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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. CHARLES A. WRIGHT, Defendant and Appellant.	B230864 (Los Angeles County Super. Ct. No. BA 328435)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie A. Swain, Judge. Affirmed.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Shawn McGahey Webb, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant was charged with kidnapping to commit rape, forcible rape, forcible oral copulation, sexual penetration by foreign object and assault with the intent to rape. The information further specially alleged that appellant raped multiple victims, he kidnapped each victim and that asportation of the victims substantially increased the risk of harm. It was also alleged that appellant had suffered a prior serious felony Strike conviction. A jury convicted appellant of all offenses as charged, except for one count of kidnapping to commit rape as to which the jury found him guilty of the lesser included offense of false imprisonment. The jury found all of the special allegations to be true. In a bifurcated proceeding, the court found the prior conviction allegations true.

The court denied appellant's motion for new trial and sentenced him to state prison for a total of 132 years to life. Appellant received 1,375 days of presentence custody credit, including 1,195 actual days and 180 days of good time/work time.

This timely appeal ensued.

FACTS

Appellant was charged with offenses committed against four victims -- Dawn W., Porsha H., Felita H. and Vanessa A. -- over a period extending from July 4, 1999, to April 3, 2007. The prosecution was also allowed to introduce, over a motion to exclude, evidence of prior uncharged sexual offenses against an additional victim, Natalie M., on March 27, 1992.

1. Prosecution Evidence

A. Dawn W.

On the evening of July 4, 1999, Dawn W. was walking to the bus stop at Hyde Park and West Boulevard on her way to a relative's home. Appellant pulled up behind her in his car. As Dawn continued walking, appellant told her, "Get in the car. I have a gun." Dawn obeyed and got into the front passenger seat of the car. Appellant kept his hand behind Dawn's seat. Dawn believed appellant was holding a gun behind the seat.

Appellant drove to a nearby liquor store. He parked outside the door and told Dawn not to move out of the car or he would hunt her down and shoot her. While appellant was in the store, Dawn considered fleeing but was afraid appellant would hunt

her down. Appellant kept Dawn in sight the entire time he was in the store. Appellant returned to the car and drove down several streets. Dawn asked where he was taking her, and she begged him not to hurt her. Appellant parked near a school, then got out of the car and into the passenger seat with Dawn. He pulled down his pants, reclined the passenger seat and got on top of Dawn. Dawn "let" appellant put his penis into her vagina because she thought he had a gun. She prayed and pleaded with him not to hurt her, telling him she needed to get home to her children. Appellant penetrated Dawn's vagina with his penis several times. Afterwards, appellant dropped Dawn near some train tracks near a bus stop.

Dawn called her boyfriend from a taco stand. She was upset and crying. Her boyfriend picked her up and drove to his sister's house. Dawn initially did not want to call the police because she felt if she had not been walking down a street at night the incident would not have occurred. Her boyfriend and his sister eventually persuaded her to report the incident. The police were called, and Dawn was taken to the hospital where she underwent a sexual assault examination. The nurse who examined Dawn determined that she had abrasions and bruises in her vaginal area. Officers took possession of Dawn's clothing and swabs collected during the sexual assault examination. Dawn referred to the size of her assailant's penis as "extremely small."

Eight years later, on September 1, 2007, police showed Dawn a six-pack photographic lineup. She selected appellant's photograph and identified him as her attacker.

B. Porsha H.

About 9:00 p.m. on January 18, 2006, 19-year-old Porsha H. was at a bus stop near Figueroa and 30th Streets. Appellant, who also had been waiting at the stop, told her, "Bitch, if you don't come with me, I'm going to kill you." Porsha was scared. Appellant said he had a gun, so she went with him to a white Explorer parked nearby. They got in the Explorer, and appellant headed down Figueroa and then turned onto Vernon Avenue.

During this time, Porsha considered opening the door or kicking in the window to escape. She knew, however, that she could not fight appellant as he was bigger and she thought he had a gun.

Appellant drove Porsha to a residential neighborhood near a high school about two miles from the bus stop and parked in front of a house. Appellant asked Porsha if she had a weapon. When she said, "No," appellant started choking her. He rummaged through her pockets and found a small folding knife, which he threw in the back of the Explorer. Porsha was scared and thought appellant would kill her.[1] He told her to "shut the fuck up or it's going to be worse." He directed her into the back seat of the Explorer, and she complied out of fear.

Appellant got into the back seat with Porsha. He told her to take off her clothing, and she removed her sweatpants because she was scared and thought appellant would kill her. Appellant began to kiss Porsha all over her chest, stomach and vagina. He stuck his fingers and tongue inside her vagina. He unzipped his own pants and "play[ed]" with his penis. Porsha stated it appeared appellant was "trying to get hard." Appellant then told her, "I want some head." She responded, "I'm not sucking your dick. I swear to God, I'm not doing that, man."[2]

Eventually, appellant got an erection, and Porsha asked him to use a condom. He showed her that he had one but then pushed his penis into her vagina without putting it on. After appellant ejaculated, he put on his clothes and told Porsha he was going to keep

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[1] Porsha described appellant as "crazy." The trial court sustained defense counsel's objection to her description.

[2] At trial, Porsha was still emotional and afraid of appellant. After testifying that appellant wanted her to orally copulate him, Porsha portrayed appellant as being "all freak and ugly." She exclaimed, "He fat. I don't want that. He took it. He took it, man. I don't want to see him again. I swear to God, the only reason I'm here is because I don't want to see -- he crazy, man. He took it. He took it. He took it." "He took it." "He crazy." "He weird. He weird." The court sustained defense counsel's objection to Porsha's outburst.

her underpants as a souvenir. Porsha tried to "be cool" with him saying she had to go. She got out of the car and left.

Porsha went to a pay phone, called her mother and said she had been raped. At her mother's direction, she called the police giving the operator a description of appellant and his vehicle.

Police officers responded to the call and took Porsha to a rape treatment center, where she was interviewed and examined. A Woods lamp fluoresced semen and saliva on Porsha's neck, left breast and left inner thigh. Those areas, as well as Porsha's mouth and vagina, were swabbed and the swabs and her clothing were collected as evidence. The examining nurse noted that Porsha had leg pain, neck pain consistent with being choked and vaginal pain consistent with blunt force trauma.

