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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JAMES DAVID HIGBEE, Defendant and Appellant.	B262761 (Los Angeles County Super. Ct. No. KA096112)

APPEAL from the judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed.

Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant James David Higbee appeals from his conviction of one count of assault on a child under the age of eight causing coma or paralysis, and one count of child abuse. The victim was defendant's infant son. Defendant raises multiple arguments on appeal: (1) insufficient evidence demonstrating defendant caused his son's injuries; (2) the trial court prejudicially erred in admitting propensity evidence under Evidence Code section 1109; (3) the prosecutor committed multiple acts of misconduct; (4) the court failed to instruct on lesser included offenses and failed to instruct on the element of causation; and (5) the court erred in denying his postverdict motion for disclosure of juror information.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Factual Summary

Defendant and Kathryn Adams[1] met when she was working at a restaurant with defendant's cousin. They began dating. Defendant and Kathryn lived a few blocks from each other in San Dimas. They each lived with their parents. Around the time Kathryn became pregnant, she and defendant stopped seeing each other. Shortly before Devin's birth in September 2010, they began talking again, mostly through social media. Defendant initially denied being Devin's father, but after a paternity test confirmed otherwise, defendant expressed a desire to be a part of Devin's life. During the first few months after Devin was born, defendant and Kathryn agreed to maintain a relationship for Devin's sake. Their relationship was cordial, but platonic. Defendant visited frequently, almost daily, at the Adams' home. The Adams family gave defendant a key to their home. After Kathryn returned to work as a waitress in January 2011, she would sometimes leave Devin at defendant's home, and either

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[1] Because of the common surname, we refer to members of the Adams family by their first names.

defendant or his mother, Deborah Armenta, would babysit and care for Devin.

At Kathryn's request (sometime in early 2011), defendant began paying $400 a month to help with Devin's expenses. However, when Kathryn made an appointment to speak with someone about getting a legal order for child support, defendant got "very angry" with her, so she did not pursue it.

Defendant and Kathryn's relationship changed after they got into an argument on Mother's Day in May 2011. Defendant made arrangements for a gathering in Los Angeles with his extended family. Even though Kathryn had to work on Mother's Day, she initially said she would come. After finishing her shift at the restaurant, she texted defendant and said she was not going to make it because she was too tired from having worked a long shift and it was too long of a drive into Los Angeles. They argued, mostly through text messages. Later that night, Kathryn drove to defendant's home so they could talk. They sat outside in Kathryn's car. Defendant was "fuming." He yelled and cursed at Kathryn, called her names, and they were unable to resolve their disagreement. When defendant got out of the car, he left a box for Kathryn. The box contained a book with pictures of Devin defendant had made for her as a Mother's Day gift.

Thereafter, Kathryn believed defendant started to act "hostile" with her and would often refuse to see Devin except for when it was convenient for him. He also stopped making any voluntary child support payments. Defendant started to regularly send her angry text messages. Some of the texts seemed threatening, including one in which defendant told her something to the effect of "wait until you really see my wrath." Kathryn called the police, and they contacted defendant and talked to him about making threats but it was not pursued further. The Adams family changed the locks on their house

and did not give defendant a new key. Defendant perceived the situation as Kathryn refusing to let him see Devin and being selfish.

Kathryn said she never saw defendant being aggressive or violent with Devin, but he would often call Devin a "retard" or other names because he did not like the name Devin which Kathryn had picked. Kathryn's mother, Robin Adams, also said defendant regularly called Devin "retard" or other names, despite her asking him repeatedly not to do so. She said it did not sound like he was joking.

Robin said defendant acted irate and went "ballistic" about the locks being changed. She tried to tell him that his recent angry behavior was scaring them, and they did not want to have him in their home if he was going to act like that.

In August 2011, defendant began dating a woman named Emely. One morning, defendant arrived to pick up Devin for a visit, and Emely was with him. Kathryn would not allow defendant to take Devin, so defendant left. Kathryn believed the woman was just someone he had met at a bar the night before (they had gone out together in a group, so she knew he had been with someone). Kathryn expected him to drop the woman off before picking up Devin. She told him to come back after he had done so, but he did not return.

The next day, Kathryn dropped Devin off at defendant's home for his regular visit. When she returned to pick him up, she could hear Devin inside, crying. No one would answer the door. Defendant appeared at the window and yelled that if she was going to keep Devin from him, he would keep him from her. Defendant and his mother refused to open the door and continued to yell at Kathryn from the window, calling her various names and saying she was selfish. Kathryn called the police. When they arrived, they advised her she should get a custody order so she would have something to enforce when problems arose. Defendant turned Devin over to Kathryn after the police arrived. Defendant said he did not yell at Kathryn and that he had refused to open the door because Kathryn was being unfair

and picking up Devin several hours early to deny him time with his son.

After that incident, Kathryn went to a lawyer to ask about getting a custody order. She wanted Devin to have a father, so she was fine with allowing defendant a "50-50" custody arrangement, but she wanted it formalized. After defendant was served with the paperwork, he came to the Adams' home and yelled and cursed at Kathryn and said she had lied about him in the papers filed with the court.

The next day, Kathryn, her parents, her brother, sister-in-law, niece and Devin went to Solvang for a family outing. They stayed overnight at a hotel and spent the following day, September 25, 2011, shopping and sightseeing in Solvang. At one point, the family was seated at a bench outside and Devin was in his stroller. Robin walked by the stroller and Devin reached out his hand towards her, and leaned forward as he did so, causing him to fall out of his stroller. Kathryn said he sort of "rolled out." Devin hit the left side of his forehead, his left hand, and knees on the sidewalk. According to Kathryn, his forehead only got a little pink and he cried for a minute or two. She got some ice from a nearby restaurant and held it on his forehead for a few minutes, and he acted completely normal the rest of the day. Later in the evening, he developed a slight bruise, but it never got dark in color and there was no bump. Kathryn conceded on cross-examination that she told Detective Montenegro there had been a slight bump.

The morning after she got back from Solvang, Kathryn texted with defendant about Devin's schedule for his birthday, which was the next day. Kathryn had made arrangements long before to take Devin to Disneyland for his first birthday. She invited defendant to join them but he declined. Defendant said he felt his relationship with the Adams family had deteriorated too much to make it reasonable to go with them. However, he insisted he was entitled to see Devin on his

first birthday and was angry about not being allowed to see him. Defendant said he felt disrespected. Kathryn said defendant could have him the whole day on Wednesday, the day after his birthday. They were unable to resolve how to spend Devin's birthday.

