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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JESUS OCTAVIO SOTO, Defendant and Appellant.	B268716 (Los Angeles County Super. Ct. No. KA108667)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mike Camacho, Judge. Affirmed.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jesus Octavio Soto (defendant) appeals from the judgment entered after he was convicted of six acts of domestic violence. He contends that the trial court erred in admitting uncharged prior acts as foundational to expert testimony, by admitting certain expert testimony, and by imposing consecutive sentences as to four of the six counts. We find no merit to defendant's contentions, and thus affirm the judgment.

BACKGROUND

Defendant was charged with the following felonies: counts 1 and 4, injuring a cohabitant, spouse or child's parent, Sandra Tapia (Tapia), in violation of Penal Code section 273.5, subdivision (a);[1] counts 2 and 5, assault by means likely to produce great bodily injury, in violation of section 245, subdivision (a)(4); count 3, forcible oral copulation in violation of section 288a, subdivision (c)(2)(A); and count 6, criminal threats in violation of section 422, subdivision (a). As to counts 1, 2, 4 and 5, it was specially alleged that defendant personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (e), and as to count 6, it was alleged that defendant personally used a knife within the meaning of section 12022, subdivision (b)(1).

A jury convicted defendant as charged, and found true the special allegations. On November 30, 2015, the trial court sentenced defendant to a total prison term of 19 years, comprised of the high term of four years as to count 1, plus five years for inflicting great bodily injury, and consecutive one-third the middle term for each of the remaining counts and enhancements.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Defendant filed a timely notice of appeal from the judgment.

Tapia's testimony

Tapia's on and off relationship with defendant lasted 26 years until January 1, 2015. The couple had a child together, named Alexa. In the beginning the relationship was good and defendant was nice. Tapia fell in love with defendant immediately. A few years into the relationship, however, defendant became verbally abusive. He argued about little things and told Tapia she was fat, no good at whatever she did, and that her family all hated her. He would harass her at work until she was fired, which placed her in financial difficulty, dependent upon defendant for rent and other bills.

When Alexa was between 7 and 13 years old, defendant would occasionally throw Tapia out, so she and Alexa would be homeless for a time. Tapia was caught stealing four times. Once while she and defendant were in a department store, and knowing about her theft arrests, defendant told her to steal two shirts for him. He then said he was going to the restroom, but went instead to the loss prevention department and arranged for her to be arrested when she left the store.

Defendant became physically abusive about three years into the relationship, shortly before his sister's wedding. Tapia was babysitting defendant's then four- or five-year-old son while defendant was at his job with the railroad, when the boy became ill with a fever. Defendant's mother came to pick up the boy for the rehearsal party, but Tapia had put him to bed and did not let him go due to his illness. Later the boy felt better, so Tapia took him with her to another family function, but had been unable to call defendant at work to tell him. Upon learning this defendant became very upset. He screamed at Tapia, hit her in the face,

ripped off her shirt and bra, and pulled her to the ground, within view of his son, who said, "Stop, Dad, stop, please stop."

After that physical abuse became a consistent part of their relationship. At Christmastime a year later, when social workers were coming to the house for his son, defendant became angry over the mess in the living room, where Tapia was working on craft arrangements to sell at parties. In addition to destroying everything she was working on, defendant hit her and choked her until she could not breathe and was nearly unconscious. Her face was bruised and her eye "popped out."

Tapia recalled several incidents between 2008 and 2014, when police were called to the home. One morning in 2008, defendant yanked Tapia out of the car, dragged her by the hair in a rage, and slammed her against the house, saying that she had lied to him about something she did not understand. When Tapia's older daughter Tiffany arrived and found defendant choking Tapia, he stopped. Alexa was home at the time.

On another occasion in 2008, defendant locked Tapia out of the house without her belongings, and would not allow her back in to get anything for herself or for Alexa, who was nine or ten at the time. Instead, within view of Alexa, defendant came outside, threw Tapia down, saying he was going to run her over, while squeezing her so tight that her arms were bruised.

In April 2013, with defendant's consent, Tapia invited a friend to stay in their extra room. The next day defendant became very upset and changed his mind. When Tapia would not ask her friend to leave, defendant became angry and yelled, screamed, hit her a few times, and suffocated her with a pillow until everything went dark. When Tapia's friend called the police, defendant stopped the attack and drove away. Tapia reported to the police that defendant had punched her in the face two or three days before that, and on other occasions had kicked

her, punched her, pulled her hair, and thrown things at her, though she had not reported any of those incidents. The police took photographs of her bruised eye and neck.

