defendant's pocket for his vehicle keys.

Defendant testified the victim became angry when told his vehicle failed the smog check. According to defendant, the victim insisted the testing machine was faulty, refused to pay, and threatened to call police. Defendant told the victim he couldn't leave without paying. The victim then asked for a discount and reached for the vehicle keys defendant was holding. When defendant put the keys in his pocket, the victim tried to

reach into defendant's pocket, all the while accusing defendant of stealing his car. Defendant testified that he pushed the victim back but the victim kept going for defendant's pocket. Eventually defendant pushed the victim hard and they wrestled. Defendant put the victim in a headlock. When the victim grabbed defendant's genitals, defendant punched him in the face many times. A smog shop employee offered similar testimony, adding that the victim punched defendant approximately 30 times.

The prosecution also introduced evidence of incidents occurring two years before and two years after the charged incident. A witness to a 2016 incident testified that he went to the tire shop next to the smog shop for new tires. There, he heard arguing. He turned to see defendant lunge forward and punch another man. The other man raised his hands and said, "Call the police." The witness did not see the other man throw any punches. The victim in that 2016 incident testified that after taking his car for a smog check, he and defendant got into a disagreement, exchanged words, and defendant punched him in the left eye.

The victim in a 2012 incident testified that when defendant told him his car had failed a smog check, he called defendant an idiot and said either that he would not or should not pay. Defendant punched him in the nose and said, "Now you don't have to pay me." That victim had a broken nose and cracked sinus. Defendant had claimed he only punched that victim after the victim first punched him in the right eye.

In the current case, the jury found defendant guilty of assault by force likely to cause great bodily injury. (Pen. Code, § 245, subd. (a)(4).)[1] The trial court suspended imposition of judgment and sentence, and placed defendant on probation for five years with 364 days in jail.

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[1] Undesignated statutory references are to the Penal Code.

DISCUSSION

I

Defendant contends his trial counsel (his mother) rendered ineffective assistance. He argues his counsel's situation gave rise to a presumption of prejudice under *United States v. Cronic* (1984) 466 U.S. 648 [80 L.Ed.2d 657] (*Cronic*), ineffective assistance is shown under *Strickland v. Washington* (1984) 466 U.S. 668 [80 L.Ed.2d 674] (*Strickland*), and his counsel breached her fiduciary duty and also had a conflict of interest.

A

During much of the time before trial, including the preliminary hearing, defendant was represented by a public defender, although he represented himself at times. On the day trial was set to commence, defendant moved to continue trial and asked that his mother, an attorney, be appointed to represent him. His mother explained that certain witnesses had not been located, reports were missing, and several important motions had to be prepared along with a pinpoint instruction. She said she needed time to get up to speed on discovery items, but also stated in a declaration that she was prepared to defend defendant at trial.

At a hearing on the motion, the deputy public defender said the purported missing witnesses had been subpoenaed or were about to be, no reports were missing, and that he was preparing the pinpoint instruction. Defendant's mother said she had been representing defendant in a civil suit filed by the victim. The trial court suggested beginning jury selection in seven days, and opening statements five days after that, to give the mother time to prepare. Defendant's mother said that would be very difficult, referencing the prosecution's 500-page trial binder. The trial court replied it was just "standard stuff" and the prosecutor explained most of the binder consisted of medical records. The trial court said granting the motion would be contingent on jury selection

and opening statements starting as proposed. Defendant's mother agreed with the proposed timeline and the trial court granted the motion.

After the jury returned its guilty verdict, defendant's mother moved for a new trial, claiming, among other things, ineffective assistance of counsel. She argued her performance was deficient because (1) her mental condition deteriorated during trial, (2) defendant wrote the closing argument for her, which she read, (3) she rested her case without calling important witnesses, (4) she failed to submit certain pinpoint instructions, (5) she failed to make appropriate objections or request admonishments, (6) she failed to argue "force likely" in closing argument, and (7) the trial court was not happy with defense counsel.

The mother submitted a declaration stating: "Due to my age [68] and declining memory, my ability to respond quickly and remember things as well as a trial attorney . . . is greatly compromised." She described her trial experience as "minimal" and wrote that between trial and caring for her mother she was getting only two to three hours of sleep, and all the while, she was recovering from a compression fracture suffered a month before trial. She said she had been forgetful, disorganized, and inept, asserting that defendant would have done a much better job in closing argument than she did and she "totally dropped the ball and closed the case abruptly" without bringing out important points or calling two particular witnesses. Just prior to the hearing, defendant's mother filed a supplemental declaration, stating that not calling those witnesses to the stand and not objecting during the end of the defendant's testimony were not tactical decisions.

At the hearing, defendant told the trial court: "I wrote 90 percent of the motion for new trial." He added: "the only reason [my mother] is representing me right now is because I feel that it's much more beneficial to have [her] . . . agreeing and working with me on this than . . . . getting a public defender or hiring another attorney, and then being kind of having me . . . pushed away further, and then maybe not working with me so well, admitting to these things so much."

The trial court denied the motion. It noted that no factor cited as ineffective assistance had occurred in front of the court. And mental state alone is not a proper basis for an ineffective assistance claim -- there must be a specific act or omission.

As to failing to call a witness, the trial court noted the witness would have testified to uncharged acts -- not the charged incident. And as to those uncharged acts, the witness "would not have helped defendant show that he had not engaged in [a] prior bad act."