Defendant went over to the Adams' home twice, still angry about the plans for Devin's birthday. He argued with Kathryn and Robin through the front screen door. They said Devin was napping and did not let him in. Kathryn was concerned that if she let defendant have Devin he would, out of spite, not return him in time to go to Disneyland. Defendant continued to insist that he was entitled to see his son on his birthday and not wait until Wednesday. He was upset that Kathryn and Robin continued to say they were going to go Disneyland as planned. Eventually, they made arrangements for Devin to be dropped off in the evening at defendant's home, after the trip to Disneyland.

While at Disneyland on September 27, Kathryn took Devin on various rides like the Jungle Cruise, It's A Small World and the Mad Tea Party. He seemed to have a good time. He ate birthday cake at lunch time. On one ride, Devin was seated in Kathryn's lap and he swung his head back a couple of inches, hitting Kathryn's chin. He did not show any symptoms of being hurt from the incident.

Robin left Disneyland with Devin around 6:00 p.m. to drop him off at defendant's home. Kathryn stayed at Disneyland with the rest of her family members who had joined them for the day. Devin drank a bottle in the car on the way to defendant's house and then fell asleep. Robin and Devin arrived at defendant's house at 7:00 p.m. Defendant answered the door, and Robin told him that Devin had just had a full bottle and a short nap, but would need to eat dinner and probably needed to be changed. Defendant took Devin and told Robin that he thought she was the most vile person he had ever met and he hoped she died before Devin ever had a chance to get to know her.

Defendant said he only told Robin that he hoped Devin would never get to see who she really was. Defendant said Devin seemed fairly normal, but was acting tired and fussy, and somewhat "clingy" with his mother. Defendant brought Devin into the living room near the couch. Devin stood up near the couch and held onto the coffee table with his hands like he usually did, but did not seem "happy." Deborah then left to go to the grocery store to pick up a birthday cupcake for Devin, and to get baby food. Defendant changed Devin's diaper while she was gone. In defendant's view, Devin continued to seem fussy. He laid down on the bed with Devin. Devin fell asleep right away, but eventually started making a wheezing sound or "throaty cough." Defendant was concerned because Devin had had pneumonia before. He called his mother and she said she was on her way home from the store. When Deborah arrived home, Devin seemed "limp." They called 911. Defendant denied ever hitting, striking or hurting Devin in any way.

Sean Cusack and Herbert Johnson, firefighter paramedics, arrived at defendant's home shortly before 8:00 p.m. on September 27, in response to a call that an infant was having trouble breathing. Once inside the home, they found defendant pacing in the living room. He was cradling Devin tightly in his arms, and needed to be coaxed by Mr. Cusack into placing Devin on the couch so he could be treated. Defendant reported Devin had been "fussy," was having difficulty breathing, and he was concerned he might have pneumonia.
Mr. Cusack saw that Devin was wheezing and unconscious. His lips were slightly bluish or cyanotic indicating a lack of oxygen. One of Devin's pupils was large and nonreactive to light. Mr. Cusack did not see any signs of external trauma. His assessment of Devin's condition, which he considered "critical," was consistent with a head injury, and not pneumonia. Devin was transported by ambulance to Pomona Valley Hospital.

When Devin arrived at the hospital, the medical staff attempted to stabilize his vitals. Because he was unresponsive and had labored breathing, a CT scan of his head was performed. The scan showed a subdural hematoma (bleeding), bilateral skull fractures in the occipital region (back of the skull), and cerebral edema (swelling) consistent with blunt force trauma. A quarter-sized bruise was noted on his left forehead.

Dr. Geoffrey Pableo, one of the emergency room doctors, said the subdural hematoma appeared to be acute, meaning the injury-causing event had occurred within a few hours. He conceded on cross-examination that he may have told the detective who interviewed him that the injury could have happened within the preceding 24 hours. Dr. Pableo did not believe it was likely that Devin's injury occurred two days earlier, particularly if he had been acting normal since then. In his opinion, it was not probable the stroller fall in Solvang, in which Devin hit the front of his head, caused skull fractures at the back of his head.

Because Devin needed to be placed on a ventilator and needed a facility with a pediatric intensive care unit, he was transferred to Loma Linda University hospital. Dr. Venkatraman Sadanand, a pediatric neurosurgeon, took over the care of Devin once he arrived at Loma Linda, sometime after midnight, in the early morning hours of September 28.

Dr. Sadanand reviewed the CT scan and transfer notes from Pomona and ordered another CT scan. The scans showed there was a subdural hematoma on the front left side of Devin's brain that was most likely from within the previous four to six hours. The blood was significant enough that it was putting pressure on the brain and compressing the brain stem. The CT scans also revealed bilateral fractures at the back of the skull. Because of the buildup of fluid and pressure, Dr. Sadanand surgically implanted a drain in Devin's skull. Devin continued to be observed in the pediatric intensive care unit.

On September 30, new scans showed evidence that Devin had suffered a stroke due to the swelling of his brain which had progressed. Dr. Sadanand performed a "decompression" surgery, or craniectomy, on September 30 in which a portion of Devin's skull was removed to release the pressure and allow the brain to heal. Ultimately, Dr. Sadanand had to perform multiple additional surgeries on Devin in an attempt to replace the portion of skull that was removed. After an infection developed upon replacement of Devin's preserved skull bone, Devin was surgically fitted with a piece of synthetic skull.

Dr. Sadanand explained the hematoma located near the front of Devin's brain, opposite the fractures at the back of his skull, was the result of a phenomenon known as coup, contrecoup injuries. A sufficiently quick and strong application of force to the skull will cause the brain to move around inside the skull, tearing the veins that attach the brain to the dura, the membrane just under the skull. The tearing of the veins then results in bleeding, or a hematoma, ordinarily at a site roughly opposite to where the application of force occurred. With Devin, the coup injury was the external trauma to the back of the skull resulting in the bilateral fractures, and the contrecoup injury was the subdural hematoma on the front left side of the brain. Dr. Sadanand said that trauma to the front of the skull can also cause an opposite contrecoup injury to the back portion of the brain, but it would not result in fractures to the back of the skull.

In his opinion, it was not likely Devin's hematoma resulted from trauma to the front of his skull because that part of the skull, called the squamous-temporal bone, is the thinnest portion of the skull and it would have likely fractured with such trauma. Instead, Devin's injuries were consistent with trauma to the back of the head. The bilateral fractures were located in the "C-curve" of the occipital bone. Because of the thickness of the occipital bone and its curved form, it is the strongest bone of the skull. Substantial force must be applied to

cause a fracture in the occipital region. It is unusual for bilateral fractures of the skull to result from ordinary household-type accidents or falls. Bilateral fractures in a small child ordinarily indicate an intentional, non-accidental injury.

Dr. Sadanand opined that Devin's injuries were acute injuries suffered within a few hours of his arrival at the hospital. This was supported by the physical symptoms that had already manifested by the time he arrived and the manner in which they progressed over the next two days. With the type of injuries Devin received, physical symptoms would likely manifest within one to two hours, including such things as a depressed level of consciousness, weakness, vomiting, confusion, and/or respiratory difficulty. With a nonverbal infant, such symptoms ordinarily appear as a persistent upset, with the child unable to be consoled or soothed. When Devin arrived at the hospital, he had vomited, was having difficulty breathing, and he had a low level of consciousness.