The charged offenses were committed over the four-day period of December 29, 30, and 31, 2014, and January 1, 2015. Tapia had spent Christmas with her daughters in San Diego, where she lost her car keys. She then had her car towed as far as she could afford and called her friend Ron Ruiz (Ruiz) to get her and bring her home. When they arrived, defendant was initially nice, but then told the visitors to leave. When he and Tapia were alone, he yelled at her, accusing her of having been somewhere else, and of other things she did not understand. Defendant threw Tapia to the ground, hit and kicked her, told her he hated her, that she was a bitch, and that he was going to kill her. The abuse continued all night until about 4:00 a.m., when she fell asleep on the couch while he was on the nearby bed in their studio apartment. Although Tapia was awake much of the time that defendant slept, she did not leave out of fear that he would come after her and hurt her. She was also afraid to tell anyone, because in the past he had threatened to kill her and hurt her grandchildren.

Tapia woke up on December 30 to defendant's yelling. He accused her of not being at her daughter's house and other things. He hit her in the stomach, threw her down, kicked her "like a football" all over her stomach and back. In the afternoon, defendant obtained a knife from his desk, approached her, held her by the throat, and told her he was going to slit her throat. She begged and pleaded with him not hurt her. Enraged, defendant said "I'm going to kill you, bitch. I hate your guts. I never want to see you again. If I can't have you, nobody else is going to have you." After Tapia begged him, said she loved him,

and apologized for everything, he put the knife away but continued to yell and argue.

That day or the next, December 31, Tapia was not sure, defendant said "I want you to suck [my dick]," as he pulled down his pants. When Tapia asked him please not to do this, he replied, "But I want you to." Defendant then yanked her by the hair, pushed her face toward his penis forcefully with his hand on the back of her head, and forced her to place his penis into her mouth. After a moment, he threw her down and said, "Forget it," and, "You can't suck it good anyway."

On December 31, Raymond, who lived in a van outside the house, came to dinner and stayed for about 45 minutes.[2] Tapia did not tell Raymond about the abuse or ask him to call the police because she thought the situation was apparent to him. After Raymond left, defendant continued yelling at Tapia, and hit her several more times. Tapia and defendant went to sleep just before midnight. The next morning, January 1, defendant continued arguing with her as well as hitting and kicking her. Tapia felt she finally had to leave, and took her opportunity when someone came to the door and defendant told her to go clean the blood off her face. Tapia walked down the street from the house, called 911, claiming to be someone else. She also called Ruiz. The police arrived and then took her to the hospital. She had cuts on her face, a fractured nose, bruises on her body, back, and legs, but mostly in the abdomen. She had difficulty breathing and was exhausted. She had not eaten much over three days, and had been allowed to shower just once. Initially Tapia was too frightened to tell the police everything that had happened.

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[2] Tapia was not certain which day Raymond came to dinner. Raymond testified that he ate dinner with Tapia and defendant almost every night.

Daughters' testimony

Tapia's daughters Alexa, who was still a minor at the time of trial, and Tiffany both testified. Tiffany lived with her mother and defendant from when she was about six or seven years old, until she moved to San Diego four years earlier. Tiffany witnessed many years of defendant's violence toward Tapia during which he would strangle, kick, hit, and verbally abuse her. Defendant had issues with trust and was controlling, which he demonstrated by accusing Tapia of being unfaithful, using him, stealing from him, and lying about his abuse, as well as by putting her down and calling her names such as bitch and whore. At times after abusing Tapia, defendant would downplay the situation, saying that she had provoked him or had made him do what he did. Once, Tapia was badly injured after her purse became caught on the seat belt as she was getting out of the car, and defendant drove off, dragging her under the car. Tiffany had picked her up and carried her home bleeding. On many occasions, Tiffany pleaded with defendant to stop his behavior, because she was afraid her mother would end up dead one day. Defendant's usual response was that it was Tapia's fault, and she had provoked him; it was never his fault. Tapia left defendant and went back to him more than 10 times. Defendant would say he loved her, and would try to convince her that everything would be different.

Tiffany testified about an incident in 2008. She arrived at Tapia's home to drop off her infant son. She heard Tapia screaming, and then saw her unconscious, with defendant on top of her, strangling her with his hands around her neck. Tiffany's boyfriend, Jesus Quintana, came in from the car, got defendant off Tapia, and one of them called the police. When Tapia regained consciousness, she said defendant had hit her, she fell and hit her head on the table, causing a large lump to form.

Alexa testified that while living with her parents she witnessed defendant become angry with Tapia, yell profanity, and hit her about once every month, beginning when Alexa was about four years old. Defendant would hit Tapia with objects, whatever was near, including on one occasion, a bat. Alexa was present more than once when the police came to the home. The first time she could remember the police coming was the 2008 incident during which Tiffany and Quintana were present. Alexa had been in the bathroom when she heard Tapia screaming. She went into the living room where she saw her father dragging her mother by the hair into the house. Defendant punched Tapia in the face, causing her to fall over the coffee table and pass out. Defendant then got on top of Tapia and choked her. He "backhanded" Alexa as she tried to intervene, causing Alexa to fall backward and suffer a bruise on her cheek. There were other, similar occurrences in 2008, sometimes worse. Alexa had seen Tapia bleeding from a cut lip, or with a swollen eye, bruises, and scrapes.