On September 1, 2007, a detective showed Porsha a six-pack photographic lineup and asked whether any of the photographs depicted her assailant. Porsha identified appellant's photo as that of the man who raped her. She also identified appellant's Explorer in a photographic lineup.[3]

C. Felita H.

On April 3, 2007, Felita H. was working as a home care provider at a senior citizens facility. That night, she left work around 10:00 p.m. and was walking to the bank in the area of Vermont and Manchester Avenues with a male friend, intending to withdraw cash from the automated teller machine. As Felita was following her friend across the street, appellant pulled up between them in a white SUV (sports utility vehicle). Felita recognized appellant from a gathering she had attended earlier that month. On that occasion, Felita had asked appellant for a ride to a liquor store, and he complied.

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[3] At trial, Porsha stated she had difficulty remembering things because she had seizures. The court sustained defense counsel's objection to the prosecutor's asking whether she had a brain tumor.

On April 3, Felita recognized appellant and told him, "Hi." Appellant asked her what was going on, and she replied she was taking care of some business. Appellant then leaned across the front passenger seat and snatched Felita headfirst into his vehicle.

Appellant drove away and kept Felita's head pushed down onto his lap. After a short drive, he parked in front of a factory. Felita asked appellant what was going on and whether he remembered her from their prior meeting. Appellant denied knowing her. Felita tried to open the passenger door, but it was locked. She asked to be let out, but appellant refused to let her go. He pointed to a duplex next to a factory and told Felita it was a "drug place." She did not know why he was showing it to her. She continued telling him she wanted out, asking, "Don't you remember me? You know, I remember you. I know you."

When appellant reached into the back seat for something, Felita reached over him, hoping to exit the vehicle through the driver's door. Appellant responded by throwing her onto the back seat. Appellant leaned over and demanded that she remove her pants. When Felita refused, appellant started hitting her in the face. Felita managed to box one of appellant's hands in the sleeve of his sweater, but he hit her repeatedly with the other hand, saying, "Bitch, I'm trying to knock you out."

After punching her for about 10 minutes, appellant told Felita, "If you don't take your pants off, I'm goin' [to] shoot you." She continued to resist. Appellant picked up a can of WD-40 and told Felita he was going to burn her alive. Felita believed she was going to die. She let go of appellant's sleeve and grabbed some pruning shears from the rear cargo area. She held the shears against appellant's neck and told him to get off her and to let her out of the car. Appellant was huffing and puffing with the effort of wrestling with her, and he opened the door.

Felita ran to a busy street and attempted to flag down a car. She was covered in blood. Her face was cut open, her "eyelid meat was hanging," her ears were swollen, and

her face was "disarranged." Eventually, someone stopped and drove her home. Her husband called the police.[4]

The swelling to Felita's face lasted for two months. The incident caused her to have a nervous breakdown.

At some later point, Felita was shown a six-pack photographic lineup that contained appellant's photograph. She identified him as the man who kidnapped and beat and attempted to rape her.

D. Vanessa A.

Nineteen-year-old Vanessa A. was waiting at a bus stop on the corner of Crenshaw Boulevard and Stocker Street about 11:30 p.m. on June 9, 2007. Vanessa had just finished work at a restaurant and was returning home. Appellant drove up in a white Ford Explorer and offered Vanessa a ride. Vanessa got into the vehicle and asked appellant to drive her to the Vernon Blue Line station.

As appellant drove down Crenshaw and turned onto Vernon in the direction of the Blue Line, they talked. Vanessa asked appellant his name and whether he had any children. She did not recall the name he gave but believed he said he had three children. They also discussed their relative heights. Appellant could not believe Vanessa was taller than he, and so he pulled over and they exited the vehicle in order to measure themselves shoulder to shoulder.

After doing so, they returned to the Explorer and continued toward the Blue Line station. Appellant asked Vanessa whether she would do him a favor and "watch his back." She took that to mean he was going to do something illegal. She told him she did

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[4] At the time of trial, Felita was on probation for spousal battery. She explained that after the incident with appellant, she was afraid to get hit by any man, so she struck first.

It was stipulated that Felita told the responding officers that she was walking to the bank from her residence at approximately 5:45 a.m. when appellant drove up in a white SUV and offered her a ride and that Felita recognized appellant from an earlier meeting and voluntarily got into appellant's vehicle. The jury convicted appellant of the lesser included offense of false imprisonment of Felita rather than kidnapping to commit rape as charged.

not want to get involved. At that point, appellant turned off Vernon, and Vanessa thought, "I [am] in trouble." She leaned over to open the door, but appellant said if she got out he would shoot her. Vanessa was shocked and froze. Appellant told her to get into the back seat of the vehicle, which she did. Appellant continued driving, making right and left turns until he reached a residential neighborhood where he parked.

Appellant then got into the back seat and sat next to Vanessa. He pointed to a nearby apartment and said, "[T]hat's where I need to take care of what I need to take care of. I need you to watch me." Vanessa told appellant she had to urinate very badly. Appellant said she could not get out of the car and gave her a container in which she relieved herself. Afterwards, appellant directed Vanessa to remove her pants. When Vanessa refused, appellant punched her in the forehead. Vanessa tried to push his arms away, but appellant continued to hit her again directing her to remove her pants. Vanessa told appellant, "Please leave me alone, stop. Just let me go." She tried to shove her thumbs into appellant's eyes, but he overpowered her, pushed her down onto the seat and pulled her hair.

After pinning Vanessa against the seat and door, appellant managed to pull down her jeans partially. Vanessa was not wearing any underpants. Appellant struck her on the legs multiple times. He penetrated her vagina with his finger two or three times. Vanessa continued to resist telling appellant, "Stop" and "Leave me alone." Appellant moved his body more fully onto Vanessa's and began to choke her. When she started to get "a little dimmed," appellant asked, "Are you going to listen?" Vanessa said, "No." Appellant choked her again, then let go and repeated his question. Vanessa then responded affirmatively.

Appellant directed Vanessa to lie flat on the seat. He removed his pants and inserted his penis into her vagina. Appellant told Vanessa he was going to wear a condom, but she was not sure whether he actually did. After penetrating her four or five times, appellant ejaculated, withdrew, and sat down. Vanessa asked appellant whether she could put her pants back on. He said, "No," and climbed into the driver's seat.

Vanessa put her pants back on anyway and, at appellant's direction, got into the front passenger seat.

Appellant drove Vanessa to a different Blue Line station than the one to which Vanessa had asked him to take her. She was crying and felt horrible. She got out of appellant's vehicle and began walking. After appellant drove off, Vanessa sat in shock on the station steps, wondering what she should do. She then remembered she had a cell phone and used it to call 911. Vanessa told the 911 operator she had been struck and raped by a black male.