Dr. Sadanand explained, using four of Devin's CT scans, why the progression of scalp swelling, located directly over the site of the fractures, further supported his opinion that Devin was suffering from an acute injury or recent trauma. The first scan from Pomona showed very little scalp swelling, but the swelling then progressed as reflected in the CT scans taken five hours later, 21 hours later and then 60 hours later. Swelling develops fairly quickly after a significant trauma and usually peaks within 48 hours. Dr. Sadanand could not state for certain the precise time when the fractures occurred, but the scalp swelling exhibited by Devin contradicted a conclusion that it had occurred days earlier.

On cross-examination, Dr. Sadanand said it may have been technically possible for Devin to have sustained a head injury from the stroller fall in Solvang, but in his opinion it was not probable. Such a short fall would not have produced the "magnitude of injury" Devin suffered.

Dr. Sadanand also rejected the theory that Devin's injuries resulted from Second Impact Syndrome, namely that he suffered injury or some form of bleed with the stroller fall which was then aggravated by his experiences at Disneyland two days later. He "strongly disagree[d]" with a paper published by Dr. Plunkett regarding head injuries in children from falls under two meters. He considers Dr. Plunkett's theories controversial, at least as applied to small children, and not widely accepted in the medical community.

Dr. Mark Massi, a biomedical engineer and a pediatrician at Loma Linda, was also involved in Devin's care. Dr. Massi works in the Division of Pediatric Forensics and regularly consults on cases of suspected child abuse. Because Devin had suffered a severe head injury, Dr. Massi was asked to assess his condition and the nature of his injuries.

Dr. Massi's opinions were consistent with those of Dr. Sadanand. Dr. Massi attested to the findings of the CT scans showing bilateral fractures to the occipital bone at the back of Devin's skull, brain swelling and a subdural hematoma, as well as scalp swelling at the back of the head. Dr. Massi noted that when he examined Devin's skull, the area of the fractures felt "boggy" or "squishy."

Dr. Massi explained that the occipital bone is not normally fractured in an ordinary fall or household accident. It requires a "higher energy impact" to break, such as the head impacting a hard surface or something hard impacting the head. In Dr. Massi's opinion, it was not "physically possible" for an infant's two-foot fall out of a stroller, striking his forehead on the ground, to result in the type and severity of injuries Devin suffered. He did not believe the stroller fall caused Devin's injuries. Under certain circumstances, a short fall by an infant can result in a skull fracture, but that will normally occur at the front of the skull where the bone is much thinner. Severe brain

injury from an ordinary fall like Devin's from the stroller is an "exceedingly rare" outcome.

In Dr. Massi's opinion, Devin's injuries had to result from a significant impact to the back of the head. He believed the impact likely occurred just before he became symptomatic and was brought to the hospital. Dr. Massi said he could not say exactly when the injury occurred but based on Devin's "presentation" at the hospital, he believed the relevant injury occurred "shortly before" his arrival at the hospital. Swelling in the brain caused by trauma usually peaks within 48 hours, consistent with when Devin required the craniectomy to relieve the intracranial pressure.

Dr. Massi also denied that the bilateral fractures seen in Devin's CT scans were actually just naturally occurring suture lines on the skull. He explained the fractures were distinguishable from the sutures because the edges of the fractures were sharp. Dr. Massi said brain swelling in a small infant (under the age of two) where sutures have not yet fused can cause sutures to widen or spread (a condition called diastasis), but such swelling will not cause the skull to fracture. Intracranial pressure is not sufficient force to break bone.

Dr. Sadanand and Dr. Massi both disagreed with the defense theory that Devin's CT scans only showed suture lines, and that the scalp swelling was just accumulated fluid from Devin lying prone in the hospital for a couple of days. Dr. Sadanand showed a CT scan taken of Devin's skull several months after the injury and pointed out that the suture lines were still visible but that the fractures had healed. Both doctors also rejected the assertion that the fractures were actually "wormian bones," another natural phenomenon. Dr. Sadanand explained that wormian bones occur where the growth plates of the skull join. Devin's fractures were not located along those joinder lines. Both doctors also said Devin's scalp swelling, located over the fractures, was the result of trauma. The type of swelling

Devin experienced would not result from just a couple of days of lying prone in a hospital.

Dr. Sadanand explained that Devin has developmental delays (speech) and a form of paralysis (hemiplegia) to the right side of his body, mainly the right arm and leg, as a result of the injury to the left side of his brain. He said Devin can continue to improve with physical therapy, but likely has permanent disabilities.

The defense called Dr. Charles Niesen as an expert. Dr. Niesen is a pediatric neurologist who is currently self-employed, but previously worked at Cedars-Sinai and had been an associate professor of neurology at UCLA and Children's Hospital Los Angeles. Dr. Niesen reviewed Devin's medical records and CT scans and agreed they showed severe swelling in the left hemisphere of his brain, as well as an "acute bleed" or subdural hematoma in the front left lobe of his brain.

Dr. Niesen opined that any type of fall, even a short fall from a bed or stroller, could have caused the subdural hematoma. He believed the stroller fall in Solvang could have caused the injury initially, which was then aggravated by going on rides at Disneyland two days later and suffering the "whiplashing" effect of those rides. Dr. Niesen opined that even repetitive minor traumas over a period of days can result in severe brain injury because the brain does not have time to heal in between. He acknowledged the Plunkett study and its conclusion that even short falls can cause brain injury in small children. Dr. Niesen stated that in his opinion Dr. Sadanand's conclusions rejecting Second Impact Syndrome were out of step with the medical community.

Dr. Niesen did not see evidence of bilateral fractures at the back of the skull, merely normal suture lines in the skull of a one-year-old infant. As to one of the areas identified as a fracture by Drs. Sadanand and Massi, Dr. Niesen said it could be a fracture, but he was not a fracture expert and could not say for sure one way or the

other. In his experience, fractures tend to be more linear, not curved. He believed Devin's scan showed the existence of a "wormian bone" which is a congenital abnormality or "skeletal oddity" that is not associated with any brain problems or difficulties. Dr. Niesen said he saw no evidence of trauma to the back of Devin's head that could have caused a contracoup injury to the front left side of his brain. Since Devin had been at defendant's home for only 45 minutes when the paramedics were called, it would be "impossible" for the type of swelling in his brain to have occurred in that short period. Most swelling takes time to develop, and only "severe" impacts or "crush" injuries would cause swelling within minutes.