Expert testimony

Licensed clinical social worker Gail Pincus, expert in the field of domestic violence, testified regarding the dynamics of intimate partner battering. She cited studies which have shown a relatively predictable pattern of reactions by victims (usually female) to continuous coercive control in an abusive relationship, and the tactics of power and control that abusers typically use in such a relationship. The abuse usually begins with criticizing the victim: calling her such things as crazy, hysterical, too sensitive, and hormonal; or telling her that she is overreacting or hormonal to explain why her reactions are inappropriate. Another tactic is emotional abuse, telling the victim she is fat, stupid, ugly, or incompetent, and such things as: "'If you loved me, if you cared about me, if you wanted this relationship to work, then you would

be whatever. You would watch your weight. You wouldn't say such stupid things. You [would] take better care of yourself,' whatever." Isolation is another tactic, whether geographic, isolation from the victim's community, church, language, friends, job, or any personal support system by destroying relationships with friends and family. Economic control is another tactic: making the financial decisions, controlling the money, removing credit cards, and limiting access to money, causing the victim to have to beg for money. This creates dependency, and causes the victim to believe she cannot make it without the abuser.

Typically, the abuser believes that controlling the victim will remove tension in the relationship, but when it does not, he begins to believe that she has failed him, that she does not love him. The victim then becomes convinced that she is not trying hard enough and is not good enough. The abuser falls into a pattern of minimizing his abuse, blaming the victim, and denying having ever touched her. He might tell her, for example, that she needs a psychiatrist or medication. He threatens consequences if she were to leave, make a police report, try to get custody or restraining order, or go to a shelter, and might brandish a weapon if he has one.

A male abuser typically bases his sense of masculinity on how much control he has over the woman in his relationship. If he feels disrespected, dishonored, disobeyed, humiliated, or embarrassed, she becomes a hated object, and he will call her names such as whore, slut, bitch, or cunt. This leads to violent thoughts, and then violent actions, usually beginning with a push, shove, hair pulling, spitting, open-hand slaps, dragging the victim by the hair, and slamming her against walls. These behaviors are generally accompanied by screaming and yelling due to the abuser's adrenalin rush and racing thoughts. The next level of violence is closed fist, beating up, multiple kicks, blows,

strangulation, and other life-threatening violence, threats with knives or guns, rape, forced sexual contact, and ultimately sometimes murder. Each incident ends when the adrenalin has worked its way out of the abuser's system. Fearing that he will go to jail, that the victim will leave, or that people will discover his character, the abuser might promise never to do it again, to change, stop drinking, or whatever hooks her back in.

The absolute symbol of loss of control by the abuser is incarceration. A study of 400 jailhouse phone calls revealed that abusers believe that it is the victim's responsibility to make the problem go away. The abuser will telephone, write letters, or send messages, anything to convince her to bail him out, say that she lied, recant in court, or whatever is necessary. He usually professes love, speaks of good times and what will happen to him, and offers her an alternate version of the incident, turning it around so the victim is the one in the wrong.

In sum, the victim enters the relationship loving and trusting the man; the abuser begins by criticizing her; and she doubts herself and backs down little by little. The abuser then isolates her, exercises financial control, and then uses coercive techniques such as threats and intimidation. The victim stays with him, convinced that what he has done is minimal, and it was her hysterical overreactive crazy self that made this a big issue. She constantly readjusts her own belief system, memories, perceptions, so that she believes she is fat, stupid, ugly, crazy, hysterical, incompetent, or whatever. Her ability to remember the abuse is affected, particularly when the abuse lasted for a very long period of time. PTSD interferes with the victim's ability to concentrate, she becomes depressed, avoiding anything that reminds her of the violence, develops a sense of helplessness and hopelessness. The abuser will use the victim's criminal record, addiction, prior rape, or any perceived flaw to convince

her that she is untrustworthy, that no one will believe her. When family and friends become worn out from trying to help as the victim continues to return to her abuser, she will lie about still being in the relationship.

Pincus had no knowledge about the facts of this case, had never met or tested defendant or the victim, and did not know what factors or behaviors, if any, applied to them. Given a hypothetical question mirroring the facts of this case, Pincus gave her opinion that the victim was typical of someone in this cycle of domestic violence.

DISCUSSION

I. Uncharged acts of domestic violence

A. Defendant's contention

Defendant contends: "The trial court abused its discretion in allowing the admission of unlimited and remote prior acts of domestic abuse to demonstrate propensity and for 'foundational' purposes in violation of appellant's rights to due process and a fair trial within the meaning of the 14th Amendment."[3] In support of this contention, defendant essentially argues that the trial court failed to properly weigh the probative value of the evidence against its prejudicial effect, pursuant to Evidence Code section 352, and failed to give a limiting instruction precluding the jury from considering as propensity evidence any act or behavior which occurred more than 10 years earlier.