As to the pinpoint instructions, one pertained to personal infliction of great bodily injury under section 12022.7, with which defendant was not charged. The other duplicated a part of CALCRIM No. 875, which the jury received. Thus, according to the trial court, defendant failed to show the trial court would have given the proposed instructions. The trial court said there was also little likelihood the proffered objections would have been sustained. And defense counsel had in fact argued "force likely" in closing, though she had elected to spend more time discussing self-defense, which the trial court deemed a reasonable tactical decision. Finally, the trial court noted that defense counsel's perception of her relationship with the trial court was not relevant to effectiveness in representation.

B

Defendant argues his counsel's situation gave rise to a presumption of prejudice under *Cronic, supra,* 466 U.S. 648. In *Cronic*, a young lawyer with a real estate practice was appointed to represent a criminal defendant charged with mail fraud and given only 25 days to prepare, whereas the prosecution had taken over four years to investigate the case and its thousands of documents. (*Id.* at p. 649.) In holding the circumstances made it unlikely the defendant received effective assistance of counsel, the United States Supreme Court identified three circumstances so likely to prejudice the accused that ineffective assistance is presumed: (1) "the complete denial of counsel"; (2) where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (3) where "counsel is available to assist the accused during trial, [but] the

likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." (*Id.* at pp. 658-660; see *id.* at p. 666.) The Court added that not every refusal to postpone trial gives rise to the presumption. (*Id.* at p. 661.)

This case does not fit any circumstance described in *Cronic*. Defendant was afforded counsel; indeed his eleventh hour request to substitute his mother as counsel was granted. His counsel subjected the prosecution's case to meaningful adversarial testing, including offering numerous witnesses and vigorously cross-examining the prosecution's witnesses. And the circumstances were not such that no competent lawyer could likely provide effective assistance. Counsel represented that she was prepared to defend defendant, a continuance was granted, and as the trial court noted, the trial binder was not particularly onerous. Further, before taking on defendant's criminal case, defendant's mother had been representing defendant in the civil suit arising out of the same incident. See also *Dows v. Wood* (9th Cir. 2000) 211 F.3d 480, 485 [mental deterioration has not been recognized by the United States Supreme Court as a basis for an automatic presumption of prejudice].) On this record, we do not presume prejudice.

C

Nevertheless, defendant argues ineffective assistance is shown under the *Strickland* test, averring he has established that his mother's representation fell below a reasonable professional standard because she admitted that many of her mistakes were not tactical. Defendant claims his counsel allowed the abrupt shutdown of the defense's case, failed to call a witnesses to the 2012 incident, forced defendant to write the closing argument, failed to submit certain pinpoint jury instructions, inadvertently introduced a 2012 incident of violence and arrest, failed to impeach the victim with his admission to an officer that he grabbed for the keys and that defendant punched him after he grabbed defendant's genitals, and failed to report her condition to the trial court.

To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance prejudiced defendant. (*Strickland,* 466 U.S. at pp. 687-688, 691-692; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) " 'Surmounting *Strickland's* high bar is never an easy task.' " (*Harrington v. Richter* (2011) 562 U.S. 86, 105 [178 L.Ed.2d 624].) "It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.' [Citations.] The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." (*Ibid.*) Further, "if the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. . . .' " (*People v. Cudjo* (1993) 6 Cal.4th 585, 623.)

Defendant asserts that his trial counsel was exhausted and suffered a breakdown and memory failure. But the *Strickland* test requires a showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." (*Strickland, supra*, 466 U.S. at p. 687; see *Smith v. Ylst* (9th Cir. 1987) 826 F.2d 872, 876 ["a defendant must point to specific errors or omissions which prejudiced his defense, because if a mental illness or defect indeed has some impact on the attorney's professional judgment it should be manifested in his courtroom behavior and conduct of the trial"].)

Although defendant's mother claimed her acts and omissions were not tactical, self-proclaimed inadequacies on the part of trial counsel in aid of a client on appeal are not necessarily persuasive (*People v. Beagle* (1972) 6 Cal.3d 441, 457, superseded by statute on other grounds as stated in *People v. Rogers* (1985) 173 Cal.App.3d 205, 208-209), and we are not obligated to accept them. (*Edwards v. Lamarque* (9th Cir. 2007)

475 F.3d 1121, 1126.) Defendant asserts that his trial counsel suffered a mental breakdown so severe that defendant had to write the closing argument, but nothing in the record supports that assertion, and the assertion was not mentioned until after the guilty verdict.

In any event, defendant has not established prejudice. "A factual basis, not speculation, must be established before reversal of a judgment may be had on grounds of ineffective assistance of counsel." (*People v. Williams* (1988) 44 Cal.3d 883, 933.) Because defendant does not explain how the asserted errors would have yielded a more favorable result, he has not met his burden on appeal.

D

Defendant further argues that his counsel breached her fiduciary duty by failing to report her condition to the trial court or to do anything to rectify the situation, such as seeking medical attention. He also argues her disability constituted a conflict of interest, and his own failure to disclose his mother's condition to the trial court did not constitute a waiver of the conflict. He maintains that had his mother informed the trial court of her condition, the trial court would have declared a mistrial or called a recess.