Dr. David Posey, a forensic pathologist, also testified for the defense. Dr. Posey stated the stroller fall in Solvang on September 25 was a significant event and was enough to result in at least a concussive injury. Dr. Posey said that Devin then suffered aggravating injuries when he was taken to Disneyland two days later, rode rides that exerted forces on his brain, and also hit his head on his mother's chin during one such ride. His brain might have healed on its own from the stroller fall, but the combination of repetitive "trauma" in a period of a couple of days resulted in the brain injury. Dr. Posey opined that the Second Impact Syndrome is well-accepted in the medical literature and accounts for the progression of Devin's injuries that he ultimately presented with at the hospital on the evening of September 27.

In Dr. Posey's opinion, Devin being tired and fussy when dropped off at defendant's home after his trip to Disneyland was consistent with the brain injury having already occurred. He opined there were no signs whatsoever of Devin having been slammed against a wall or having received external blows to the back of the head. Dr. Posey said he was absolutely certain Devin's injuries did not occur during the short period of time he was in defendant's home, primarily because there were no signs of external trauma. He agreed

with Dr. Niesen that the CT scans did not show bilateral fractures, only widening of the naturally occurring sutures due to the brain swelling and the existence of wormian bones. Dr. Posey conceded that if someone slammed Devin against a hard surface or exerted sufficient force against his skull then the symptoms he experienced could develop almost immediately.

2. Relevant Procedural Background

Defendant was charged by information with one count of assault on a child under the age of eight causing brain injury resulting in coma or paralysis (Pen. Code, § 273ab, subd. (b); count 1), and one count of child abuse (§ 273a, subd. (a); count 2). As to both counts, it was further alleged defendant personally inflicted great bodily injury on a child under the age of five within the meaning of section 12022.7, subdivision (d). The enhancement was later stricken as to count 1.

During pretrial motions, defendant moved to exclude evidence regarding two incidents the prosecution sought to introduce under Evidence Code section 1109. The motion was denied. We reserve a more detailed recitation of the facts related to defendant's motion to part 2 of the Discussion below.

The case proceeded to a jury trial in October 2014. The jury found defendant guilty on both counts and found true the great bodily injury allegation as to count 2.

Defendant brought a motion seeking the disclosure of juror information which the court denied. We reserve a more detailed recitation of the facts related to the motion to part 5 of the Discussion below.

The court sentenced defendant to life with the possibility of parole on count 1 (seven-year minimum parole eligibility), and imposed and stayed sentence on count 2. Defendant was awarded 218 days of custody credits.

This appeal followed.

DISCUSSION

1. Substantial Evidence of Causation

Defendant contends the record lacks substantial evidence he caused Devin's injuries. We disagree.

Our task is to review " 'the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Johnson* (2015) 60 Cal.4th 966, 988.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; accord, *People v. Manriquez* (2005) 37 Cal.4th 547, 577.)

In arguing the record lacks substantial evidence of causation, defendant misconstrues our standard of review. Where, as here, there is ample, credible evidence supporting the jury's verdict, it is not within our purview to reweigh the evidence or draw inferences in favor of other evidence rejected by the jury. Manifestly, the trial testimony we have described above includes substantial evidence that defendant caused Devin's injuries.

In describing the alleged deficiencies in the evidentiary record, defendant mischaracterizes the prosecution evidence. In particular, defendant takes isolated bits of testimony by Drs. Sadanand and Massi out of context. It is true that both doctors said they could not state with certainty the precise time the skull fractures occurred, but they both nonetheless testified without equivocation that the nature of Devin's injuries and the progression of his symptoms reflected an acute, recent trauma, and that it was not probable he had suffered the injuries two days before. Both doctors also stated they could not definitively state the precise mechanism and nature of the trauma (whether his head was slammed into a hard surface or he was struck

with a hard object) as they were not present when the injury occurred. Nevertheless, both doctors testified in great detail that in their opinion Devin's skull fractures and resulting brain trauma were caused by blunt force trauma to the back of the head. None of the alleged deficiencies in Drs. Sadanand and Massi's testimony detract in any material way from their medical opinions about the cause of Devin's injuries.

2. Admission of Propensity Evidence

Defendant contends the trial court erred by admitting prejudicial propensity evidence regarding a prior incident with a former girlfriend, Morgan Kostolefsky, and an incident involving his stepfather, Martin Armenta. Defendant contends both incidents were more prejudicial than probative, and not sufficiently similar to be properly admitted under Evidence Code section 1109.

"A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and 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.)

Ms. Kostolefsky testified that she previously dated defendant for about six months, in 2007, when she was 19 years old. Several months into their relationship, she received a text from a male coworker about covering a shift. Defendant got angry, grabbed her phone and called the coworker who had texted and yelled at him. Defendant also grabbed Ms. Kostolefsky's upper arm "really hard" and "kind of" shook her. She could not recall whether she was bruised from the incident, but the incident scared her and she felt like she was "walking on eggshells" after that, until they eventually stopped seeing each other. Ms. Kostolefsky said that defendant never hit her and she conceded she did not call the police or otherwise report the incident.

Mr. Armenta testified that he lived with defendant in the same home, along with defendant's mother, Deborah. Mr. Armenta said he has called the police "many times on various family members," but did not specifically remember calling the police in April 2011 and reporting that defendant had tried to hit him. When shown a police report of the incident to refresh his memory, he claimed not to recall it. However, he also admitted, "I'm sure it happened. You have a report. As to what I said or exactly the verbiages or what have you not, I don't recall." Similarly, on cross-examination, when asked if he remembered calling the police to report defendant tried to hit him, Mr. Armenta again said he did not recall, and again he admitted, "obviously I did. There's a report."

Defendant argues these two incidents were not substantially similar to the charged offenses; neither incident resulted in an arrest or conviction; and neither incident had a similar victim or involved a similar alleged assault. Defendant contends they were, at best, marginally relevant, and, at worst, grossly prejudicial. Their admission served no function except to prejudice the jury against defendant based on his alleged "bad character." Respondent counters that both incidents are classic domestic violence scenarios showing defendant's tendency to react with violence towards loved ones and family members, and that the testimony did not consume an undue amount of time.

While evidence of prior criminal acts is ordinarily inadmissible, the Legislature, by enacting Evidence Code section 1109, created an exception to this rule in cases involving domestic violence, including elder abuse and child abuse. " '[T]he California Legislature has determined the policy considerations favoring the exclusion of evidence of uncharged domestic violence offenses are outweighed in criminal domestic violence cases by the policy considerations favoring the admission of such evidence.' [Citation.] Section 1109, in effect, 'permits the admission of defendant's other acts of domestic violence

for the purpose of showing a propensity to commit such crimes. [Citation.]' [Citations.] '[I]t is apparent that the Legislature considered the difficulties of proof unique to the prosecution of these crimes when compared with other crimes where propensity evidence may be probative but has been historically prohibited.' [Citation.]" (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1232-1233.)