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[3] The prior acts challenged by defendant are uncharged acts of domestic violence before 2008. Defendant does not challenge the admission of evidence relating to the more recent uncharged acts of domestic violence which were committed between 2008 and 2014.

B. Background

In a motion in limine, the prosecutor sought leave to present evidence of defendant's domestic abuse over the course of his 26-year relationship with Tapia, including generalized evidence of defendant's abusive behavior over the years, as well as four specific, relatively recent incidents. The four recent incidents, which occurred between 2008 and 2014, were offered pursuant to Evidence Code section 1109,[4] but the older occurrences were offered as foundation for expert testimony regarding intimate partner battering under Evidence Code section 1107[5] (formerly, battered women's syndrome).

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[4] Evidence Code section 1109, subdivision (a), provides in relevant 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." Subdivision (e) provides: "Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice."

[5] Evidence Code section 1107 provides: "(a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding intimate partner battering and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge. [¶] (b) The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness."

In hearings on the prosecution's motion, defense counsel's objection to evidence of abuse which occurred more than 20 years earlier was made solely on the grounds that it would be remote and thus inflammatory under Evidence Code section 1109, and that the prosecution had not described the evidence in sufficient detail to give notice of the older acts the prosecution intended to present. The trial court ruled that the evidence of abuse that occurred more than 20 years earlier would not be admitted under Evidence Code section 1109, but under section 1107, as foundation for expert testimony.

C. Forfeiture

Respondent contends that defendant has forfeited his claims. We agree. Under Evidence Code section 352, the trial court may exclude evidence in its discretion if its probative value is substantially outweighed by its potential to cause undue prejudice. (*People v. Valdez* (2012) 55 Cal.4th 82, 138.) Defendant did not ask the trial court to weigh the probative value of the older incidents as propensity evidence against potential prejudice, nor did he ask the trial court to weigh the probative value of the older incidents to support the expert's opinion. A defendant may not complain on appeal that the trial court abused its discretion by "failing to conduct an analysis it was not asked to conduct." (*People v. Partida* (2005) 37 Cal.4th 428, 435 (*Partida*).)

As respondent points out with regard to the absence of a limiting instruction, defendant did not request one and the trial court had no sua sponte duty to give one. "When evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly." (Evid. Code, § 355, italics added.) The rule is no different in cases of past

domestic violence. (See *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1316.)

Defendant offers several reasons to support his argument that there is no forfeiture. First, that he preserved the issue with his in limine objection to the older acts of domestic violence on the ground that they were too remote for use under Evidence Code section 1109, even though the court ruled that the older misconduct was admitted under section 1107, not section 1109. As we construe defendant's reasoning, his objection that the evidence was remote as propensity evidence was sufficient because the absence of a limiting instruction allowed the jury to consider it for all purposes.

Defendant also argues that he "did not raise a discrete claim of instructional error"; and "[t]here does not appear, therefore, to be any waiver or forfeiture issue regarding the instructions." On the contrary, defendant did, in fact, make a discreet claim of instructional error under subheading I.F of his opening brief, "Failure To Give A Limiting Instruction Exacerbated The Error In Admitting Unlimited Evidence Of Domestic Violence." Regardless, we reject defendant's circular argument that his failure to make appropriate objections was excused by his additional failure to request a limiting instruction that the trial court was not obligated to give.

Defendant also relies on language in the trial court's in limine ruling in response to his objections as to why there was not forfeiture. Defendant notes that the court admitted the older misconduct for foundational purposes, not propensity, and in doing so, stated that it would permit a general inquiry "as to when her relationship with [defendant] turned sour . . . , but we're not going to get into specific acts." Tapia thereafter testified about two specific occasions, one of which occurred four years into the relationship (the wedding incident), and one which

occurred one year later (the Christmastime incident). Defendant argues there is no forfeiture because his in limine objections and the trial court's ruling preserved the issues raised on appeal.

We find that defendant was required to object to specific incidents such as the wedding and Christmastime incidents at the time of Tapia's testimony, if he thought they violated the trial court's ruling. An objection to evidence during a motion in limine is sufficient only where it was "'precisely directed at a well-defined issue. . . . Once the trial court rule[s] on it, no further objections or motions [are] necessary to preserve the point for appeal purposes.'" "[A] motion *in limine* to exclude evidence is a sufficient manifestation of objection to protect the record on appeal when it satisfies the basic requirements of Evidence Code section 353, i.e.: (1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context. When such a motion is made and denied, the issue is preserved for appeal. On the other hand, if a motion *in limine* does not satisfy each of these requirements, a proper objection satisfying Evidence Code section 353 must be made to preserve the evidentiary issue for appeal." (*People v. Morris* (1991) 53 Cal.3d 152, 188-190, overruled on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

Here, neither the ruling, the prosecutor's in limine motion to admit the evidence, the ensuing discussions, nor defendant's objections expressly described the parameters of a "general inquiry," and none specifically mentioned the wedding and Christmastime incidents. We conclude that defendant's in limine objections were insufficient to preserve a challenge to the wedding and Christmastime incidents for appeal, as an objection

satisfying Evidence Code section 353 was required at the time of the testimony.