We decline to speculate on what the trial court might have done if defendant or his mother had mentioned to the trial court that the mother was not feeling well during trial. All we know is that the record does not evidence any illness, and defendant has not established a presumption of prejudice under *Cronic* or made a showing of prejudice under *Strickland.* Under the circumstances, defendant has not convinced us that he is entitled to relief based on a breach of fiduciary duty or conflict of interest.

II

Defendant next contends the trial court failed to instruct the jury on what to do if it found some force was used in self-defense and some force was not. He challenges the following instructions given by the trial court:

"To prove that the defendant is guilty of this crime, the People must prove that, A, the defendant did an act that by its nature would directly and probably result in the application of force to a person. And, B, the force used was likely to produce great bodily injury. . . . And . . . the defendant did not act in self-defense."

"The defendant acted in a lawful self-defense if . . . three, the defendant used no more force than was reasonably necessary to defend against that danger."

Defendant argues those instructions did not prevent the jury from finding that part of the force was used in self-defense but the total force used was likely to produce great bodily injury. He says the defense theory was that some punches were in self-defense and some were not, noting that his trial counsel argued that the jury would "have to determine which of the punches were made in self-defense and which were not."

Whether a jury instruction correctly states the law is reviewed de novo. (*People v. Quinonez* (2020) 46 Cal.App.5th 457, 465.) And in situations such as this, we determine "whether there is a 'reasonable likelihood' that the jury understood the charge as the defendant asserts." (*People v. Kelly* (1992) 1 Cal.4th 495, 525.)

Here, the trial court instructed the jury that a finding of guilt required proof that defendant used force likely to produce great bodily injury, and that the prosecution must prove that defendant did not act in self-defense. Given those instructions, it is not reasonably likely that the jury would nevertheless conclude that force found to be in self-defense could be considered in determining whether defendant was guilty of using force likely to produce great bodily injury.

Defendant's reliance on *People v. Ross* (2007) 155 Cal.App.4th 1033 does not assist him. In *Ross* a victim slapped the defendant during an argument and the defendant responded by striking the victim and fracturing her cheekbone. (*Id.* at p. 1036.) The defense theorized that the defendant initially acted in self-defense and his subsequent hits, which were not in self-defense, were simple assaults or battery. (*Id.* at p. 1051.) Over the defense's objection, the jury was instructed on mutual combat. (*Id.* at pp. 1041-

1042.) On appeal, the court held the evidence did not support a mutual combat instruction as no reasonable juror could conclude that the defendant and the victim were engaged in mutual combat when he punched her. (*Id.* at pp. 1050, 1054.) The court further concluded the error was prejudicial as it removed the defense's theory from the jury's consideration. (*Id.* at pp. 1054-1055.)

Although *Ross* illustrates that an individual can act in self-defense and then not in self-defense during an incident, the case does not support defendant's argument that the jury in this case considered force he purportedly used in self-defense in determining whether he used force likely to inflict great bodily injury.

III

Defendant further claims the jury instruction for assault with force likely to cause great bodily injury allowed the jury to eliminate the requirement that the force used be likely to produce great bodily injury.

The trial court instructed the jury with CALCRIM No. 875. The instruction states in pertinent part:

"To prove that the defendant is guilty of [assault with force likely to cause great bodily injury], the People must prove that: [¶] . . . The defendant did an act that by its nature would directly and probably result in the application of force to a person; . . . [¶] . . . The force used was likely to produce great bodily injury; [¶] . . . [¶] The terms application of force and apply force mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his clothing, is enough." (CALCRIM No. 875.)

Defendant argues the definition of "application of force" conflicted with the requirement that the force used be likely to produce great bodily injury. He posits that there was a reasonable chance the jury interpreted the instruction to eliminate the requirement that the force used be enough to cause great bodily injury. But we must assume that jurors are intelligent and capable of understanding the jury instructions

given. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 915.) Because defendant has not established otherwise, we presume the jurors understood the instruction to say that defendant could not be found guilty unless the People proved that defendant did an act that by its nature would probably result in the application of force and the force he used was likely to produce great bodily injury. We will not presume without evidence that the jury read the instruction to mean something else. (*People v. Kelly, supra,* 1 Cal.4th at p. 525 [there must be a " 'reasonable likelihood' " the jury understood the instruction as asserted].)

The contention lacks merit.

IV

Defendant next challenges another portion of CALCRIM No. 875: "No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault, and if so, what kind of assault it was." Focusing on the words "that fact," defendant claims the jury likely misinterpreted the instruction to mean it could only consider whether an injury occurred, not the nature and extent of the injury.

Again, however, we assume jurors are able to understand and correlate jury instructions. (*People v. Covarrubias*, *supra*, 1 Cal.5th at p. 915.) Nothing in the challenged instruction precluded the jury from considering the nature of the injuries in deciding whether the assault was likely to produce great bodily injury. Indeed, the instruction expressly directed the jurors to consider all the other evidence. The contention fails.

V

In addition, defendant contends the trial court violated his right to confront witnesses when it allowed the prosecution to present evidence from a police report containing statements of third-party witnesses who claimed defendant kicked someone on

the ground during a prior altercation. We agree but find the error harmless beyond a reasonable doubt.

A

Mid-trial, after defendant's direct examination, the prosecution referenced defendant's testimony that he was a puncher, not a kicker, and asked the trial court to permit impeachment with a 2000 misdemeanor battery conviction in which defendant was alleged to have kicked the victim. The prosecutor told the trial court: "The People would only be able to show that he has a prior conviction for battery and confront the defendant with the police report. [The] People do not have [the victim] under subpoena or . . . any of the other witnesses who observed this being done."