Both of the incidents qualify as prior acts of domestic violence within the meaning of Evidence Code section 1109. Both incidents demonstrated defendant's propensity to react with sudden angry violence towards vulnerable loved ones and family members. (See, e.g., *People v. Culbert* (2013) 218 Cal.App.4th 184, 191-193 [prior acts of domestic violence against ex-wife properly admitted in an action involving charges of criminal threats against stepson]; *People v. Dallas* (2008) 165 Cal.App.4th 940, 952-957 [statutory language supported admission of prior acts of domestic violence against a former girlfriend and her child in an action involving charges of child abuse].)

There was no undue consumption of time. The testimony of both Ms. Kostolefsky and Mr. Armenta regarding each incident was brief. Neither incident involved facts that were more inflammatory than the facts surrounding the charged offenses. Neither incident was remote in time relative to the time when the charged offenses were committed. The incident involving Mr. Armenta occurred just months before Devin's injury, and the incident involving Ms. Kostolefsky occurred about four years earlier.

The trial court did not abuse its discretion in finding the probative value outweighed any claimed prejudice.

3. Prosecutorial Misconduct

Next, defendant argues the prosecutor engaged in multiple acts of misconduct that misled the jury and denied him a fair trial. Defendant identifies the alleged misconduct as falling into four categories: (1) improperly appealing to the emotions or prejudices of

the jurors; (2) improperly vouching for prosecution witnesses; (3) questioning the integrity of defense counsel and the defense witnesses; and (4) improper argument shifting of the burden of proof to defendant. We are not persuaded.

a. Forfeiture

Respondent argues a number of the alleged acts of misconduct identified by defendant were not objected to in the trial court and have therefore been forfeited. "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841 (*Samayoa*); accord, *People v. Bonilla* (2007) 41 Cal.4th 313, 336 (*Bonilla*).) We agree defendant has forfeited any claim of error as to several of the alleged acts of misconduct.

Defendant contends the prosecutor improperly appealed to the passion or prejudice of the jury in asking several questions of Kathryn about the extensive care Devin required after he returned home from the hospital, and inquiring about how "traumatic" that must have been for her as his mother. No objections were raised to this line of questions. Another question to which defendant takes issue was posed to Dr. Sadanand. The question concerned how the various family members reacted to his explanations about Devin's diagnosis. Dr. Sadanand began to answer. Defendant objected on relevance grounds and the court sustained his objection. Defendant did not ask for the partial answer to be stricken from the record or that the jury be admonished to disregard it. The line of questions was not further pursued.

During closing argument, the prosecutor said she did not know how Kathryn "did it," "how she managed to be so polite" to defendant when he behaved the way he did. Shortly thereafter, the prosecutor said, "[i]t seems the defense in this case has pulled out all the stops to

get him out of this conviction. Experts were hired that will say anything to accomplish the goal." Defendant did not object on any ground to either of these statements.

Defendant forfeited his claims related to these alleged acts of misconduct. (*Samayoa*, *supra*, 15 Cal.4th at p. 841.) In any event, even if we considered the merits, we would reject defendant's claims as he failed to demonstrate how any of these questions or comments by the prosecutor rose to the level of misconduct.

b. Analysis

We now turn to the balance of defendant's identified acts of misconduct. First, defendant contends the prosecutor sought to impugn the integrity of both the defense witnesses and defense counsel. During the cross-examination of Dr. Posey, the prosecutor asked about his divorce proceedings and an alleged prior statement by the doctor that he had tried to hide his income from his wife. Defense counsel objected that the question was argumentative. At sidebar, the prosecutor said the line of questions was designed to elicit the doctor's bias and that he was just testifying for the money. The trial court sustained defense counsel's objection, struck the question and instructed the jury to disregard it. The prosecutor moved on to a different topic of impeachment.

During defendant's testimony, the prosecutor asked about text messages between defendant and Kathryn, and inquired about whether all of those texts were disclosed. Defendant argues the prosecutor "subtly" suggested some messages had been erased. Defendant denied erasing any of the messages and said he had given his cell phone to his lawyers. After several more questions, the prosecutor asked, "you said you turned [the phone] over to a lawyer. It's not the lawyers that are here in court, right?" Defense counsel raised a relevance objection which was sustained by the court, and the prosecutor moved on to another topic.

Defendant argues the prosecutor also improperly vouched for the credibility of the prosecution witnesses. During closing argument, the prosecutor discussed and contrasted the prosecution experts (Dr. Sadanand and Dr. Massi) with the defense experts (Dr. Niesen and Dr. Posey). At one point, the prosecutor said that Drs. Sadanand and Massi "wanted to find out what the truth was, and they wanted to be able to explain it to you. Which I think they were able to do very well." Defense counsel objected that it was improper argument and the court sustained the objection. The prosecutor continued discussing the experts' testimony, and then said "Dr. Sadanand and Dr. Massi tried to give you well thought out, honest answers to questions." Defense counsel again objected, but the court overruled the objection.

Finally, defendant contends the prosecutor misled the jury about the burden of proof, arguing that it was the defense that had to convince them and prove reasonable doubt. The prosecutor's theme was that there were essentially four elements the jury had to accept, that the defense had "to convince" them were true, in order to conclude there was reasonable doubt, namely that the stroller fall caused injury, that the trip to Disneyland aggravated the injury, that there were no skull fractures at the back of the head, and that any other medical findings were not what they seemed to be. A defense objection that the prosecutor was shifting the burden of proof was overruled. The prosecutor reiterated that theme several more times.

" ' " ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade

either the court or the jury.' " ' " ' [Citation.]" (*People v. Peoples* (2016) 62 Cal.4th 718, 792-793.)

Defendant's objection to the question to Dr. Posey about his divorce proceedings was sustained and the court admonished the jury to disregard it. Defendant's objection to the question to defendant about the phone being turned over to counsel was also sustained. "[M]erely asking a question to which an objection is sustained does not itself show misconduct." (*People v. Freeman* (1994) 8 Cal.4th 450, 495.) We discern no pattern of intemperate or egregious behavior from these questions.

The prosecutor's argument allegedly vouching for the prosecution's experts did not rely on or make reference to matters outside of the record. The comments, read in the context of the prosecutor's overall argument, were tied to the prosecutor's assessment of the credibility of the experts' opinions based on what they actually testified to in court. A prosecutor is granted wide latitude in closing argument and " '[s]o long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief," her comments cannot be characterized as improper vouching.' [Citation.]" (*Bonilla*, *supra*, 41 Cal.4th at p. 337.)

We are also unconvinced the prosecutor's argument about the defense theory improperly shifted the burden of proof to defendant. "[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*Samayoa*, *supra*, 15 Cal.4th at p. 841.) The jury was properly instructed on the burden of proof. There is nothing but strained speculation that the jury would have disregarded the court's instructions on the law and construed the

prosecutor's argument as an indication the law requires defendant to prove his innocence.