Defendant disagrees, and contends that "defense counsel clearly sought to renew his objection by asking for a sidebar," which the trial court denied. This request came during Tapia's testimony regarding the Christmastime incident. However, Tapia had already testified about the wedding incident, with no request for a sidebar conference. Defendant's only objections to the testimony concerning the wedding incident were made on the grounds of "narrative" and "leading." An issue for appeal is not preserved unless the defendant's objection was timely and specific, and on the same ground asserted on appeal. (*Partida, supra*, 37 Cal.4th at pp. 433-434; Evid. Code, § 353, subd. (a).) Thus, objections on the grounds of "narrative" and "leading" did not preserve defendant's appellate challenge to the evidence.

With regard to the Christmastime incident, the request for a sidebar conference was not made until Tapia had already testified, without objection, that this was the second instance of abusive behavior that she remembered clearly, that it occurred about a year after the first incident, and that it began when defendant became angry about Tapia's craft projects. Defendant destroyed the projects, choked Tapia, hit her, bruised her face, and made her eye pop out. It was not until Tapia began to testify, "His family came over, his mom came over," that defense counsel said, "Your Honor, at this juncture I'm going to ask for a sidebar." Defense counsel did not make an "objection," or state a ground.

Defendant suggests that requesting a sidebar conference was sufficient to inform the court that he was objecting specifically to Tapia's description of the wedding and Christmastime incidents. Given that Tapia had already described both incidents without objection, we do not agree that

simply asking for a sidebar when she began to testify about defendant's family, informed the court of any specific objection.

Defendant contends that the language of court's ruling on his request for a sidebar, "I'm going to deny your request for a sidebar but just remind counsel with respect to the court's previous rulings on the subject matter," showed that the court understood his objection as relating to the wedding and Christmastime incidents. We do not discern from defendant's request for a sidebar, that the court understood any specific objection beyond narrative. Indeed, after the court's ruling, Tapia immediately went on to testify, without objection, about details such as when defendant choked her she felt like she was "going under . . . like everything was closing up on" her, and that she could not breath or get oxygen. It thus appears more likely that neither the court, the prosecutor, nor even defense counsel construed the request as a specific objection to all testimony regarding the wedding and Christmastime incidents.

D. Assistance of counsel

Defendant asks that we reach the merits of his contentions to avoid a later claim of ineffective assistance of counsel. The Sixth Amendment right to assistance of counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-674; see also Cal. Const., art. I, § 15.) To prevail on such a claim, defendant must overcome the presumption that counsel acted upon sound tactical reasons, and must affirmatively prove prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, at pp. 687, 694.)

Assuming counsel erred, defendant has not met his burden to show prejudice. He merely argues that it was impossible for him to defend against the older incidents due to the passage of

time and lack of specificity; and he suggests that the evidence was more prejudicial than probative, as it "portrayed [defendant] as a brute who beat his girlfriend." Defendant's arguments beg the question whether there was a reasonable probability of a different result had counsel requested a limiting instruction, had requested the court to weigh the probative value of the evidence of the pre-2008 misconduct against potential prejudice, and had specifically objected to the wedding and Christmastime incidents.

Had the trial court instructed the jury to consider for propensity purposes only those four incidents which occurred between 2008 and 2014, we discern no reasonable probability that the jury would not see defendant as a "brute who beat his girlfriend." In 2008, defendant yanked Tapia from the car in a rage, pulled her by the hair into the house, punched her in the face, causing her to fall, hit her head, and pass out; he then got on top of her, strangled her, and when his then eight-year-old daughter tried to stop him, he hit the child hard enough to cause her to fall. Defendant stopped his attack only when adult Tiffany and her boyfriend arrived and intervened. From 2008 through 2014, Alexa witnessed defendant hitting and yelling profanities at her mother approximately every month. At times, she saw him hit Tapia with various objects, including a bat on one occasion.

Had the wedding and Christmastime incidents been described in general terms that were sufficient to support the expert's opinion, it is unlikely the trial court would have excluded the evidence as remote or more prejudicial than probative. Uncharged misconduct which occurred years ago is neither remote nor unduly prejudicial when perpetrated as part of an ongoing pattern of similar behavior against the same victim. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 405; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1029.) As the evidence was not

admitted under Evidence Code section 1109, the 10-year limit in subdivision (e) of that section did not apply.