The trial court denied the request, explaining "if you had [the victim] available to testify, that might change my ruling. But given the fact that there is no way for the People to prove the underlying conduct . . . . [¶] . . . [¶] I'm not going to allow the People to impeach [defendant] with the fact that he kicked [the victim]."

Later, while defendant was being cross-examined, he testified that once he had the victim in the current case on the ground, he did not beat him in the back of the head, explaining "if I was truly in a fit of rage, that is what I would have done, because I had him pinned." The prosecutor asked if defendant had ever, in a fit of rage, punched someone on the ground repeatedly. Defendant testified: "Not that I ever remember."

The prosecutor then asked to approach the bench, and an unreported sidebar discussion occurred. After the sidebar, the prosecutor asked defendant to think back to the year 2000. Defense counsel objected, noting the year 2000 was many years prior when defendant was in his twenties. The trial court allowed the prosecutor to proceed, and the prosecutor inquired about an altercation in 2000, asking: "at one point [the victim] was laying on the ground and you punched and kicked him multiple times; isn't that true?" Defendant responded, "That is false."

The prosecutor then had defendant read from a police report and asked defendant, "according to [the victim], you kicked him several times while laying on the ground?" Defendant replied, "That's what it says there, but he had other statements too." The prosecutor then had defendant read another portion of the police report and asked, "[a witness] said that you were kicking [the victim] in the head on the side; isn't that true?" Defendant answered: "That is what it says there, but that's not true."

The prosecutor directed defendant to a different portion of the police report and the prosecutor asked, "What she said was that you stomped on [the victim's] head with your right foot at least two times and you punched him in the head at least 20 to 30 times; that is what she said?" Defendant replied, "That is what she said. That is not correct." At that point defendant's counsel interjected, "I would like to renew the hearsay objection." The trial court overruled the objection.

B

Defendant argues the use of witness statements from the police report violated his right of confrontation. Although the People respond that the contention is forfeited for failure to object on confrontation clause grounds, we will address the merits of the contention.

Hearsay -- evidence of an out-of-court statement offered to prove the truth of the matter asserted -- is inadmissible except as provided by law. (Evid. Code, § 1200.) In *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] (*Crawford*), the United States Supreme Court held that testimonial hearsay violates the confrontation clause unless the declarant is unavailable, and the defendant had a prior opportunity to cross-examine the declarant. (*Id.* at pp. 53-54, 59, fn. 9.)

Here, the statements in the police report appear to have been testimonial and there is no indication that defendant had a prior opportunity to cross-examine the declarants. (See *People v. Sanchez* (2016) 63 Cal.4th 665, 694 [a statement about a completed crime made to an investigating officer by a nontestifying declarant is generally testimonial

unless an exception applies].) Nevertheless, the People argue the police report statements could be used to impeach defendant because he took the stand and put his credibility at issue. But having reviewed the record, we conclude some of the specific questions posed to defendant in reference to the 2000 police report should not have been allowed.

We further conclude, however, that any error was harmless. *Crawford* error is reviewed for prejudice under *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705]. (*People v. Rutterschmidt* (2012) 55 Cal.4th 650, 661.) Under that standard, reversal is required unless we find beyond a reasonable doubt that the error was harmless. (*Ibid.*) We make such a finding here.

Overwhelming evidence supported a finding of guilt on the charged offense. Various witnesses provided testimony that was consistent with each other, with the statements they had made to responding officers, with a 911 call, and with the circumstantial evidence. The defense witnesses offered testimony that was not consistent with each other, with statements to responding officers, or with the circumstantial evidence. Moreover, even if some of the evidence of the 2000 incident should not have been allowed, the jury properly received other evidence that defendant had attacked customers in 2012 and 2016.

Against the weight of all the evidence, the erroneously admitted evidence pertaining to the incident in 2000 was harmless beyond a reasonable doubt.

VI

Defendant argues the jury foreperson improperly introduced evidence outside of the record during deliberations. Defendant points to the declaration from another juror who reported that during deliberations, the foreperson described someone who got knocked out with one punch. Defendant claims the foreperson's statement constituted prejudicial misconduct because it "went directly to one of the defendant's only two defenses, that he did not use force likely to cause bodily injury."

Although it is misconduct for a juror to assert expertise or specialized knowledge about a subject, jurors " ' "must be given enough latitude in their deliberations to permit them to use common experiences and illustrations in reaching their verdicts." ' " (*People v. Engstrom* (2011) 201 Cal.App.4th 174, 185 [jurors' views of the evidence are necessarily informed by their life experiences]; *In re Lucas* (2004) 33 Cal.4th 682, 697 [where intoxication defense was raised, juror divulging personal experiences with drugs did not constitute misconduct since juror did not bring highly technical information before the jury or claim expertise].) It would be an impossible standard to require a jury to be completely sterilized from any external factors. (*People v. Riel* (2000) 22 Cal.4th 1153, 1219.)

Here, the foreperson merely relayed an incident he observed in his personal life. Nothing indicates he held himself out as an expert or divulged technical information about the likelihood of injuries from a single punch. Defendant has not established juror misconduct.