The police arrived and took Vanessa to a hospital where she met with a nurse trained to conduct sexual assault examinations. Vanessa told the nurse that her assailant had punched her in the face and extremities causing her neck and shoulder pain. She also said he had sexually assaulted her. Upon physical examination, the nurse found Vanessa had bruising, abrasions, tenderness and scratches to her neck, bruising on her left upper thigh, and swelling on her forehead, all consistent with Vanessa's complaints. Swabs of Vanessa's mouth, vagina, cervix and external genitalia were retained as evidence.

Vanessa told the nurse and the detectives who interviewed her at the hospital that appellant had forced her into his vehicle by threatening to shoot her. Later, she was informed that a surveillance video showed her entering appellant's vehicle voluntarily. Vanessa admitted she had lied about getting into appellant's vehicle. She explained that she felt guilty for having made a bad decision and did not want to be blamed for what happened to her.

On September 1, 2007, Vanessa viewed a six-pack photographic lineup and identified appellant as her assailant.

E. Prior Uncharged Sexual Offenses (Natalie M.)

Natalie M. met appellant when he approached her in his vehicle early on the morning of March 27, 1992.[5] At appellant's invitation, she got into his car and they

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[5] The testimony Natalie gave at appellant's 2010 trial differed from her 1992 preliminary hearing testimony regarding the location at which she first met appellant. At

cruised around, talking. At some point, appellant parked the vehicle. Natalie thought they were waiting for someone. Appellant asked if they could "do something," meaning something sexual. Natalie responded that she had just met him and it would be best if they got to know each other first. Appellant changed the subject, but eventually said again that he wanted Natalie to put her mouth on his penis. Natalie refused and asked appellant to take her home.

Appellant pulled out a screwdriver and put it to Natalie's neck. She attempted to jump out of the car, but the door would not open. At first she thought it was locked but then realized it had been rigged. Appellant said, "Just do what I tell you to do and I'll take you back home."

Natalie was scared. She was seven or eight months pregnant. She told appellant about the baby and asked him not to hurt her. She said she would put her mouth on his penis if he agreed to drive her closer to home. Appellant said, "No. We're going to do it right here. Get in the back seat." Natalie tried the door again, but it would not open. Appellant got into the back seat and "strong-armed" Natalie; he grabbed her neck tightly so she would not try anything. Natalie wanted to try to "take" him, but she was afraid appellant would kill her.

Appellant pulled his penis out of his pants and tried to put it into Natalie's vagina. She wrestled with him and tried to get out of the car, but the back door would not open. She told appellant, "I'm not going to let you do nothing to my baby. You might as well just kill me."

Appellant made Natalie orally copulate him but she promptly urinated on herself and lied to appellant, telling him her water had broken. At first, appellant was not

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trial, Natalie stated that she was walking from her home to a Taco Bell in the area of 57th Street and Vermont Avenue when appellant approached her in his vehicle. At the preliminary hearing, Natalie testified that she had gotten off work at a Taco Bell near Century Boulevard and Normandie Avenue when appellant drove up and said he was a "veteran's cab" and offered to drive her to 57th and Vermont for two dollars.

convinced, but he finally got back into the front seat and drove Natalie back to her original location.

It was stipulated that, with respect to Natalie, appellant was charged in 1992 with kidnapping, attempted rape, rape and forcible oral copulation; he went to trial and a jury found him not guilty on all counts.

F. Arrest and DNA Results

Shortly after midnight on September 1, 2007, Sergeant Roy Gardner of the Los Angeles Police Department was in the area of 112th Street and Vermont Avenue. He saw a female walk up to the passenger side of a white Ford Explorer that was stopped at the side of the road. He observed the driver of the Explorer lean across the front seat and speak with the female through the window before she walked away.

Four days earlier, Sergeant Gardner had read a flyer indicating the driver of a white Explorer had been involved in recent rapes in the area. The Explorer he observed was very similar in make and model to the vehicle depicted on the flyer. He observed that the driver (appellant) also matched the description of the suspected rapist. Sergeant Gardner ran the Explorer's license plate number and determined that the registration had expired. He conducted a traffic stop and contacted the detective assigned to investigate the rapes. As a result, appellant's photograph was placed in a six-pack photographic lineup for the victims to view, and appellant was arrested after the victims identified him as the perpetrator.

A DNA sample was obtained from appellant. Criminalists employed by the Los Angeles Police Department analyzed swabbed material obtained from the sexual assault examinations of Dawn, Porsha and Vanessa. Genetic material found on the swabs of all three women matched the DNA sample taken from appellant.

2. Defense Evidence

Appellant testified in his defense and generally denied the allegations that he had sexually assaulted Dawn, Porsha and Vanessa; he claimed to have had only consensual sex with Felita in his apartment on several occasions.[6]

As to Dawn, appellant testified she had approached him in a liquor store parking lot asking for a ride. When she was in his vehicle, she asked whether he had any money and he said he did not. Dawn told appellant she charged $20 for sex. Appellant gave her $10 and said he had to go to another liquor store because the one they were at did not have the brand of condoms he wanted. Dawn asked appellant to buy her a cherry-flavored cigarillo. At the second liquor store, appellant purchased the condoms and cigarillo while Dawn waited in the Explorer. Appellant returned to the vehicle, disarmed the alarm and gave Dawn an additional $9, deducting $1 for the cigarillo. Dawn directed appellant to a residential area and told him to park in front of a house. She got into the back seat, and appellant followed her. Dawn removed her clothing and "inserted" appellant. The condom slipped off after Dawn inserted his penis, but she told him to keep going anyway. Appellant ejaculated into Dawn's vagina. Afterward, Dawn asked appellant to take her to "Dime block," i.e., 10th Avenue. Appellant replied, "I don't do drug runs." Dawn cursed at him and said something to the effect that "I have your nut in my . . . [¶] . . . pussy." She threatened to tell the police he raped her.

Appellant testified as to Porsha that she flagged him down in the area of 30th Street and Figueroa. Porsha walked up to his vehicle and asked whether he had seen a bus coming. When appellant answered "No," she asked if he would drive her to her apartment at 43rd Street and Central Avenue. Appellant agreed, and Porsha got into his vehicle. They reached Central, and Porsha directed him to turn north of Vernon and asked him to park down the street from her apartment building.

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6 Appellant admitted he pleaded guilty to manslaughter in 1985 and to spousal battery in 1993. He also acknowledged he had been tried for assaulting Natalie and, despite that experience, he had continued in "picking up strange ladies at night."