We therefore decline to consider defendant's claim of ineffective assistance of counsel, and further decline to reach the merits of defendant's first assignment of error. If we had reached the merits, defendant would still be required to demonstrate prejudice by showing a reasonable probability that he would have reached a more favorable result in the absence of the alleged evidentiary errors, and he has failed to do so. (See *People v. Hernandez* (2011) 51 Cal.4th 733, 746; *People v. Watson* (1956) 46 Cal.2d 818, 836; Cal. Const., art. VI, § 13.) Further, as defendant has demonstrated neither error nor prejudice, and did not assert a constitutional violation below, we do not reach his claim that the alleged errors resulted in a denial of due process and a fair trial. (See *Partida, supra*, 37 Cal.4th at p. 435.)

II. Expert witness testimony

Defendant contends that the trial court abused its discretion by allowing the expert witness to testify to matters beyond the scope of its ruling and beyond what is permitted under Evidence Code section 1107.

Prior to Pincus's testimony, defense counsel objected under Evidence Code section 352 to the admission of *all* expert testimony on intimate partner battering. Counsel argued that because the victim did not recant or minimize the violence, and because the victim was, on the contrary, grossly exaggerating, there was no need for such an expert, and to allow such evidence would be unduly prejudicial under Evidence Code section 352.

The trial court overruled the objection, explaining that it would be "probative to a certain point to help explain the behaviors that are attributed to cycles of violence and victims of abuse that, again, despite legitimate abuse claims, they either do not report or, if they do report, perhaps they minimize the

conduct yet continue to stay within that abusive relationship. That certainly is consistent with the evidence that we have in our case; so it is relevant. I think the jury is entitled to understand the psychology behind that type of behavior."

On appeal, defendant does not contend that it was error to admit expert testimony, or that the trial court should have excluded such testimony. Instead, defendant complains that the expert exceeded the scope of the trial court's ruling by focusing on the behaviors of typical abusers, rather than the behaviors of the victim. He argues that the expert's testimony included "matters that had nothing to do with the behaviors and actions of the complaining witness, as contemplated by the trial court, but instead went straight to evidence related to propensity of the defendant to commit such acts. The testimony allowed the jury to convict [defendant] on the basis of character evidence that was not even necessarily related to his own character, and deprived him of his rights to due process and a fair trial."

We agree with respondent that to the extent defendant now claims that portions of the expert testimony should have been excluded as propensity or character evidence, his failure to object on that ground forfeits the issue. (See *People v. Alexander* (2010) 49 Cal.4th 846, 912.)

Further, we reject defendant's contention that the expert exceeded the scope of the trial court's ruling by describing the behaviors of typical abusers. Defendant's argument suggests that the trial court limited the scope of the testimony to the behavior and mindset of the typical victim, and thus prohibited testimony regarding the typical abuser. We read no such limitation in the court's ruling. The court ruled that the testimony could "help explain the behaviors that are attributed to cycles of violence *and* victims of abuse." (Italics added.) Thus, the court did not restrict the testimony solely to victim behavior.

Moreover, defendant fails to explain how a cycle of violence might be described without an explanation of the part played by the typical abuser. It cannot be, as "limiting the testimony to the victim's state of mind without some explanation of the types of behaviors that trigger [the syndrome] could easily defeat the purpose for which the expert is called, which is to explain the victim's actions in light of the abusive conduct." (*People v. Gadlin* (2000) 78 Cal.App.4th 587, 595.)

Nor do we read Evidence Code section 1107 so narrowly. The only limitations which appear in section 1107 are that the testimony may not be admitted "against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge," and the foundation must establish "its relevancy and the proper qualifications of the expert witness." (Evid. Code, § 1107, subds. (a) & (b).) Defendant did not object to Pincus's qualifications, and did not argue that the testimony was intended to prove that the abuse occurred. Indeed, in making his Evidence Code section 352 objection, defense counsel acknowledged that the evidence was not offered to prove the charges against defendant, as he stated: "I understand full well [Pincus is] not coming in here to render an opinion or to state that, based on the facts of this case, it's more probable that it happened than not." Further, counsel stated that the testimony would have "no probative value to the charges and [defendant's] basis."

Defendant's argument below instead centered upon defense counsel's suggestion that the testimony would not be probative of credibility, because Tapia did not recant or minimize the degree of violence, but instead grossly exaggerated it. Evidence Code section 1107 contains no language restricting its use to explaining a victim's recantation or minimization of the violence. Moreover, "the admission of expert testimony does not depend on

fitting it under section 1107. . . [U]nder subdivision (a) of section 801, expert testimony is admissible on any subject 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" (*People v. Brown* (2004) 33 Cal.4th 892, 905 (*Brown*).) Thus, expert testimony regarding intimate partner battering is admissible under Evidence Code sections 1107 and 801 whenever the victim's behavior, the trial evidence, or defense argument makes it relevant to the victim's credibility or any other contested issue in the case. (*People v. Gadlin*, *supra*, 78 Cal.App.4th at p. 592; see *Brown*, at pp. 899-902.) And such expert testimony has been widely admitted in anticipation that some jurors will disbelieve the victim due to commonly held misconceptions about victims of violence who fail to leave or report their abusers. (See, e.g., *People v. Kovacich* (2011) 201 Cal.App.4th 863, 898-899.)