VII

Defendant also challenges the admission of evidence of two uncharged acts of violence. He argues the trial court failed to consider the confusing or misleading effects of multiple witnesses testifying to different evidence. And, while noting that he was never charged or arrested for the incidents, he avers the trial court failed to engage in caution or careful analysis in admitting the evidence. He further argues there are significant doubts that he acted illegally.

A

The prosecution moved in limine to admit evidence of battery arrests from 2012 and 2016. According to the motion, in the 2012 incident defendant told a customer that his vehicle had failed its smog test. When the victim told defendant he didn't think he should have to pay, defendant punched the victim multiple times. Defendant told police the victim punched first and defendant acted in self-defense.

In the 2016 incident, as described in the motion, the victim brought his car in for a smog test. Defendant refused to test the vehicle because the victim lacked proper paperwork and an argument ensued. Defendant punched the victim in the eye. Defendant claimed the victim threatened to "[b]ring his boys down to take care of him."

The defense moved to exclude the acts, arguing defense witnesses would rebut the claims, the jury would be confused, and the evidence would consume too much time and result in mini trials.

The trial court conditionally admitted the evidence, explaining that if self-defense was raised (as was anticipated), the prosecution would have to prove defendant did not act in self-defense. Therefore the uncharged conduct would be admissible as to defendant's intent. The trial court noted it had considered the defense's argument that the evidence would involve witnesses and the consumption of time. It also considered the probative value and whether it would be outweighed by prejudice.

Thereafter, in her opening argument, defense counsel argued self-defense. Afterward, defense counsel agreed the door had been opened, though she continued to express concern that the jury would be confused by the incidents.

B

Evidence of other crimes, civil wrongs, or other acts may be admitted to prove a material fact, such as intent or identity. (Evid. Code, § 1101, subd. (b); *People v. Leon* (2015) 61 Cal.4th 569, 597 (*Leon*).) It is not necessary that the conduct was prosecuted or that it resulted in a conviction. (*Leon,* at p. 597.) But the conduct must be relevant to prove a fact at issue, and it must not be unduly prejudicial, confusing, or time consuming. (*Id.* at pp. 597-598; Evid. Code, § 352.) To that end, evidence of other crimes is subjected to " 'extremely careful analysis.' " (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404 (*Ewoldt*).) On appeal, we review for abuse of discretion both the trial court's decision to admit evidence of other crimes as well as its ruling under Evidence Code

section 352. (*People v. Harris* (2013) 57 Cal.4th 804, 841; *People v. Lewis* (2001) 26 Cal.4th 334, 374.)

Here, the trial court acted well within its discretion in admitting the uncharged acts. As defendant's trial counsel conceded, defendant's intent as to self-defense was at issue. And the 2012 and 2016 incidents were probative of defendant's intent in the charged incident in that they involved a similar act (punching a customer) with similar claims of self-defense (or that the customer was an aggressor). (See *People v. Steele* (2002) 27 Cal.4th 1230, 1244 [the more often a person does something, the more likely that something was intended rather than accidental or spontaneous]; *Ewoldt, supra,* 7 Cal.4th at p. 402 [the least degree of similarity is required to prove intent].)

Further, under Evidence Code section 352, confusion was not inevitable, and the nature of the incidents were such that they were not likely to consume undue time. And the fact that the defense contested the uncharged incidents did not preclude admissibility. (See *Leon, supra,* 61 Cal.4th at p. 599 [admissibility does not require a conceded act; the jury determines the accuracy of the evidence of the prior acts].)

Defendant asserts that this case is analogous to *People v. Sam* (1969) 71 Cal.2d 194 (*Sam*). There, the defendant, while drunk, kicked the victim in the stomach. (*Id.* at pp. 199, 201) When the man died two weeks later, the defendant claimed self-defense, arguing the victim seemed about to hit him. (*Id.* at pp. 200-201) At trial, evidence of two prior acts were admitted "purportedly to show his modus operandi, or common plan or scheme." (*Id.* at p. 200.) The first was that defendant had a drunken quarrel and kicked his mistress in the ribs. (*Ibid.*) The second was that he had knocked down and kicked a long-time friend. (*Id.* at pp. 200-201.) But the California Supreme Court rejected the theory of identity or common plan, explaining there was no connection between the prior acts and the charged incident. (*Id.* at p. 205.) It also rejected the argument that the evidence was admissible to show criminal intent and to negate a claim of self-defense. (*Ibid.*) As to self-defense, the Court explained: "In effect, two drunken fights over the

past two years, in which defendant may or may not have acted in self-defense, were introduced to suggest that a more recent altercation was not in self-defense. If there was a concatenation of events, it was tenuous at best . . . ." (*Id.* at p. 205-206.)

Here, by contrast, the uncharged acts were considerably more probative. Both involved near-identical conduct of punching a smog-shop customer, and at least one involved an explicit claim of self-defense (and defendant would later testify both were in self-defense). Hence, there was a substantial probative link, and *Sam* is distinguishable.

Defendant's contention lacks merit.

DISPOSITION

The judgment is affirmed.

/S/
MAURO, Acting P. J.

We concur:

/S/
HOCH, J.

/S/
KRAUSE, J.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

DANIEL LAWRENCE MCGARRY,

Petitioner,

v.

SCOTT JONES,

Respondent.

No. 2:17-cv-2630 KJN P

ORDER AND FINDINGS AND RECOMMENDATIONS

I. Introduction

Petitioner is a state prisoner, proceeding pro se, with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.[1] Petitioner paid the filing fee. Petitioner challenges his conviction in the Sacramento County Superior Court. For the reasons stated below, this action must be dismissed.