Once they were parked, Porsha got into the back seat and appellant joined her. Porsha found a baggie of marijuana that appellant's friend had left in the vehicle. She offered to have sex with appellant in exchange for the marijuana and the loan of a compact disc. Appellant said, "Okay." Porsha put a condom on appellant and "insert[ed]" him. After having sex, they put their clothing back on. Porsha got out of the vehicle, and appellant drove home.

With respect to Vanessa, appellant testified that about midnight on June 8 or 9, 2007, he was in his Explorer near the intersection of 43rd and Crenshaw. He heard someone shouting, "Hey, hey." He stopped, looked around and saw Vanessa at a bus stop. He rolled the passenger-side window down. Vanessa asked him to take her to the Slauson Blue Line station and said she would "thank" him for the ride. Appellant asked her when the trains stopped running, and Vanessa responded, "Midnight" and got into the Explorer.

As appellant drove toward the station, he and Vanessa talked. Vanessa asserted she was taller than appellant, and he pulled to the curb at McKinley and Slauson Avenues. They got out of the vehicle to measure their respective heights. They could not tell who was taller. Appellant said they should get going, and they got back into the vehicle. As appellant approached a yellow light, Vanessa became aggressive and told him to hurry. She directed him to turn left and then right and to park between some cars.

After appellant parked, Vanessa got into the back seat, reminded him that she had said she would thank him for the ride, and removed one leg from her pants. Appellant told her he was not planning to be intimate with her and said he was "soft." Vanessa asked him to get into the back seat. Appellant sat on the console, fell backward, and bumped his head against Vanessa's. Appellant slid between the seats and apologized. Vanessa asked appellant if he had something into which she could urinate. He gave her a bottle in which she urinated. She then unzipped his pants, lay back on the seat, and pulled appellant on top of her. By that time, appellant's penis was semierect. Vanessa rubbed appellant's penis up and down on her vagina and tried to "insert" him, but he was not hard enough. Appellant felt "pre-ejaculate" and pulled his penis away from Vanessa.

He said he had to get her to the Blue Line. He zipped up his pants, got out of the vehicle and reentered through the driver's door. Vanessa pulled her pants up and climbed into the front between the seats. Appellant drove her to the Blue Line station, and she thanked him for the ride.

Concerning Felita, appellant testified he first met her late in the evening in January 2007, when he stopped for a light at Manchester and Budlong Avenues. Felita tapped on his passenger-side window. Appellant rolled the window part way down. Felita asked him if he would drop her off at a bus stop on Normandie. Appellant said he did not mind. Felita got into the vehicle and asked appellant where he was going. He responded that he was going to check on his mother. When they reached Normandie, Felita asked appellant if she could go home with him. Appellant drove to his mother's apartment, parked in the back and went inside while Felita waited in the car. Appellant returned to the vehicle about five minutes later. Felita then asked him to drive to her home at 60th Street and Hollydale Drive. Appellant complied. He waited in the vehicle while Felita went inside. She came out with a large tub of ice cream and got back into the vehicle. Appellant took her to his apartment.

At his apartment, appellant offered Felita some food, and she told him she wanted to watch a pornographic movie with him. They watched the movie on appellant's bed. Felita got "loose" and "aggressive" and lay down next to him. At some point, she indicated she needed $10 for feminine hygiene products. They had sex, and afterward, appellant gave Felita $10. The next morning, he drove her to 60th and Hollydale.

Felita called appellant on a subsequent evening, and they had sex again. They were intimate on three or four occasions. They always had sex in appellant's apartment, not in his vehicle. Appellant denied the alleged assault of April 3, 2007 ever occurred.

Appellant testified he drove around South Central Los Angeles often. Most of the women he saw in the area were prostitutes, hookers or "strawberries," i.e., "neighborhood girls" who "do it anywhere" whether or not money is involved. He wanted to help them if he could, so he sometimes drove them around.

CONTENTIONS

Appellant makes numerous contentions of error: (1) improper communication by the bailiff with the jury resulting in a coerced verdict; (2) error in giving the jury a modified CALCRIM No. 1191 instruction; (3) improper admission of evidence of uncharged prior sexual assault; (4) improper use of the charged offenses as propensity evidence; (5) failure to sua sponte declare a mistrial after Porsha's emotional outbursts while testifying; (6) prosecutorial misconduct in questioning Porsha; (7) ineffective assistance of counsel; and (8) improper impeachment of appellant with his prior convictions.

DISCUSSION

1. Juror Coercion

Appellant contends the bailiff's improper communication with the jury regarding further deliberations on count 1 (kidnapping to commit rape of Dawn) coerced a holdout juror to change her vote in violation of state law and his federal constitutional rights to due process and an impartial jury. Appellant also contends that prejudice must be presumed. We do not agree.

On the afternoon of Friday, July 9, 2010, just before the jury entered the courtroom to render its verdicts, the trial court informed counsel that an issue had arisen concerning a "conversation" between the bailiff and the jurors in the jury room. The bailiff related what occurred.[7]

The court then questioned the foreperson regarding the incident. After it was clarified that count 1 was the count at issue, the court continued questioning the foreperson, who stated she recalled a conversation "with a couple of them and it's not

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[7] The bailiff explained that "[t]hey [the jurors] buzzed that they had a question, so I went back there. They said they had a verdict on nine counts except for one and I told them well, just write that down and I'll give it to the judge and then they asked, like, well, what happens next and I told them that it depends on the judge. They may have to come back and deliberate more or they may just take the nine verdicts and they said well, so we have to come back on Monday? And I said that is a possibility and so then one of them stated well, I'll change my vote then."

because of the Monday. None of us wanted to come back on Monday, but . . . it was conversation. There was a lot of conversation going on. I can't say with certainty that I heard them say that, oh, if it's Monday we're going to go ahead and change the vote. All I heard I'm going to go ahead and -- I'm going to go ahead and change . . . ."

The trial court asked the foreperson about the timing of the juror's change of vote. The foreperson stated it could have been in the last hour, but she was uncertain because there was "a lot of discussion" going on as the jurors were aware from the instructions that "it was okay if you're trying to convince some of your other jurors about this, this and this . . . ." The trial court inquired as to what occurred when the bailiff was summoned, saying, "Someone apparently asked if they were going to have to come back Monday. At that point it's our understanding this was 11 to 1 as to one count and all the others they reached verdicts; is that correct?" The foreperson answered, "Pretty much." The court asked, "And right after the bailiff was there did you hear all the conversation with the bailiff that every juror had with the bailiff?" The foreperson recalled that "we told him to get out." The foreperson related that after the bailiff closed the door, "We discussed it some more. [¶] . . . [¶] . . . And then [the holdout juror] went ahead and sa[id], okay, I'll go ahead and change."