4. Instructional Error

Defendant raises two claims of instructional error. We review claims of instructional error de novo. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

a. Lesser included offense

Defendant concedes that his trial counsel expressly declined having any lesser included instructions provided to the jury. However, he argues the trial court nonetheless had a sua sponte duty to give an instruction on assault by force likely to produce great bodily injury as a lesser included offense on count 1. (Pen. Code, § 245, subd. (a)(4).) We disagree.

The court's obligation to instruct on all principles of law relevant to the issues raised by the evidence at trial includes the obligation to instruct " 'on any lesser offense "necessarily included" in the charged offense, if there is substantial evidence that only the lesser crime was committed.' [Citation.] " (*People v. Smith* (2013) 57 Cal.4th 232, 239; accord, *People v. Bradford* (1997) 15 Cal.4th 1229, 1344-1345.) "An instruction on a lesser included offense *must be given only when the evidence warrants such an instruction*. [Citation.] To warrant such an instruction, there must be substantial evidence of the lesser included offense, that is, 'evidence from which a rational trier of fact could find beyond a reasonable doubt' that the defendant committed the lesser offense. [Citation.] Speculation is insufficient to require the giving of an instruction on a lesser included offense." (*People v. Mendoza* (2000) 24 Cal.4th 130, 174, italics added.)

Defendant argues there was substantial evidence warranting the lesser included instruction. Defendant contends the jury could have decided that he shook or hit Devin and caused some injury, but that the extent of his injuries, including the severe brain swelling and resulting stroke that required surgery, was the cumulative result of

the events, like the stroller fall, that occurred in the days leading up to his hospitalization. Presumably, defendant is relying on some version of the Second Impact Syndrome attested to by his medical experts. We find the argument difficult to follow, unpersuasive, and unsupported by the record. There was not the requisite level of evidence to warrant the court instructing on a lesser included offense.

Moreover, it is not the theory defendant urged at trial. Defendant testified that he did not assault or hurt Devin in any way. There was no testimony or argument by the defense that defendant may have accidentally hit or injured Devin but it was insignificant and not the substantial cause of his brain injuries. "Generally, when a defendant completely denies complicity in the charged crime, there is no error in failing to instruct on a lesser included offense." (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 709.) Even assuming there was error for the sake of argument, it was harmless beyond a reasonable doubt in light of the evidence summarized and discussed above.

b. Definition of causation

Defendant further claims the court erred in failing to properly define causation for the jury. He argues that an essential element of a violation of Penal Code section 273ab, subdivision (b) is an assaultive act that *results in* a child becoming comatose and suffering a permanent disability. He asserts that CALJIC No. 9.36.6 fails to adequately define causation and it was the court's duty to properly instruct on all elements of the charged offenses.

Defendant tacitly agrees he did not object to CALJIC No. 9.36.6 or seek a clarifying instruction, but argues he is nonetheless entitled to appellate review because the court had a duty to instruct on all elements of the law. However couched, defendant is not arguing that the instruction is an erroneous statement of law, only that the phrase "resulted in" was inadequate to instruct the jury on the element of causation. " 'A party may not complain on appeal that an instruction

correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citations.]" (*People v. Grimes* (2016) 1 Cal.5th 698, 724; accord, *People v. Guiuan* (1998) 18 Cal.4th 558, 570.) We find defendant forfeited this claim of error by failing to seek a clarifying instruction.

In his reply brief, defendant argues that if we conclude there was a forfeiture, then we should find his trial counsel provided ineffective assistance. We disagree. We need not address arguments raised for the first time in the reply brief, and questions of ineffective assistance are rarely properly resolved on direct appeal.

In any event, defendant's argument lacks merit. In relevant part, CALJIC No. 9.36.6 provides: "Every person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child becoming comatose due to brain injury or suffering paralysis of a permanent nature, is guilty of a violation of Penal Code section 273ab, subdivision (b), a crime." The instruction essentially tracks the language of the statute. "As a general rule, in the absence of a request for amplification, the language of a statute defining a crime or defense usually is an appropriate basis for an instruction." (*People v. Rodriguez* (2002) 28 Cal.4th 543, 546.)

CALJIC No. 9.36.6 further defines the elements of the crime as "1. A person had the care or custody of a child under eight years of age; [¶] 2. That person committed an assault upon the child; [¶] 3. The assault was committed by means of force that, to a reasonable person, would be likely to produce great bodily injury; and [¶] 4. The assault resulted in the child becoming comatose due to brain injury or suffering paralysis of a permanent nature."

The jury was also instructed with CALJIC No. 9.00 defining an "assault" which includes the following language: "A person willfully

and unlawfully committed an act which by its nature would probably and directly result in the application of physical force on another person; [¶] . . . The person committing the act was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person."

Moreover, the jury's consideration of causation in this case was necessarily informed by the medical testimony. The jury was thoroughly instructed on assessing expert testimony. The instructions, read as a whole and in conjunction with one another, reasonably instructed the jury on the element of causation.

5. Denial of Motion for Disclosure of Juror Information

Finally, defendant urges us to find error in the court's denial of his postverdict motion for release of juror information. We are not persuaded.

After the recording of the jury's verdict in a criminal trial, the names, addresses and telephone numbers of the jurors are, by statute, required to be sealed. (Code Civ. Proc., § 237, subd. (a)(2).) A defendant may move for an order granting access to that information upon a showing of good cause. (§ 237, subd. (b).) "Denial of a petition filed pursuant to Code of Civil Procedure section 237 is reviewed under the deferential abuse of discretion standard. (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 991.)

Here, defendant moved for disclosure of the jurors' personal identifying information on the grounds of suspected juror misconduct. However, the written motion, supported only by the attached declaration of defense counsel, identified no specific instances or facts as the basis for the potential misconduct. At the hearing on the motion, defense counsel argued only that "we had two jurors interviewed during the trial, we had a prayer circle in the hallway, we had the maternal grandfather speaking with the jurors, and from our

perspective, a rather quick verdict." Defense counsel made no other argument and submitted on his written motion.

In denying the motion for failure to make a prima facie showing, the court noted that the "prayer circle" had not involved any jurors, and that the other instances had been discussed and resolved during trial as insignificant.

Defendant has not shown any abuse of discretion by the trial court. The motion did not contain facts setting forth good cause for disclosure but rather mere speculation that speaking with willing jurors might reveal some unknown misconduct that transpired during deliberations or otherwise. The court was justified in denying the motion.

Moreover, the court's denial is supported by a review of the record pertaining to the incidents briefly mentioned by defense counsel at oral argument as the basis for his motion.