II. Standards

This court has authority under Rule 4 of the Rules Governing Section 2254 Cases to dismiss a petition if it "plainly appears from the face of the petition and any attached exhibits that the petitioner is not entitled to relief in the district court. . . ." Id.

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[1] This proceeding was referred to this court by Local Rule 302 under 28 U.S.C. § 636(b)(1).

APPENDIX B

III. Background

Petitioner commenced this action on December 15, 2017. He challenges his September 18, 2017 conviction of one count of assault with a deadly weapon in violation of California Penal Code § 245(a)(4). He was sentenced to one year in county jail, but appears to be serving the sentence on home detention. (ECF No. 1 at 1.) Petitioner filed an appeal, and concedes the appeal is still pending in the California Court of Appeal, Third Appellate District.[2]

It is premature for this court to review petitioner's collateral attack on his conviction before the state court has had the opportunity to adjudicate the claims raised in his direct appeal. See Younger v. Harris, 401 U.S. 37 (1971). Under Younger, federal courts may not enjoin pending state criminal proceedings except under extraordinary circumstances. Id. at 49, 53. Younger abstention prevents a court from exercising jurisdiction when three criteria are met: 1) there are ongoing state judicial proceedings; 2) an important state interest is involved; and 3) there is an adequate opportunity to raise the federal question at issue in the state proceedings. H.C. ex rel. Gordon v. Koppel, 203 F.3d 610, 613 (9th Cir. 2000).

All three of these criteria are satisfied here. First, petitioner has an appeal pending in the California Court of Appeal. Second, California has "an important interest in passing upon and correcting violations of a defendant's rights." Roberts v. Dicarlo, 296 F.Supp.2d 1182, 1185 (C.D. Cal. 2003). And third, the California state courts provide an adequate forum in which petitioner may pursue his claims. See id. When the state proceedings have concluded and his conviction becomes final, petitioner may seek federal habeas relief.

Petitioner claims that he has exhausted the two issues upon which the instant petition is based. (ECF No. 1 at 2.) However, the "[a]pparent finality" of a particular claim "is not enough." Drury v. Cox, 457 F.2d 764, 764-65 (9th Cir. 1972) (per curiam). As another district court explained:

> The Ninth Circuit has held unequivocally that the exhaustion requirement is not satisfied if there is a pending proceeding in state court, even if the issue the petitioner seeks to raise in federal court

[2] According the California Courts' website, petitioner's appeal remains pending as of December 19, 2017. People v. McGarry, Case No. 14F05046.

> has been finally determined by the highest available state court. See Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir. 1983). This is because the pending state action might result in reversal of the conviction on some other ground, mooting the federal case. See id. In Sherwood a direct appeal was pending although the federal issues had been decided by the state courts via another procedural route. Although the Younger abstention might seem a better rationale for this requirement than exhaustion, see Phillips v. Vasquez, 56 F.3d 1030, 1038-39 (9th Cir. 1995) (concurring opinion), the requirement is nevertheless well-established in this circuit.

Torres v. Yates, 2008 WL 2383871, at *2 (N.D. Cal. June 9, 2008). Under the Younger doctrine, this court must abstain from granting petitioner any relief until his entire case has concluded in state court. Id. As petitioner's direct appeal is pending, his underlying action is ongoing, and this court cannot enter judgment in petitioner's favor.[3]

IV. Conclusion

Therefore, the petition should be dismissed, without prejudice, as premature. See 28 U.S.C. § 2254(a); Juidice v. Vail, 430 U.S. 327, 337 (1977) (if Younger abstention applies, a court should dismiss the action).

Accordingly, IT IS HEREBY ORDERED that the Clerk of the Court is directed to assign a district judge to this case; and

Further, IT IS RECOMMENDED that this action be dismissed without prejudice.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned

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[3] Moreover, a stay of this action would be inappropriate. Under the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), a one-year limitations period for seeking federal habeas relief begins to run from "the date the judgment became final on direct review." 28 U.S.C. § 2244(d)(1)(A). Until petitioner's conviction is rendered final "by conclusion of direct review or by the expiration of the time for seeking such review," AEDPA's one-year statute of limitations period will not begin to run. See Burton v. Stewart, 549 U.S. 147, 156-57 (2007). Because the statute of limitations period for the filing of a federal habeas petition has not yet begun to run, it would be inappropriate to grant a stay and abeyance. Bennett v. Fisher, 2015 WL 6523689, at *1 (E.D. Cal. Oct. 27, 2015) (stay inappropriate where limitations period has not even begun to run); Henderson v. Martel, 2010 WL 2179913, at *6-7 (E.D. Cal. May 26, 2010) (denying petitioner's renewed motion for a stay and abeyance as premature).

"Objections to Magistrate Judge's Findings and Recommendations." If petitioner files objections, he shall also address whether a certificate of appealability should issue and, if so, why and as to which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). Any response to the objections shall be served and filed within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: December 21, 2017

Kendall J. Newman

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

/mcga2630.younger

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

HON. ALAN G. PERKINS, JUDGE, DEPARTMENT 35

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COPY

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
vs.
DANIEL LAWRENCE McGARRY,
Defendant.