The trial court then invited counsel to ask questions of the foreperson. The prosecuting attorney inquired, "Was there any discussion of changing your verdict because it's Friday and no one wants to come back Monday . . . ?" The foreperson said, "I really don't believe so," and went on to explain that although none of the jurors wanted to return on Monday, it had "nothing to do with" the verdicts. The foreperson stated that "one of the questions that we were going to ask [the bailiff] was . . . if we had . . . a hung jury on that particular point, what did we need to do? That was originally what we wanted the deputy to come in as to what we needed to do. We were talking. [W]e had formed a verdict on all of the counts maybe except for that one . . . ." Defense counsel inquired whether it was true the foreperson "did not hear everything that was said by different jurors to the bailiff" at that time, eliciting the foreperson's response that she "really wasn't paying attention . . . ."

The court summoned the holdout juror for questioning. The prosecuting attorney asked the juror whether, as to count 1, "the fact that it's Friday and you didn't want to be here on Monday" was a factor "in any of [her] decisions?" The juror responded, "[a]bsolutely not."[8] The juror acknowledged that she was the one vote on the 11-1 verdict and that she changed her vote after the bailiff knocked on the door. However, she denied changing her vote because of having to return on Monday. When asked by defense counsel whether there was a change of vote after the bailiff stated it would be up to the judge whether the jurors had to come back on Monday, the juror responded, "Yes, but not for that reason."[9]

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[8] Counsel's questioning of the juror went as follows:

"[Prosecuting Attorney]: Juror Number 7, on count 1 do you remember that count, it was the kidnapping count of Dawn W?

"Juror No. 7: Yes, I do.

[Prosecuting Attorney]: In a decision that you made, did it factor at all the fact that it's Friday and you didn't want to be here on Monday? Was that a factor?

"Juror No. 7: No.

"[Prosecuting Attorney]: Was that a factor in any of your decisions --

"Juror No. 7: Absolutely not.

"[Prosecuting Attorney]: -- you made on the verdict?

"The Court: At one point was it 11-1 and you were the one vote on that count?

"Juror No. 7: Yeah.

"The Court: Okay. And did you change your vote after the bailiff knocked on the door and had a brief conversation?

"Juror No. 7: Yeah.

"[Prosecuting Attorney]: And did you change your vote because you knew you would have to come back on Monday?

"Juror No. 7: No."

[9] Under further questioning, the holdout juror consistently denied changing her vote to avoid having to return on Monday.

Counsel specifically inquired about what the bailiff told the jurors:

The trial court proceeded to take the verdicts from the jurors, with defense counsel agreeing with the court that "[t]hey're not hung at this point." After the verdict, appellant discharged his counsel and filed a motion for new trial in pro. per., claiming misconduct of the jury in connection with the verdict. The trial court denied the new trial motion.

A. State Law

Under state law, appellant relies on a 1924 decision of the California Supreme Court, *People v. Ferdinand* (1924) 194 Cal. 555, the only California case he was able to find involving allegedly coercive remarks made by a bailiff to the jury. In *Ferdinand*, a juror questioned the bailiff whether there was a standard rule that a jury must be discharged if it failed to reach a verdict within 72 hours. The bailiff responded that it depended upon "'the nature of the case and the length of time required to try it'" and he did not think there was "'any arbitrary time within which a jury must be discharged.'" (*Id.* at p. 573.) The court found no error occurred because the bailiff's comments were not directed to the specific case in question and there was no indication the jurors had been deadlocked at the time. (*Id.* at pp. 573-574.) The bailiff in *Ferdinand* also admittedly told the jury during deliberations that unless a verdict were agreed upon "the court would keep them out until the balance of the week, or until they had arrived upon a verdict." (*Id.* at p. 573.) Even so, the court held that "no error was committed on the trial

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"[Defense Counsel]: Did somebody ask the question of the bailiff what happens if we have verdicts on 9 counts and not the other one, will we have to come back Monday?

"Juror No. 7: Yes.

"[Defense Counsel]: And did the bailiff say I don't know, it's up to the judge, you may have to come back on Monday?

"Juror No. 7: Yes.

"[Defense Counsel]: And then was there a change of vote? Did the vote then become unanimous?

"[Prosecuting Attorney]: At that time.

"Juror No. 7: Yes, but not for that reason."

of the defendants which would justify an order of reversal . . . ." (*Id.* at p. 574.) Thus, *Ferdinand* does not assist appellant.

Respondent cites a more recent decision, *People v. Hawthorne* (1992) 4 Cal.4th 43, which we find instructive. In *Hawthorne*, a capital case, the trial judge was home on vacation during a portion of the jury's deliberations. Counsel had stipulated to a procedure for handling jury matters while the judge was out of the courthouse. (*Id.* at p. 61.) Twelve days into their deliberations, the jurors gave the bailiff a note asking, "'What do we do now? After much extra deliberation one member of the jury is not sure whether the defendant is guilty or not guilty.'" (*Ibid.*) The bailiff called the judge at home and informed him of the jury's question. The judge instructed the bailiff to advise the jury to continue deliberating until an answer was returned and to have the clerk alert the attorneys of the jury's inquiry. Immediately after the first call, however, the judge received a second call from the bailiff informing him the jury wished to continue to deliberate without receiving an answer to their inquiry. The judge therefore instructed the bailiff to place the jury's question in the file and to have the jury continue to deliberate without informing counsel of the jury's query. (*Id.* at pp. 62-63, 64.) The jury later found the defendant guilty of capital murder. (*Id.* at p. 51.)