At the start of the trial, defense counsel advised the court that Devin's mother was maintaining a blog about Devin that also included information about the trial. The court indicated it would instruct the jury about refraining from viewing social media, the internet and news accounts related to the trial. At some point during the trial, at least one juror raised unspecified concerns about the growing number of spectators for the trial, and the court allowed the jurors to remain in the break room at their discretion during breaks to avoid interacting with them. As the number of spectators for the trial continued to grow, defense counsel also made the court aware that a woman had identified herself in the elevator as being in the "Adams" camp and was seen hugging various members of the Adams family in the court hallway, was apparently a member of the same church, and was taking notes during the trial. This is apparently the "prayer circle" reference. The court stated that the public was entitled to access and there had been no showing of misconduct or inappropriate

behavior. The court admonished counsel to remain vigilant and aware of hallway interactions.

During one court break prior to the presentation of evidence, the prosecutor saw Devin's maternal grandfather approach alternate Juror No. 4 and ask about his wife having been a principal at a Catholic school (information apparently learned from watching the voir dire proceedings). The prosecutor advised the court that she immediately went up to the two men and admonished the maternal grandfather about speaking to any juror and he said he understood. Two days later, alternate Juror No. 4 was excused due to a family emergency.

Several days into the trial, Juror No. 7 asked to speak with the court about an incident that had happened over the weekend. He advised the court he had gone to an event with family and friends and that the mother-in-law of a friend said she was a friend of defendant's aunt and started to express her opinions about what happened, mainly that she did not believe defendant did anything wrong. The juror said it had made him uncomfortable and he tried to avoid it, but that these are family friends he sees regularly and they attend the same church, so it was an uncomfortable situation for him. When asked, Juror No. 7 said he did not feel prejudiced towards either side, he just felt it was going to be awkward with these friends no matter which way the jury ultimately decided. Several days later, at the request of the prosecutor, the court spoke with Juror No. 7 again to clarify the circumstances. Juror No. 7 said that the comments were not specifically directed to him and he did not believe anyone was trying to influence him. He reiterated that he felt he could be fair to both sides.

Over the objection of the prosecutor who sought to have Juror No. 7 dismissed, the court concluded that Juror No. 7 had not committed any misconduct and had expressed a willingness and ability to fairly resolve the case on the evidence and nothing else.

Just before closing arguments, the court spoke with Juror No. 2 who had reportedly made a comment in the jury room about the amount of money being paid to the experts and the lawyers. When asked, Juror No. 2 denied knowing any of the parties, family members or lawyers. He said he was simply speculating given the testimony from the experts and how "the case was going." He told the court he could and would resolve the case only on the evidence and not any speculation about other matters. Neither side requested the juror be excused.

None of these instances, either individually or collectively, demonstrate good cause for release of juror information for alleged misconduct. The motion was properly denied.

DISPOSITION

The judgment of conviction is affirmed.

GRIMES, J.

I CONCUR:

SORTINO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

People v. Higbee
B262761

FLIER, J., Concurring

I concur in the opinion with the exception of part 2 of the Discussion, which analyzes the admission of evidence of defendant James Higbee's alleged prior acts of domestic violence. I conclude that the trial court abused its discretion in admitting Martin Armenta's (defendant's stepfather) and Morgan Kostolefsky's (defendant's ex-girlfriend) testimonies. (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531 [appellate court reviews trial court's decision to admit evidence under Evid. Code, § 1109 for abuse of discretion].) However, as I shall explain, the erroneous admission of the evidence did not prejudice defendant, and therefore the judgment of conviction should be affirmed.

Propensity evidence generally is inadmissible to prove a criminal defendant's conduct on a specified occasion. (*People v. Disa* (2016) 1 Cal.App.5th 654, 670.) Evidence Code section 1109[1] provides an exception to the general rule. (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1233 ["Section 1109, in effect, 'permits the admission of defendant's other acts of domestic violence for the purpose of showing a propensity to commit such crimes.' "].) It permits evidence of domestic violence in a criminal action involving domestic violence (§ 1109, subd. (a)(1)), and it allows evidence of child abuse in a criminal action involving child abuse (*id.*, subd. (a)(3)). For purposes of this appeal, I assume that the charged offenses involved domestic violence.

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1 All further statutory references are to the Evidence Code unless otherwise indicated.

Nevertheless, as I shall explain, Armenta's testimony should have been excluded because it was inadmissible hearsay and Kostolefsky's testimony should have been excluded because it was not probative.

1. Armenta's Testimony Regarding Prior Incident of Violence Should Have Been Excluded

Armenta testified that he had "issues" with defendant but they "get along." Armenta called the police several times to report defendant "annoying" him. Armenta testified he would call the police because defendant "would be there at 1:00, 2:00, 3:00 in the morning, you know, making food, making noises in the house, taking showers at 1:00, 2:00, 3 o'clock in the morning. Just things like that." Armenta had no recollection of calling the police to report defendant tried to hit him but testified, "I'm sure it happened. You have a report." The referenced report was not admitted into evidence, and the author of the referenced report did not testify. Outside the presence of jurors, the prosecutor represented that "what was reported is that the defendant tried to hit his stepfather."

Armenta testified that he had no recollection of defendant ever trying to hit him. Armenta testified that "[i]f he [(defendant)] wanted to hit me, he would hit me. He's a big guy." Armenta further testified that "I'm not saying it didn't happen because if there's a police report, something happened. But I have no idea how it came to this situation where I called the sheriffs." When the prosecutor asked if defendant tried to hit Armenta, Armenta responded, "As I mentioned, if James [(defendant)] wanted to hit me, he would hit me. There's no two ways about that. . . . I mean, come on, if somebody wants to hit you, they're gonna hit you. I don't understand why I would have

said he's trying to hit me." The prosecutor asked Armenta if it would refresh his recollection to look at a police incident report. Armenta still did not recall the alleged incident.

The trial court abused its discretion in admitting Armenta's testimony because it lacked admissible evidence of a prior incident of domestic violence. The police report indicating that defendant hit Armenta was hearsay. Therefore it could not be introduced into evidence and was not introduced. (*People v. Sanchez* (2016) 63 Cal.4th 665, 674 ["[A] hearsay statement is one in which a person makes a factual assertion out of court and the proponent seeks to rely on the statement to prove that assertion is true."]; *People v. Ayers* (2005) 125 Cal.App.4th 988, 994 [police reports do not qualify as business records exception to hearsay rule].)

No person with knowledge of the contents of the report testified as to the incident purportedly described in the report. The officer who wrote the report did not testify, and no other witness testified regarding the conduct described in the report.

The only testimony that defendant tried to hit Armenta was Armenta's statement that he was "sure it happened" because it was reported in the police report. Armenta was repeating inadmissible hearsay. (See *People v. Lee* (1990) 219 Cal.App.3d 829, 840.) "Statements which have no independent basis of admissibility may not be introduced under the guise of refreshing a witness' memory." (*People v. Parks* (1971) 4 Cal.3d 955, 961.) Therefore, Armenta's testimony regarding the police report—the only testimony suggesting that defendant tried to hit Armenta—should have been excluded.