NO. 14F05046

FILED/ENDORSED
JUL - 9 2015
By M. Milbourne, Deputy Clerk

REPORTER'S TRANSCRIPT OF
PRELIMINARY HEARING

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MONDAY, JUNE 29, 2015; MONDAY, JULY 6, 2015

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APPEARANCES

FOR THE PEOPLE: ANNE MARIE SCHUBERT,
DISTRICT ATTORNEY
COUNTY OF SACRAMENTO
BY: NICHOLAS JOHNSON
Deputy District Attorney

FOR THE DEFENDANT: PAULINO G. DURAN, PUBLIC DEFENDER
COUNTY OF SACRAMENTO
BY: REUBEN J. MORENO
Assistant Public Defender

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Reported by: Elizabeth Teklinsky, CSR No. 7895
Michelle Lelevier, CSR No. 6967

I N D E X

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Appendix C

Q. It seemed brief?
A. Yes. Very brief. About four or five questions.
MR. MORENO: Nothing further.
MR. JOHNSON: Nothing further, Your Honor.
THE COURT: All right. May the witness be excused?
MR. MORENO: Yes, Your Honor.
MR. JOHNSON: Yes.
THE COURT: Thank you, sir. You're free to go.
THE WITNESS: Thank you.
THE COURT: Any additional defense presentation?
MR. MORENO: If I could have one moment, please, Your Honor, with my client, please?
Your Honor, despite my conversations and advice on the matter, Mr. McGarry would like to testify.
THE COURT: All right. So, Mr. McGarry, you have the right to testify in this proceeding. However, I do have to advise you of a couple of things, one of which is this is a preliminary hearing.
The Court's role is, in essence, to find whether or not there is probable cause to believe that an offense has been committed. So it's not like a little trial before the big trial. The Court has a very limited function. So credibility determinations are -- can sometimes be made. But it's not my role to decide whether or not the People should prosecute the charge or whether or not it should be prosecuted as a felony.
I also have to advise you that you have the right to remain silent and anything you say at this preliminary hearing will be recorded and could be used against you at trial and

APPENDIX C

misstating, but basically it is -- let's see here. I want to misstate it for you.

MR. MORENO: While you're looking that up, Yo may I talk to him?

THE COURT: Yes.

So let me just state it this way as a summary: At a preliminary hearing the magistrate, which is me, must be convinced only of such a state of facts as would lead a reasonable person to believe and conscientiously entertain a strong suspicion of the defendant's guilt. The evidence that will justify prosecution need not be sufficient to support a conviction. All that need be shown is some rational ground for assuming the possibility that an offense has been committed and that the defendant committed it.

So that's the only -- that's the standard that the People have to meet at a preliminary hearing.

THE DEFENDANT: All right.

THE COURT: So what I will do now, since maybe it's an unusual turn of events where I'm advising the defendant about the preliminary hearing standard, is I'll take a five-minute recess so you can talk with your attorney and then come back out.

THE DEFENDANT: Okay.

(A short break was taken.)

THE COURT: All right. Back on the record.

So, Mr. Moreno, have you had a chance to further speak with your client?

MR. MORENO: I have, Your Honor.

Appendix C

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Appendix C

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

HON. CURTIS M. FIORINI, DEPARTMENT 8

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THE PEOPLE OF THE STATE OF CALIFORNIA,

vs. No. 14F05046

DANIEL LAWRENCE MCGARRY,

Defendant.

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REPORTER'S TRANSCRIPT OF
995 MOTION

---oOo---

Wednesday, April 6, 2016

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APPEARANCES:

For the People: ANNE MARIE SCHUBERT, District Attorney for the County of Sacramento
By: NICK JOHNSON
Deputy District Attorney

For the Defendant: In Pro Per
By: DANIEL LAWRENCE McGARRY

CARA FOSTER, RPR CSR NO. 11973

THE COURT: Thank you both.

Anything further or is the matter submitted?

MR. JOHNSON: Submitted.

THE COURT: Hearing your arguments today and in reviewing all of the pleadings, I am going to make a record for you, Mr. McGarry.

I notice in the motion you've raised 27 enumerated questions just in an initial motion but basically comes down to five main issues. And that is number one, did the defendant have a right to retain Mr. Saunders' keys for his failure to pay for a smog test? Number two, does the evidence demonstrate the victim was the initial aggressor? Number three, the defendant was only acting in self-defense? Number four, any injuries suffered by the victim in this scuffle was insufficient to establish great bodily injury, was the crux of today's argument as well, and under the correct standard of probable cause, which was discussed at length today as well, the prosecution has not established that the defendant committed the offense.

I note that the magistrate Judge Perkins did conclude and he stated, "For the purposes of a preliminary hearing however, there was sufficient evidence that an offense was committed outside the scope of any self-defense." And he stated, "Primarily because of the allegation of the kicking and the pursuit on the ground that was testified through 115 by Manly and Rodriguez."

Looking at the standards for the 995 motion. First of all, with regard to the defendant's right to retain his keys,

he does claim that the key to this case was his right to retain Mr. Saunders under Civil Code 3068, and therefore Mr. Saunders trying to grab the keys was the initial act of aggression. I believe the defendant was justified in retaining the keys to Mr. Saunders' car when he refused to pay for the smog test.

Then going to whether who was the additional aggressor, the right to self-defense. The defendant here claims because he had the right to retain Mr. Saunders' keys, Mr. Saunders was the initial aggressor, when he tried to forcibly take the keys from the defendant, therefore the defendant's actions were excusable as they were made in self-defense.