On appeal, Hawthorne asserted that the trial judge, through the bailiff, improperly instructed the jury ex parte and off the record in response to an indication they were deadlocked in their deliberations. (*Hawthorne, supra*, 4 Cal.4th at p. 63.) The Supreme Court rebuffed this argument, noting a critical examination of the record failed to substantiate such a broad characterization of the proceedings. (*Id.* at pp. 63-64.) The court rejected Hawthorne's contention that absent a reporter's transcript of the bailiff's communications with the jurors it could not be determined whether his directions conveyed a prejudicially coercive connotation to the jury. "Bailiffs," the court noted, "have innumerable contacts with deliberating juries any of which offers the opportunity for an untoward comment. The mere potential for impropriety, however, cannot sustain an inference of misconduct. As officers of the court, bailiffs must be presumed to act in accordance with their sworn duty to keep the jury insulated from all extraneous

influences, including their own." (*Id.* at p. 67.) The record reasonably supported the conclusion that the bailiff told the jury "nothing more or less than to continue their deliberations, as they were already doing." (*Ibid.*) There was no evidence the jury had deadlocked or reached an impasse likely resolved other than in accordance with their individual judgment. The circumstances, the court concluded, were not such as to present any potential for undue or untoward influence by the ex parte contact. (*Ibid.*)

Here, the bailiff responded to the jury room after being summoned by the jury. When told by the jurors that they had reached a verdict on all but one of the counts, he told them to write a note to the judge. The jurors then asked what would happen next. The bailiff simply responded that it depended on the judge -- the judge either would ask the jury to deliberate further or take the verdicts that had been reached. When asked whether further deliberations would require the jury to return on Monday, the bailiff merely responded that returning to court on Monday was a possibility. Sometime afterwards, the bailiff heard one of the jurors say she would change her vote.

When questioned, the foreperson indicated the bailiff was summoned so the jurors could ask what they needed to do if they could not agree on a verdict on a particular count. According to the foreperson, before the bailiff's arrival there was "a lot of conversation going on, including talk about the possibility of returning Monday to continue deliberations." The foreperson indicated that no juror wanted to return on Monday, but the holdout juror did not change her vote for that reason. Rather, the bailiff was asked to leave and further discussions took place, after which the holdout juror indicated she would change her vote.

The holdout juror stated that the bailiff was called to the jury room and asked whether deliberations would continue Monday if a verdict had not been reached on one of the counts. She recalled the bailiff said it was up to the judge, but it was possible the jury would have to return Monday for further deliberations. The holdout juror stated she subsequently changed her vote. Although it is not clear from the record exactly when she changed her vote, under questioning by the court and counsel the holdout juror indicated the possibility of returning Monday for further deliberations had "[a]bsolutely not"

factored into her decision to change her vote, and she declared the change was "not for that reason."

As in *Hawthorne*, there is no indication in the record in the case at bar that the jurors had reached an impasse they would likely resolve other than in accordance with their individual judgment. After hearing from the bailiff, the foreperson and the holdout juror, the court and counsel agreed on the record that the jury was *not* hung and that the holdout juror said she changed her mind after, and not because of, the bailiff's confirming what the jury already suspected regarding the possibility of returning on Monday for further deliberations.

B. Federal Constitutional Rights

Appellant contends the bailiff's comment to the jurors amounted to an *Allen* charge gone awry. (*Allen v. United States* (1896) 164 U.S. 492 (*Allen*).) In *Allen*, the United States Supreme Court held that the trial court did not err by reminding an apparently deadlocked jury that "although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, . . . they should listen, with a disposition to be convinced, to each other's arguments [and] a dissenting juror should consider whether his doubt was a reasonable one . . . ." (*Id.* at p. 501.) In comparison, the Supreme Court, in *Jenkins v. United States* (1965) 380 U.S. 445 (*Jenkins*), found the trial court's instruction to deadlocked jurors that "'You have got to reach a decision in this case,'" coercive and reversed for a new trial. (*Id.* at p. 446.) Thus, a trial court may encourage a deadlocked jury to reach a unanimous verdict, but it may not order it to do so.

Appellant asserts that though the statements at issue here were not made by the court but were conveyed to the jury by the bailiff, the analysis is essentially the same as in the *Allen* instruction cases. Accordingly, he argues, "where the bailiff advises jurors about continued deliberations in the face of a jury deadlock, coercion is the likely consequence . . . ." We disagree.

On the record before us, the bailiff did not advise the jury to continue deliberations. In the present case, the jury called the bailiff and informed him that it had

reached verdicts on all but one count. The bailiff told the jurors, to "just write that down and I'll give it to the judge." When the jurors asked, "What happens next?" the bailiff responded that "it depends on the judge" whether they would have to come back and deliberate more or whether the judge would simply take the verdicts on nine counts. No *Allen* charge was given, and we find no *Jenkins* error occurred to deprive appellant of due process and his right to a jury trial.

2. Jury Instruction

Appellant contends CALCRIM No. 1191, which the trial court gave the jury with respect to the uncharged prior sexual assault on Natalie, interfered with the presumption of innocence and allowed the jury to convict him on a standard of proof less than beyond a reasonable doubt.

CALCRIM No. 1191 advised the jury that it may consider evidence of the uncharged crimes "only if the People have proved by *a preponderance of the evidence* that the defendant, in fact, committed the uncharged offenses against Natalie M." (Italics added.) The instruction further told the jurors that if they decided that appellant had committed the uncharged offenses, "you may, but are not required to[,] conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses[,] and based on that decision, also conclude that the defendant was likely to commit rape and assault [with] intent to commit rape as charged . . . ." Further, the jury was instructed that if it concluded appellant committed the uncharged offenses, "that conclusion is only one factor to consider, along with all the other evidence" and that "[i]t is not sufficient by itself to prove that the defendant is guilty of rape and assault with intent to commit rape as charged . . . ." Rather, "[t]he People must still prove each charge beyond a reasonable doubt." The court also instructed, "Do not consider this evidence for any other purpose except for the limited purpose of determining whether the defendant was disposed or inclined to commit sexual offenses."

Appellant concedes that our Supreme Court has held in *People v. Reliford* that CALJIC No. 2.50.01, the former propensity evidence instruction given in sex offense cases, correctly states the law and does not violate due process. (*People v. Reliford*

(2003) 29 Cal.4th 1007, 1012-1016 (*Reliford*); see also *People v. Loy* (2011) 52 Cal.4th 46, 74-76.) Subsequent cases have held that CALCRIM No. 1191 is sufficiently similar to the CALJIC No. 2.50.01 instruction upheld in *Reliford* and have rejected similar constitutional challenges to CALCRIM No. 1191. (*People v. Cromp* (2007) 153 Cal.App.4th 476, 480; see also *People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1103.)

Appellant acknowledges that this court must follow *Reliford*, as we must. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) He states he raises the argument solely for purposes of preserving the issue for federal review.

3. Evidence of Uncharged Prior Sexual Offenses

Appellant contends his convictions should be reversed because the trial court erred in admitting, under Evidence Code section 1108, evidence of the uncharged prior sexual assault by appellant against Natalie. He argues such evidence should have been excluded because its probative value was substantially outweighed by the undue confusion and prejudice resulting from testimony as to a nearly two-decades-old incident. We disagree.