Aside from paraphrasing the report, Armenta's testimony *contradicted* the fact that defendant previously hit him or tried to

hit him. Armenta denied being hit. As respondent concedes, "Mr. Armenta actually testified favorably for [defendant] and he repeatedly said that he could not remember calling the police and saying that [defendant] had tried to hit him." Respondent's acknowledgement is consistent with the record. When asked, "Has James ever assaulted you," Armenta responded, "No." When asked has James "[e]ver beat you up," Armenta responded, "No." Armenta testified that "James never physically threatened me. [He] [h]as never physically harmed me." In short, the trial court erred in admitting Armenta's testimony paraphrasing the inadmissible police report.

2. Kostolefsky

Kostolefsky dated defendant in 2007, four years before the conduct underlying defendant's conviction. Kostolefsky testified that during their relationship, defendant grabbed her arm. Defendant "grabbed [her] by the arm really hard to like get [her] attention." Kostolefsky did not remember if she had a bruise. "It was a quick grab. . . . It wasn't a shaking, it was a grab, but it just shook [her] emotionally . . . ." Kostolefsky also testified that defendant would become "possessive" when a male called her. When she dated defendant, she was "not allowed to really have male friends." When he grabbed her arm, defendant demanded to know why a male was texting her, and he sounded angry. Kostolefsky testified that defendant never hit her. When asked if she had "any kind of injury as a result of [defendant] grabbing your arm," Kostolefsky responded, "No."

Section 1109 does not permit the admission of all prior acts of domestic violence, but instead is limited by section 352 which requires balancing the probative value of the evidence with its

prejudicial effect.[2] (§ 1109 [incorporating § 352]; *People v. Disa, supra*, 1 Cal.App.5th at p. 671.) A "careful weighing of prejudice against probative value . . . is essential to protect a defendant's due process right to a fundamentally fair trial." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.) Relevant factors include the prior offense's "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 . . . offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta* (1999) 21 Cal.4th 903, 917 [discussing § 352 in the analogous context of § 1108 admission of prior sex offenses].)[3] " ' "The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense." ' " (*People v. Johnson, supra*, 185 Cal.App.4th at p. 531.) "[E]vidence is unduly prejudicial under section 352 only if it ' " 'uniquely tends to evoke an emotional bias against the

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[2] Section 352 provides: "The court in its discretion may exclude evidence if its 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."

[3] "[S]ections 1108 and 1109 can properly be read together as complementary portions of the same statutory scheme." (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333.)

defendant as an individual and . . . has very little effect on the issues' " ' . . . ." (*Id.* at p. 534.) As I shall explain, the evidence that defendant grabbed his ex-girlfriend's arm had minimal if any probative value and should have been excluded.

The prosecution's theory of the case was that defendant slammed Devin's head against the wall or caused Devin to hit his head on a solid object.[4] With respect to probative value of Kostolefsky's testimony, respondent argues that "[g]iven that [defendant] grabbed Kostolefsky's arm and physically shook her, leaving a bruise," the evidence was relevant to show defendant grabbed Devin and violently shook him.[5] Respondent also argues that the arguments with Kostolefsky were similar to the arguments with Devin's mother, Kathryn Adams. These arguments are not persuasive.

The record does not support respondent's first argument that defendant's conduct with Kostolefsky was similar to his conduct with Devin. For example, respondent states that defendant "physically shook" Kostolefsky. But Kostolefsky testified that defendant did not shake her physically, only emotionally. Specifically, she testified, "It wasn't a shaking, it was a grab, but it just shook me emotionally . . . ." Next, respondent states that defendant left a bruise on Kostolefsky, but

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[4] During closing argument, the prosecutor argued: "[I]t's the People's position that at some point, [defendant] just lost his temper. Just in the split second, in just a moment of anger, he grabbed the child and just slammed the child's head against a wall." The prosecutor further argued that defendant may have shaken Devin and Devin hit his head on a solid object.

[5] The prosecutor presented this version of events to the court prior to trial. However, no evidence at trial supported it.

she testified that she did not remember whether she was bruised and expressly testified that defendant did not injure her when he grabbed her arm. No other witness testified that Kostolefsky was bruised or reported having been bruised. The purported facts respondent relies upon to establish the relevance of Kostolefsky's testimony do not exist.

Second, assuming defendant's arguments with Kostolefsky were similar to his arguments with Adams, defendant was not charged with any crime against Adams. Devin was the *only* victim of the charged crimes. Thus, the fact that the arguments with Adams may have been similar does not show that the evidence was probative of defendant's conduct with Devin. There was no " 'repetitive nature' " to defendant's conduct, the purpose underlying the admission of evidence under section 1109. (See *People v. Johnson, supra*, 185 Cal.App.4th at p. 532.)

Kostolefsky's testimony was not probative. There was no substantial similarities between the incident with Kostolefsky and the charged conduct. There was no pattern of abuse or similar modus operandi. Devin, the victim, did not testify and there was no need to bolster his credibility. The alleged domestic violence—grabbing a girlfriend's arm—was unrelated to the charged crimes—assault on a child causing brain injury and child abuse. The lack of similarity decreases any probative value of the uncharged offenses. (See *People v. Falsetta, supra*, 21 Cal.4th at p. 917.) It had very little effect on the issues and served only to evoke an emotional bias against defendant. (See *People v. Johnson, supra*, 185 Cal.App.4th at p. 534.)

3. Defendant Fails to Demonstrate He Suffered Prejudice

Defendant fails to demonstrate he suffered prejudice (under any standard) from the erroneous introduction of the evidence. The incidents involving Kostolefsky and Armenta were far less inflammatory than the charged conduct. Their testimony was not particularly damaging as both acknowledged defendant did not hit them. Defendant's argument that the evidence was a tool to appeal to jurors' emotions is not persuasive because the prosecutor did not refer to the evidence during her closing argument. In his reply brief, defendant acknowledges "the prosecutor did not mention either incident in her closing, because conceivably she could not draw or suggest any inferences of guilt on the current charge based on these prior incidents."

Instead, during closing argument, the prosecutor focused on the critical issue at trial: the respective credibility of the various experts and whose conclusion about what happened to Devin should be believed. The challenged evidence regarding prior incidents of domestic violence did not bear on the experts' credibility. Additionally, as the majority fully explains strong evidence supported the prosecution's theory that defendant suffered an acute recent trauma. (Maj. opn., *ante*, at pp. 9, 11, 13, 19.) Because the erroneous admission of evidence did not prejudice defendant, his judgment of conviction should be affirmed.

FLIER, J.