Yet, there was conflicting evidence regarding the fight. Ms. Manly and Rodriguez reported that not only did the defendant initiate the altercation, but he actively pursued Mr. Saunders even to the point of kicking Mr. Saunders in the head and face while Mr. Saunders was on the ground, and that evidence provided by Ms. Manly and Rodriguez may be deemed sufficient to establish that he was the initial aggressor.

Because the evidence is conflicting on that point, the trier of fact will be tasked with making the ultimate credibility and factual determinations on that issue.

The magistrate here found that the testimony of Ms. Manly and Rodriguez was sufficient to establish for preliminary hearing purposes that the defendant committed an offense outside the scope of self-defense. At this stage, at this proceeding, this court cannot reweigh the evidence.

Going on to great bodily injury. Great bodily injury

means by statute significant or substantial physical injury.

The People are not required to show that someone was actually injured in order to show assault with force likely to produce great bodily injury. And that the crime with assault by means of force likely to produce great bodily injury is completed actually before any injury is inflicted, and it is enough that the force used is likely to cause serious bodily injury but no injury is necessary.

I do note, especially in the reply briefs, all the cases that the defense has cited and distinguished there was significant bodily injury in those cases, and that was a significant factor that the court could consider in whether there was force likely to cause great bodily injury.

And those cases stand for the proposition that that is something that could be shown from the injury, especially in a situation like this where it's feet and kick and not weapons. Obviously, if somebody swung an ax at somebody and missed, that would still be assault likely to produce great bodily injury even though there was no injury.

Here, as the defense argues, this is a case of allegations of physical force from hands and feet and, therefore, the court should give more weight to the minor or moderate injuries that were actually occurred.

The defendant admitted he did punch Mr. Saunders in the face several times while holding Mr. Saunders in a headlock, but according to Manly and Rodriguez the defendant also kicked Mr. Saunders in the face and in the head area.

This great bodily injury issue is a question of fact

for a jury, it's a question for the magistrate at the preliminary hearing, and it's a function that at this point in time this court cannot reweigh.

Regarding 995 motions, the applicable standard is well-settled that the 995 requires an indictment to be set aside where the defendant has been indicted and without reasonable or probable cause. In context of a 995 motion, probable cause to hold a defendant to answer has been defined as evidence such that a reasonable person can harbor a strong suspicion of the defendant's guilt.

A magistrate conducting a preliminary examination must be convinced of only such a state of facts that would lead a man of ordinary caution and prudence to believe or conscientiously entertain a strong suspicion of the guilt of the accused.

Here as I stated, this court cannot reweigh the evidence or substitute its own judgment for that of a committee magistrate as to the weight of the evidence.

I understand the defense believes that the live in-court testimony that was presented on behalf of the defense is more credible, more reliable, and should outweigh that testimony that was introduced by way of 115, that hearsay testimony, that the court's unable to gauge the credibility of those witnesses in court as they testify but that goes to a weight of the evidence issue.

Here if there is some evidence in support of the information, then the court is not allowed to inquire into the sufficiency of the evidence. Only when there is a total

absence of evidence that support a necessary element of the offense charged should the information be set aside and that's not the case here.

There is evidence. I understand the defense believes it is outweighed by the defense evidence that was presented, but the fact that that goes to an issue of weight and the conflicting evidence and whether that should be outweighed or not, but as I stated multiple times this court cannot reweigh the evidence. I'm looking to see whether there's a total absence of evidence.

Since there is not a total absence of evidence on this record, this motion should be denied. So that is what I'm going to do, I'm going to deny the 995 motion.

Ms. Manly-Rodriguez said she had a clear and unobstructed view of the altercation, the defendant pursued the alleged victim as he tried to get away, and that's what the magistrate found that went beyond any initial aggressor or self-defense, and the defendant kicked Mr. Saunders several times in the head and facial area while Mr. Saunders was on the ground.

I believe that is sufficient to show a force likely to produce great bodily injury when someone is being kicked in the head and facial area.

And then Ms. Manly-Rodriguez stated Mr. Saunders attempted to get away but the defendant reengaged and continued to punch and attack Mr. Saunders. That was evidence before the magistrate.

And so for all the reasons that I've already put on

the record and based on all the standards that I have to follow in this case, the 995 is denied.

The matter is currently on for further proceedings as well. In light of the Court's ruling, what would the parties like to do with regard to the next court date?

MR. JOHNSON: Your Honor, I still have a jury trial date for April 20th.

THE COURT: It is set for April 20th. You are correct. Today was the 995 and the trial readiness conference.

Mr. McGarry, what would you like to do? I know you recently went pro per for purposes of this motion. Would you wish to confirm that? Proceed to trial?

MR. McGARRY: I don't know. I'm still thinking about it.

THE COURT: Sure.

Do the People have any objection to continuing the matter so Mr. McGarry can decide what he wants to do in light of the procedural posture now?

MR. JOHNSON: The People have no objection.

THE COURT: Would you like sometime to figure out what you would like to do? I'm not putting any pressure on you for the next court date.

MR. McGARRY: Yeah, I guess.

THE COURT: Do you want to continue the trial date?

MR. JOHNSON: Yes. I would be agreeable to continue TRC for another two weeks and follow that with moving the jury trial another two weeks.