Under Evidence Code section 1108, evidence of uncharged sex offenses is admissible to show that the defendant has a disposition or propensity to commit sex offenses, subject to the limitations set forth in Evidence Code section 352.[10] (*People v. Falsetta* (1999) 21 Cal.4th 903, 910-911, 918-919 (*Falsetta*).) Our Supreme Court has explained the rationale underlying this deviation from the historical practice of excluding

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10 Evidence Code section 1108 provides in pertinent part: "(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Evidence Code section 1101, subdivision (a) provides that with certain exceptions, including as provided in section 1108, "evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion." Evidence Code section 352 allows the court discretion to exclude evidence if "its probative value is substantially outweighed by the probability its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

propensity evidence, noting that "the Legislature's principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes." (*Id.* at p. 915.)

In holding that Evidence Code section 1108 survives a due process challenge, the court indicated the trial court must engage in a careful weighing process to avoid undue prejudice to the defendant. (*Falsetta, supra*, 21 Cal.4th at pp. 915-917.) Rather than admit or exclude evidence of every sex offense the defendant has committed, the trial court must consider a number of factors, including the similarity of the offenses, the remoteness in time of the uncharged offense, whether the uncharged offenses resulted in a conviction, whether the uncharged offense came from an independent source and if it was cumulative of an issue not reasonably subject to dispute. (*Id.* at pp. 916-918; see also *People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1117.) The trial court balances the propensity evidence's probative value against its prejudicial and time-consuming effects as provided by Evidence Code section 352. (*Nguyen*, at p. 1117.)

A trial court's exercise of discretion under Evidence Code section 352 will not be disturbed on appeal except on a showing that the court acted in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice. (*People v. Hernandez* (2011) 200 Cal.App.4th 953, 966.)

Appellant claims that the trial court abused its discretion by admitting evidence of the uncharged offenses because they were significantly different from the charged offenses in that Natalie, unlike the victims in the charged offenses, was pregnant making her alleged assault particularly heinous and likely to inflame the passions of the jurors in ways the allegations of the charged offenses did not. Appellant further argues that the incident involving Natalie was remote, as that incident occurred in 1992, many years prior to the charged offenses, which took place in 1999, 2006 and 2007. Also, Natalie

testified that appellant pulled out a screwdriver that he put to her neck, and the use of a weapon involved far more violence than claimed by the victims in the charged offenses. Appellant asserts that although Felita claimed to have been beaten and Porsha to have been choked, they did not testify that appellant employed any weapon against them; and, although Dawn testified appellant claimed to have a gun and threatened to shoot her, she never actually saw any firearm. We find no abuse of discretion.

In the present case, the charged and uncharged offenses are all sex offenses. (*People v. Frazier* (2001) 89 Cal.App.4th 30, 41 (*Frazier*) ["It is enough the charged and uncharged offenses are sex offenses as defined in section 1108"].) That Natalie was obviously pregnant and the other victims were not fails to alter the nature of the crimes or to render the instant crimes less abhorrent. The Penal Code makes no distinction between pregnant and nonpregnant victims of sexual assault, and, in any case, there is no requirement that the alleged occurrences be identical in all respects. (See *People v. Mullens* (2004) 119 Cal.App.4th 648, 660 [dissimilarities in alleged incidents go to the weight, not admissibility, of propensity evidence].)

Although there were minor dissimilarities, the manner in which appellant committed the uncharged offenses was strikingly similar to the manner in which he committed the charged offenses. Appellant acted at night when fewer people could be expected to be out and about and while his victims, young females, were alone or easily separated from a companion. He lured the victims into his vehicle by force or pretext, and he drove them to less trafficked areas before assaulting them. He prevented the victims from escaping from his vehicle by rigging the passenger door so it would not open. He used threats or physical force to overpower his victims and then either sexually assaulted or attempted to sexually assault them. Only after he had finished, or was unsuccessful in his attempt, did he allow the victims to leave his vehicle. Although appellant asserts there were "many years" between his assault of Natalie and his assault of Porsha, there was only a seven-year gap between the two incidents. (See *Frazier, supra,* 89 Cal.App.4th at p. 41 [15- or 16-year gap still relevant to establish pattern of molestation].) That appellant used a screwdriver to threaten Natalie and displayed no

weapon in the attacks upon his other victims does not make evidence of the uncharged sex offenses inadmissible but rather goes to the weight of such evidence under Evidence Code section 1108. (*Frazier*, at pp. 40-41.)

4. Propensity Evidence

Appellant's additional contention that Evidence Code section 1108 deprived him of equal protection and the right to a fair trial is equally unavailing. In *Falsetta*, our Supreme Court cited with approval the Court of Appeal's rejection of an equal protection challenge in *People v. Fitch* (1997) 55 Cal.App.4th 172, 184. (*Falsetta, supra*, 21 Cal.4th at p. 918.) *Falsetta* noted that the Legislature reasonably could create an exception to the propensity rule in sex offense cases "because of their serious nature, and because they are usually committed secretly and result in trials that are largely credibility contests." (*Ibid.*) Quoting *Fitch*, at pages 184-185, the Supreme Court explained that "'[t]he Legislature is free to address a problem one step at a time or even to apply the remedy to one area and neglect others. [Citation.]' [Citations.]" (*Falsetta*, *supra*, at p. 918; see also *People v. Waples* (2000) 79 Cal.App.4th 1389, 1394-1395; see *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310-1311.) We agree with these authorities.

5. Failure to Declare Mistrial

Appellant contends the trial court's failure to declare a mistrial sua sponte after Porsha's "emotional outbursts" during her testimony violated his federal and state due process rights to a fair trial and unbiased jury. We disagree.

The trial court is vested with inherent and statutory power to exercise reasonable control over its proceedings to ensure the efficacious administration of justice. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 951; Pen. Code, § 1044.) The trial judge has the responsibility of safeguarding both the rights of the accused and the interest of the public in the administration of criminal justice. (*People v. Shelley* (1984) 156 Cal.App.3d 521, 530.) "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) Whether an occurrence is incurably prejudicial by nature is speculative, and therefore the trial court has "considerable discretion" in ruling upon motions for mistrial. (*Ibid.*; see

also *Illinois v. Somerville* (1973) 410 U.S. 458, 461-462; *People v. Jenkins* (2000) 22 Cal.4th 900, 986.) A sua sponte declaration of a mistrial should be an "'extremely rare event'" (*Carrillo v. Superior Court* (2006) 145 Cal.App.4th 1511, 1529) because, absent the defendant's consent or legal necessity, double jeopardy will bar the matter from retrial (*Curry v. Superior Court* (1970) 2 Cal.3d 707, 712-714). Legal necessity for a mistrial usually arises from the jury's inability to agree or from physical causes not within the court's control such as the death, illness or absence of the judge, a juror or defendant. (*Id.* at pp. 713-714.)

