

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Aaron Vrh.
Petitioner

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Kamala D. Harris et. al. Respondents

APPENDICES

FOR PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA
COURT OF APPEAL, DISTRICT COURT OF APPEALS FIFTH APPELLATE DISTRICT

Dated

4/9/2018

Aaron Vrh (In Pro Per)
SCC, Facility C1/115
5150 O'Byrnes Ferry Rd.
Jamestown, Ca 95327

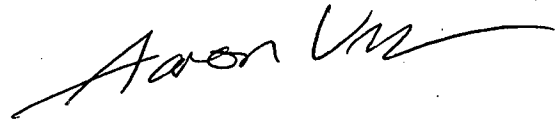


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APPENDIX A

OPINION OF THE CALIFORNIA COURT OF APPEAL

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED

NOV 28 2017

By Deputy

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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

THE PEOPLE,

Plaintiff and Respondent,

v.

AARON ANTHONY VRH,

Defendant and Appellant.

F072983

(Super. Ct. No. 1483396)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Joseph R. Distaso, Judge.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Nicholas M. Fogg, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

A jury convicted Aaron Anthony Vrh of unlawful sexual penetration and assault with intent to commit mayhem. Vrh claims the trial court erred by admitting, pursuant to Evidence Code section 1109, evidence of prior domestic violence committed by him against two ex-girlfriends. Finding no error, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The victim, Jane Doe, was romantically involved with Vrh on an intermittent basis from approximately August 2011 through November 2013. On July 5, 2013, Doe was hospitalized with a severe rectal injury that required surgery and left her with a prolapsed rectum. She told her healthcare providers that she had fallen on a toilet plunger. The hospital contacted the Turlock Police Department. A police officer questioned Doe about the incident, and she provided the same explanation. The officer photographed bruises on Doe's legs and around the site of injury. Although the officer did not believe her story, there was no further criminal investigation at that time.

On or about April 23, 2014, Doe contacted the Merced County Sheriff's Department to report a physical altercation that had occurred between her and Vrh the previous evening. The investigating deputy photographed bruises on her arms. While speaking with the deputy, Doe began to cry and disclosed that Vrh was responsible for the rectal injury she sustained in July 2013. The sheriff's department did not have jurisdiction over the prior incident, and thus referred the matter to the Turlock Police Department.

A detective spoke to Doe and other witnesses about the events of July 5, 2013. Vrh voluntarily participated in a non-custodial interview, during which he initially repeated the story about Doe having injured herself by falling on a toilet plunger. He purported to recall hearing "a bunch of screaming and stuff in the bathroom," and subsequently discovering that Doe, in a drunken stupor, had "missed the toilet and sat on the plunger that was right next to the toilet." Later in the interview, Vrh retracted those statements and claimed Doe was accidentally injured during consensual sexual activity.

The Stanislaus County District Attorney charged Vrh with sexual penetration by a foreign object (Pen. Code, § 289, subd. (a)(1); count 1) and mayhem (Pen. Code, § 203; count 2). Count 1 included enhancement allegations of personal infliction of great bodily injury by means of sexual penetration (Pen. Code, § 667.61, subd. (c)(5), (d)(6)) and

under circumstances involving domestic violence (*id.*, § 12022.7, subd. (e).) The case went to trial in October 2015.

The victim testified that she and Vrh had gotten into a fight in the early morning hours of July 5, 2013, at which time he threatened to subject her to extreme digital sexual penetration. He carried out the threat by forcing his entire hand into her rectum. The pain caused her to lose consciousness. She awoke to find herself in the shower and Vrh “running around saying, ‘Oh, God, oh God, what did I do?’ ” She agreed to go along with the story about a toilet plunger so that Vrh would not be arrested.

Doe’s testimony described prior acts of domestic violence, including when Vrh allegedly broke her nose during an argument on or about December 31, 2012. One of the victim’s friends, who had lived with her and Vrh during part of 2013, testified to having witnessed Vrh be abusive toward Doe on multiple occasions. She recalled seeing “[h]im dragging her hair, pulling her [by the] hair through the hallway of the house,” and alleged that he had once tied Doe to a bed and held a pillow over her face.

Over the objections of defense counsel, the trial court permitted two of Vrh’s ex-girlfriends to testify about uncharged acts of prior domestic violence. The first of those witnesses alleged that Vrh had kicked her in the head and punched her in the stomach when she was two months pregnant. He was also verbally abusive and sometimes spit on her during arguments. The second witness alleged similar forms of verbal abuse and recounted an incident during which Vrh had violently pulled her hair. She reported the hair-pulling incident to police, but later declined to press charges. The second witness’s testimony was partially corroborated by that of a Turlock police officer who had spoken to her on the night of the alleged incident.

Vrh testified on his own behalf. He accused Jane Doe of being a habitual liar and mentally unstable (Doe admitted on direct examination that she suffered from bipolar disorder). With regard to Doe’s July 2013 injury, he testified that they had engaged in consensual foreplay in a “pitch black” room and used lubricant to facilitate the activity.

He had intended to digitally penetrate her vagina, but accidentally inserted his hand into her rectum. Doe later concocted the plunger explanation and repeated it to others despite Vrh's warning that nobody would believe such a story. He denied committing prior acts of domestic violence against Doe, maintaining that she had broken her nose on New Year's Eve by tripping over footwear while intoxicated.

With regard to his ex-girlfriends, Vrh portrayed the first witness as a methamphetamine addict but nevertheless admitted to having punched her during a heated argument. She had repeatedly punched and kicked *him*, which caused him to reflexively strike her in the head. He claimed to have "barely bumped" her stomach with his foot while trying to defend himself. Vrh alleged that the second witness still held a grudge against him for having "sued her in court for false arrest," presumably in relation to the hair-pulling allegation. In his version of events, her "very long hair" accidentally "got caught in between" his hand and the steering wheel of his car during a verbal disagreement.

Vrh was found guilty as charged on count 1 and convicted of assault with intent to commit mayhem (Pen. Code, § 220, subd. (a)(1)) as a lesser included offense on count 2. The enhancement allegations were found to be true. The count 1 conviction carried a statutorily mandated sentence of 25 years to life in prison. (See Pen. Code, § 667.61, sub. (a).) The trial court imposed a stayed four-year prison term for count 2. The appeal is timely.

DISCUSSION

Applicable Law

"Character evidence, sometimes described as evidence of a propensity or disposition to engage in a type of conduct, is generally inadmissible to prove a person's conduct on a specified occasion." (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1159.) This principle is codified at Evidence Code section 1101 (all further statutory references are to the Evidence Code). An exception is found in sections 1108 and 1109, which

supersede section 1101 in cases involving sex crimes and domestic violence. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*).)

Section 1109 provides, in pertinent part: “[I]n 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.” By operation of section 352, even relevant evidence of prior domestic violence should be excluded if the “probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (§ 352.) Undue prejudice refers to “ ‘evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues.’ ” (*People v. Scheid* (1997) 16 Cal.4th 1, 19; accord, *People v. McCurdy* (2014) 59 Cal.4th 1063, 1095.)

Section 1109 was enacted in part “ ‘because of the typically repetitive nature of domestic violence crimes, and because of the acute difficulties of proof associated with frequently uncooperative victims’ ” (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333 (*Brown*).) The statute was designed “to make admissible a prior incident ‘similar in character to the charged domestic violence crime, and which was committed against the victim of the charged crime or another similarly situated person.’ ” (*People v. Johnson* (2010) 185 Cal.App.4th 520, 532 (*Johnson*).) The parties do not dispute that the charged and uncharged offenses in this case involved acts of domestic violence. (See § 1109, subd. (d)(3).)

Constitutional Claim

In the first of two related claims, Vrh contends that section 1109 infringes upon the constitutional guarantees of due process and equal protection of laws. The parties devote substantial portions of their briefing to the question of whether or not this claim is

forfeited by Vrh's failure to raise it below. We decline to resolve that debate. In the interest of judicial economy and to forestall unnecessary future claims of ineffective assistance of counsel, we elect to dispose of the issue on the merits. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6; *People v. Lewis* (1990) 50 Cal.3d 262, 282.)

As Vrh concedes, the case law holds that admission of evidence pursuant to section 1109 and its counterpart, section 1108, does not violate a defendant's rights to due process and equal protection. (*Falsetta, supra*, 21 Cal.4th at pp. 917-918; *People v. Brown* (2011) 192 Cal.App.4th 1222, 1233, fn. 14; *People v. Cabrera* (2007) 152 Cal.App.4th 695, 703-704; *People v. Price* (2004) 120 Cal.App.4th 224, 240; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1309-1313 (*Jennings*).) "The specific retention of the power to exclude evidence under section 352, found in both sections 1108 and 1109, provides 'a realistic safeguard that ensures that the presumption of innocence and other characteristics of due process are not weakened by an unfair use of evidence of past acts.'" (*Brown, supra*, 77 Cal.App.4th at p. 1334.) "In short, the constitutionality of section 1109 under the due process clauses of the federal and state constitutions has now been settled." (*Jennings, supra*, 81 Cal.App.4th at p. 1310.)

Abuse of Discretion Claim

Evidentiary rulings are reviewed for abuse of discretion. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1120.) A decision to admit certain evidence "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) In cases involving the balancing process under section 352, abuse of discretion is found when "the prejudicial effect of the evidence clearly outweighs its probative value." (*People v. Karis* (1988) 46 Cal.3d 612, 637; *People v. Brown* (1993) 17 Cal.App.4th 1389, 1396.)