Defendant argues that the testimony was not relevant to bolster Tapia's credibility because in closing argument, defense counsel attacked her credibility on the ground that she had six theft convictions, and had admitted using methamphetamine in the past, and not on grounds usually raised when there is expert testimony regarding intimate partner battering. Defendant cites no authority, and we have found none, for the suggestion that expert testimony regarding intimate partner battering is admissible or relevant only where the defendant has specifically raised typical victim behavior as a reason to doubt her credibility.

In any event, we review the trial court's determination under Evidence Code section 352 as of the time of the ruling, not as of closing argument. (See *People v. Robertson* (2012) 208 Cal.App.4th 965, 991.) Prior to Pincus's testimony, defense counsel made it clear that he would rely on typical victim behavior by arguing that Tapia had grossly exaggerated the violence. The prosecutor countered that Tapia's prior behavior of

repeatedly returning to her abuser was in fact a form of minimizing the past abuse, and could thus refute the assertion that she was exaggerating the recent abuse. We find the prosecutor's argument persuasive, and find no abuse of discretion in the court's determination that the testimony would be probative and helpful to explain such behavior.

Defendant contends that the expert's descriptions of typical abuser behavior and mindset were inflammatory, because it was implied that they described defendant himself. In particular, he contends that the trial court should have excluded the following testimony by Pincus: "If the abuser feels that he has been dishonored, disobeyed, disrespected, humiliated, or embarrassed by this horrible woman, then he gives himself permission to crash through this mythical membrane that we all have that separates out violent thoughts from violent actions." As defendant did not make a timely or specific objection to this testimony on the ground now advanced, he has not preserved the issue for review. (See Evid. Code, § 353; *People v. Morris*, *supra*, 53 Cal.3d at pp. 188-190.)

Regardless, Pincus did not suggest she was describing defendant. A licensed clinical social worker specializing in the area of domestic violence, Pincus testified that she had worked with about 10,000 victims and about 5,000 batterers over the years, was familiar with a study that included interviews of 7,000 battered women, and based her testimony on her experience and such research. She testified that she knew nothing about the facts of this particular case, had never met the victim or defendant, had not done any psychological testing of either of them, and had not read any reports relating to this case. Pincus testified that she did not know what, if any, factors or behaviors applied in this case, and did not know what the charges were. She made it clear that she was not rendering an opinion about

whether defendant committed the alleged acts or whether they occurred.

Moreover, any such implication was also dispelled by the trial court's instruction with CALCRIM No. 850:

> "Now, you have heard testimony from Gail [Pincus] regarding the effect of intimate partner battering. Gail [Pincus's] testimony about intimate partner battering is not evidence that the defendant committed any of the crimes charged against him. You may consider this evidence only in deciding whether or not [Tapia's] conduct was not inconsistent with the conduct of someone who has been abused, and in evaluating the believability of her testimony."

Defendant contends that the testimony was so prejudicial and inflammatory, that there is no reason to assume that the jury followed its instruction. To demonstrate the prejudicial character of the testimony, defendant quotes an appellate court in another case in which Pincus gave expert testimony, *People v. Gomez* (1999) 72 Cal.App.4th 405, disapproved in *Brown*, *supra*, 33 Cal.4th at p. 908.[6] The *Gomez* court found the testimony inflammatory and prejudicial because it was probative of an issue that the court found irrelevant; the court thus concluded that the error in admitting irrelevant evidence was not harmless. (*Gomez*, *supra*, at pp. 418-419.) Here, expert testimony about intimate partner battering was relevant, and we have concluded that the trial court did not abuse its discretion in admitting it. There is thus no reason to believe that the jurors disregarded their

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6 In *Brown*, the California Supreme Court held that the *Gomez* court erred in holding that expert testimony about the behavior of domestic violence victims was irrelevant when only one incident of abuse had occurred. (*Brown*, *supra*, 33 Cal.4th at p. 897.)

instructions or Pincus's disclaimer. "It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions. [Citation.]" (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.)

III. Consecutive terms

Defendant contends that the trial court was required to apply section 654 by staying the sentences as to counts 2, 4, 5, and 6.

In general, section 654 precludes multiple punishments for a single physical act that violates different provisions of law, although "what is a single physical act might not always be easy to ascertain." (*People v. Jones* (2012) 54 Cal.4th 350, 358.) In some cases, it may be appropriate to apply the "intent and objective" test. (*Id.* at pp. 359-360.) Under that test, "[w]hether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on other grounds by *People v. Correa* (2012) 54 Cal.4th 331, 334, 336.)