The trial court did not abuse its discretion in not declaring a mistrial. Porsha's comments obviously were an expression of her personal opinion and a reasonable juror would not have considered them a basis upon which to determine appellant's guilt or innocence. (E.g., *People v. Roy* (1971) 18 Cal.App.3d 537, 554 [mistrial properly denied based on emotional outburst by victim's wife on stand], disapproved on other grounds as stated in *People v. Ray* (1975) 14 Cal.3d 20, 29, disapproved on other grounds as stated in *People v. Lasko* (2000) 23 Cal.4th 101, 110.) The trial court sustained objections to Porsha's outbursts raised by appellant's counsel, and it instructed the jurors to ignore such objectionable questions or testimony. The jurors were also instructed that they were not to "let bias, sympathy, prejudice, or public opinion influence [their] decision." Porsha's comments did not constitute one of the "extremely rare" cases in which the trial court was obligated to grant a mistrial on its own motion.

6. Prosecutorial Misconduct

During the redirect examination of Porsha, the prosecutor asked Porsha whether her mom was worried about her, "or do you have a brain tumor?" Porsha responded, "Yes." Defense counsel objected to the question as beyond the scope and irrelevant, and the court sustained the objection. Appellant contends the prosecutor committed misconduct by appealing to the passions and prejudice of the jury. We disagree.

A prosecutor does not commit misconduct merely by asking a question to which an objection was sustained. (*People v. Chatman* (2006) 38 Cal.4th 344, 405 ["It is not misconduct to ask a question in good faith even if the court exercises its discretion by

sustaining an objection"].) Here, once the court sustained the objection, the prosecutor dropped the subject and went on to examine Porsha on other matters. We find no prosecutorial misconduct in the prosecuting attorney's single query to Porsha.

7. Ineffective Assistance of Counsel

Appellant asserts that should this court hold his arguments regarding CALCRIM No. 1191, Evidence Code section 1108, alleged misconduct by the prosecutor and objections to Porsha's emotional outbursts to be forfeited by his counsel's failure to object, his attorney rendered constitutionally ineffective assistance. We disagree.

"'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome.'" (*Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*); see also *People v. Ledesma* (1987) 43 Cal.3d 171, 217.) We will indulge in a presumption that counsel's performance fell within the wide range of professional competence and his actions and inactions can be explained as a matter of sound trial strategy. (*People v. Gamache* (2010) 48 Cal.4th 347, 391.)

Appellant thus bears the burden of establishing constitutionally inadequate assistance of counsel. (*Strickland, supra,* 466 U.S. at p. 687; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.) If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus. (*Id.* at pp. 266-267.)

Appellant has not shown defense counsel's actions fell below an objective standard of reasonableness, nor has he shown that counsel's conduct was such as to undermine confidence in the outcome.

8. Impeachment Evidence

Appellant contends the trial court abused its discretion in permitting the prosecutor to impeach his credibility by introducing evidence he suffered a 1985 conviction for voluntary manslaughter and a 1993 conviction for corporal injury on a cohabitant. We disagree.

Evidence Code sections 788 and 352 "provide discretion to the trial judge to exclude evidence of prior felony convictions when their probative value on credibility is outweighed by the risk of undue prejudice." (*People v. Muldrow* (1988) 202 Cal.App.3d 636, 644 (*Muldrow*), citing *People v. Beagle* (1972) 6 Cal.3d 441, 453 (*Beagle*), superseded by statute on other grounds, as stated in *People v. Rogers* (1985) 173 Cal.App.3d 205, 208.) In ruling on the admissibility of evidence of prior felony convictions, the trial court should consider: "(1) Whether the prior conviction reflects adversely on an individual's honesty or veracity; (2) the nearness or remoteness in time of the prior conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged offense; and (4) what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions." (*Muldrow*, *supra*, at p. 644, citing *Beagle*, *supra*, at p. 453.) Such factors, however, need not be rigidly followed. (*Beagle*, *supra*, at p. 453.)

In the present case, under *Beagle*'s first factor, both manslaughter and spousal abuse involve moral turpitude. (*People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402 [spousal abuse involves "general readiness to do evil that has been held to define moral turpitude"]; *People v. Foster* (1988) 201 Cal.App.3d 20, 25 [voluntary manslaughter involves moral turpitude].)

Nor, under *Beagle*'s second factor, were appellant's two prior felony convictions too remote. Convictions factually remote in time are nonetheless probative and admissible if, excluding periods of incarceration, the defendant "did not subsequently lead a blameless life." (*People v. Green* (1995) 34 Cal.App.4th 165, 183.) Here, appellant did not lead a blameless life after his early convictions. Appellant was convicted of manslaughter in 1985, released from prison in 1989, convicted of

misdemeanor spousal abuse in 1991, convicted of felony spousal abuse in 1993, convicted of a misdemeanor in violating a domestic violence protective order in 1994 and convicted of evading a peace officer in 1995. In 1996, he was sent back to prison for two years for violating probation. In 1999, shortly after his release, the first of the charged offenses occurred. The trial court properly concluded neither conviction was too remote taking into consideration appellant's "sporadic but consistent commission of other crimes in the interim."

As to the third *Beagle* factor, similarity between the prior convictions and the charged offenses, a similarity between the prior and current offenses does not require automatic exclusion. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 926 (*Mendoza*); *Muldrow*, *supra*, 202 Cal.App.3d at p. 647.) That appellant's prior convictions and the current charges all involved some form of violence made the priors more probative of his credibility. On the other hand, the dissimilarity between the manslaughter and spousal abuse convictions and the sexual assault charges eliminated the danger he would be convicted of the current charges solely because of the prior convictions.

Finally, the fourth *Beagle* factor -- the adverse impact of the prior convictions upon appellant's right to testify -- has no application because appellant actually took the stand and suffered impeachment with the priors. Appellant thus was not deterred from testifying by the admission of the priors. (*Mendoza, supra*, 78 Cal.App.4th at p. 926.)

We find no abuse of discretion in the trial court's admission of prior conviction evidence for impeachment.

DISPOSITION

The judgment is affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J. GRIMES, J.