In *Falsetta, supra*, the California Supreme Court explained how trial courts should evaluate propensity evidence under section 352. Although *Falsetta* involved prior sexual

misconduct considered under section 1108, the guidelines also apply to the admission of evidence under section 1109. (*People v. Disa* (2016) 1 Cal.App.5th 654, 671-673 (*Disa*); see *People v. James* (2010) 191 Cal.App.4th 478, 482, fn. 2.) “Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant’s other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.” (*Falsetta, supra*, (1999) 21 Cal.4th at p. 917.)

Vrh presents four arguments in support of his abuse of discretion claim: (1) “The uncharged incidents were dissimilar to the charged conduct”; (2) “The uncharged incidents did not result in the filing of charges, prosecution[,] or conviction”; (3) “The uncharged incidents were remote”; and (4) “The uncharged incidents risked the danger [of] confusing the issues.” These are all relevant considerations. However, as we explain, several countervailing factors support the trial court’s ruling.

It is true that the principal factor affecting the probative value of a prior bad act is its similarity to the charged offense. (*Johnson, supra*, 185 Cal.App.4th at p. 531; *People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274.) On the other hand, “[c]ourts are primarily concerned where the past bad act was ‘more inflammatory’ than the offense for which the defendant is on trial.” (*Johnson, supra*, 185 Cal.App.4th at p. 534, fn. 11.) Here, the charged offense involved heinous, unconscionable behavior. There are no acceptable forms of domestic violence, but, in terms of potential inflammatory impact, the evidence of prior misconduct paled in comparison to the crimes for which Vrh was prosecuted. Furthermore, the prior bad acts were substantially probative of Vrh’s

propensity to commit violence against a romantic partner. We agree with the trial court's ultimate conclusion that the challenged evidence was not unduly prejudicial.

Vrh's argument that he was never prosecuted or convicted of the prior bad acts is objectively weak. Under *Falsetta, supra*, the "burden on the defendant in defending against the uncharged offense" and "the degree of certainty of its commission" are factors that may weigh against admission of prior domestic violence evidence. (21 Cal.4th at p. 917.) Vrh admitted to punching one of his ex-girlfriends and acknowledged that the other woman's hair was pulled during an argument, albeit under disputed circumstances. Clearly, both of the alleged incidents occurred. The lack of corresponding convictions is inconsequential.

In terms of remoteness, Section 1109, subdivision (e) states that "[e]vidence of acts occurring more than 10 years before the charged offense is inadmissible ... unless the court determines that the admission of this evidence is in the interest of justice." The hair-pulling incident allegedly occurred on October 25, 2008, less than five years prior to the charged offenses. The punching of Vrh's other ex-girlfriend happened sometime in 2003, which raises a legitimate issue of remoteness.

The record does not provide the exact date of the 2003 incident, but we note Vrh's opening brief says it occurred "*nearly* ten years before the charged crimes." (Italics added.) Thus, we have no basis upon which to conclude the evidence fell outside of the permissible 10-year window. "Remote prior conduct is, at least theoretically, less probative of propensity than more recent misconduct. [Citation.] This is especially true if the defendant has led a substantially blameless life in the interim [citation], which was not true in this case." (*Johnson, supra*, 185 Cal.App.4th at p. 534, fn. omitted.) Vrh was alleged to have mistreated another girlfriend in October 2008, broken Doe's nose on or about December 31, 2012, and, according to the former roommate's testimony, abused Doe on multiple occasions during the approximate time period of February 2013 to

April 2013. While the remoteness of the punching incident weighed in favor of exclusion, temporal proximity was not a dispositive factor.

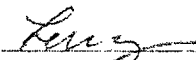
Vrh's final argument, i.e., the potential for juror confusion, is also weak. The testimony of his ex-girlfriends comprises approximately 24 pages of the reporter's transcript, including direct and cross-examination: 13 pages for the woman who was punched and 11 pages for the woman who made the hair-pulling allegation. The central focus of the prosecution's case was Vrh's relationship with Jane Doe and the subject events of July 2013.

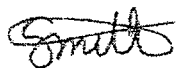
In summary, both sides presented valid arguments on the section 1109 issue. The trial court would have been justified in ruling either way, that is, in choosing to admit or exclude the evidence of prior domestic violence. We cannot say the potentially prejudicial impact of the challenged evidence clearly outweighed its probative value, nor can we conclude the decision to admit the evidence was "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377 [articulating the abuse of discretion standard].)

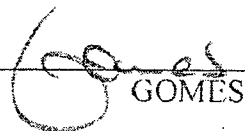
DISPOSITION

The judgment is affirmed.

WE CONCUR:


LEVY, Acting P.J.


SMITH, J.


GOMES, J.

APPENDIX B

DENIAL OF REVIEW BY CALIFORNIA SUPREME COURT

SUPREME COURT
FILED

JAN 31 2018

Jorge Navarrete Clerk

Court of Appeal, Fifth Appellate District - No. F072983

S246194

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

AARON ANTHONY VRH, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

**Additional material
from this filing is
available in the
Clerk's Office.**