However, "where a course of conduct is divisible in time it may give rise to multiple punishment even if the acts are directive to one objective. [Citation.]" (*People v. Louie* (2012) 203 Cal.App.4th 388, 399, citing *People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11.) "If the separation in time afforded defendants an opportunity to reflect and to renew their intent before committing the next crime, a new and separate crime is committed. [Citation.]" (*Louie*, at p. 399.) "On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for the independent

violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct. [Citations.]" (*People v. Perez* (1979) 23 Cal.3d 545, 551.)

As the trial court's ruling is presumed correct, it is defendant's burden to demonstrate error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Whether a course of criminal conduct is divisible presents a factual issue for the trial court, and we will uphold its ruling if supported by substantial evidence. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.)

Defendant attempts to apply the "intent and objective" test. (See *People v. Jones*, *supra*, 54 Cal.4th at pp. 359-360.) Defendant's argument appears to be that criminal acts are necessarily a single course of conduct when they are committed on the same day or same period of several days, and they are directed against a single victim.

First, defendant asserts that there was no direction from instructions or argument about which of defendant's acts related to which charge, and that there is no way to determine which specific acts the jury relied on to reach verdicts on counts 1, 2, 4, and 5, other than to assume the dates on which they were committed. Defendant therefore assumes that counts 1 and 2 were committed on December 30, and counts 3, 4, 5, and 6 were committed on December 31. Second, defendant contends that all the crimes were committed in a continuous course of conduct because defendant acted in a never-ending rage, and that he harbored a single intent and objective: to harm Tapia.

Defendant then concludes that section 654 applies to count 2 because it was committed on December 30 with the same criminal objective and on the same day as count 1; and he reasons that section 654 applies to counts 4, 5 and 6 because those offenses were part of the same indivisible course of conduct

that took place on December 31 with the same criminal objective and on the same day as count 3.

We reject any suggestion that all assaultive acts that occur in a single day necessarily amount to a single course of conduct. Sometimes, even simultaneous physical acts can be separate for purposes of section 654. (*People v. Jones*, *supra*, 54 Cal.4th at p. 358.)

Moreover, defendant's assumed timeline is incorrect. Contrary to defendant's assertion that the prosecutor provided no direction, she in fact elected specific dates in her closing argument, and related them to the acts of assault and injury to a cohabitant alleged in the information, as follows: count 1, injuring a cohabitant on December 29; count 2, assault by means likely to produce great bodily injury on December 30; count 4, injuring a cohabitant on December 31; and count 5, assault by means likely to produce great bodily injury on January 1. Further, Tapia testified that the forcible oral copulation (count 3) occurred on December 30 or 31 (she was unsure); and that the criminal threats with the knife (count 6) occurred on December 30. Thus, each instance of assaultive behavior other than the forcible oral copulation and the criminal threat occurred on a separate day from each other instance.

We also reject defendant's assertion that harming Tapia was the single intent or objective for all his behavior over the nearly four-day period. An intent or objective to inflict harm on Tapia could apply to all of defendant's assaultive behavior over a 20-year period. It is simply too amorphous and broad to determine if the acts are indivisible. (See *People v. Perez*, *supra*, 23 Cal.3d at p. 552 ["sexual gratification" too amorphous and broad].) "To accept such a broad, overriding intent and objective to preclude punishment for otherwise clearly separate offenses would violate the statute's purpose to insure that a defendant's

punishment will be commensurate with his culpability. [Citation.] It would reward the defendant who has the greater criminal ambition with a lesser punishment. [Citation.]" (*Ibid*.)

We agree with respondent that each night's sleep gave defendant an opportunity to reflect on his actions of the following day, and thus counts 1, 2, 4, and 5 are each a separate, divisible crime. (See *People v. Louie*, *supra*, 203 Cal.App.4th at p. 399.) Defendant also had the opportunity to reflect between the assault and criminal threat at knifepoint, although they took place the same day (December 30), as the former was committed when defendant awoke, and the latter was committed in the afternoon. Further, defendant had the opportunity to reflect while he went to his desk, retrieved a knife, approached Tapia, and then took her by the throat. Thus count 6 is a separate and divisible crime. (See *Louie,* at p. 399.)

It is not clear when the forcible oral copulation took place, or what occurred, if anything, to give defendant the opportunity to reflect on his behavior. However, we have determined that all the other acts were separate and independent of one another, and there is no indication in the record that the act of forcible oral copulation was intended to accomplish or facilitate any or all of the separate acts of inflicting injury on a cohabitant, assaulting Tapia by means likely to produce great bodily injury, or threatening to kill her at knifepoint. The trial court could reasonably conclude that the forcible oral copulation was not incidental to any intent or objective in committing to any other offense. (See *People v. Perez*, *supra*, 23 Cal.3d at pp. 553-554.)

We conclude that defendant has failed to meet his burden to demonstrate that the trial court erred in ruling that section 654 was inapplicable.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT