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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. JASON HARLSTON, Defendant and Appellant.	B266253 (Los Angeles County Super. Ct. No. VA138758)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph Porras, Judge. Affirmed in part and reversed in part.

Maggie Shrout, 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, Scott A. Taryle and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jason Harlston appeals from the judgment entered following his conviction, by jury trial, for a series of crimes arising out of a domestic violence incident. He contends there was trial and sentencing error.

The judgment is affirmed in part and reversed in part.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *The charged March 2015 incident*.

Domonique B. and defendant Harlston had been in a dating relationship for "[t]hree years off and on." On March 21, 2015, Domonique went to the Norwalk Metro Station to pick up Harlston in her car. Harlston became upset when he saw a stain on Domonique's steering wheel and said angrily, " 'What the fuck is that white stain that's right there.' "

Domonique was supposed to take Harlston to Moreno Valley, but she decided to drive home first to pick up her mother because she didn't want to be alone in the car with Harlston. When they arrived at her house, Domonique got out of the car and said she was going to get her mother. With his face "curling up," Harlston asked in a "harsh" tone why her mother was coming. Domonique explained why. Harlston got out of the car and they argued. He snatched Domonique's keys from the car and threw them over a fence. He then angrily pushed Domonique's forehead with his index finger, and threatened to snap her neck and put her in a body bag. Domonique reacted by screaming for her mother to come outside. When her mother did not appear, Domonique got back in her car to lock herself in, but she was unable to shut the door because "[Harlston] grabbed the

car door," pulled on it and bent the door out of shape. Domonique later learned the door would not shut and that her repair bill would be $380.

Domonique's sister, Monique, who had been inside the house, came out at the urging of her brother who said that Harlston was "messing" with Domonique again. Monique heard Harlston threatening to break Domonique's neck, and when he placed his finger on Domonique's forehead, Monique told him not to touch her. Harlston responded by saying, " 'Oh, you want to put yourself in the middle of this,' " and started walking toward her. Monique called 911 and told the operator that Harlston had threatened to break Domonique's neck.[1] By the time police arrived, Harlston had already left. Monique testified Harlston had physically harmed Domonique in the past, but this was the first time that she ever heard him threaten Domonique's life.

2. *The prior domestic violence evidence.*

a. *The prior Domonique incidents.*

The first domestic violence incident in their relationship occurred when Harlston had been drinking and in the middle of the night he choked Domonique. Domonique did not contact the police because she "took into account that he was drinking" and believed "he wasn't in his right state of mind."

The second incident occurred when Domonique was driving Harlston home: "[A]nd I went a different route than what I

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[1] A tape recording of Monique's 911 call was played to the jury. At one point on the tape, according to the transcript, Monique can be heard saying: "Don't touch her! Keep your hands to yourself! He just—he just threatened to break her neck. He just threatened to break her neck. You guys need to get here immediately, cause he started walking towards me."

normally went. So he didn't believe I was taking him home. So he was grabbing my steering wheel and trying to make me crash into the wall on the freeway."

As Domonique described the third incident: "He cornered me in my downstairs bathroom at [a] time he thought I was pregnant and he was pushing[2] me in the stomach saying that he was going to kill the baby, that he didn't want me to be pregnant, but I wasn't pregnant." Harlston also threatened to kill Domonique. Later that day, he climbed to the second floor of Domonique's home as she tried to close the windows to keep him out. At her family's urging, Domonique obtained a restraining order against Harlston in response to these events.

The fourth incident, which caused Domonique for the first time to fear that Harlston would actually carry out his threats, stemmed from an argument over driving directions. Domonique pulled the car over at a gas station and told Harlston to get out. Instead of leaving, he grabbed Domonique's cell phone and ripped her keys out of the ignition. He threw Domonique's cell phone into the street. When Domonique went to retrieve her phone, Harlston drove away in her car. He came back around about three times and acted as though he was going to run her over while "screaming and threatening for [her] to get into the car." Domonique testified: "I was standing at a pay phone and he would drive at the pay phone like full speed and then just stop before he got really close. Like before he would hit me, he would

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[2] Although the prosecutor tried to get Domonique to testify that Harlston had *punched* her in the stomach, she firmly testified that she had only been *pushed*.

just hit the brakes and laugh and back off and then drive away and then come back and do it over again."

During the fifth and final incident prior to the charged offense, the pair argued while driving on the freeway because Domonique had found out that Harlston was cheating on her. Harlston snatched Domonique's phone and threatened to throw it out of the moving car. Domonique cried and pleaded with him not to destroy her property. In the meantime, Harlston was pulling her hair while she was driving, threatening to kill her, and saying, "You should kill me."

b. *The prior incidents involving D.R.*

D.R. testified she and Harlston had been in a relationship from 2002 to 2007 and had two children together. D.R. ended the relationship because there was "too much domestic violence" and she was tired of "making excuses for . . . bruises."

In 2004, they got into an argument and physical altercation over their toddler son. Harlston struck D.R.'s wrist with a pay telephone receiver. When she fell to the ground, Harlston kicked and punched her; D.R. testified her "face was black and blue for quite some time."

Another time, around 2007, D.R. was staying at her grandmother's house when she received multiple harassing phone calls from Harlston. When she refused to answer the phone, Harlston showed up at the house and threw a brick at D.R.'s uncle's car, breaking the rear window. Harlston then threatened to "blow this whole house up." (As a result of this incident, Harlston apparently was convicted of criminal stalking.)

c. *The prior incident involving A.P.*

Los Angeles Police Department Detective David Kofoed testified that he investigated an incident which occurred on August 7, 2010, in which Harlston and a former girlfriend, A.P., got into a physical altercation. Kofoed had obtained video surveillance footage showing Harlston and A.P. arguing in a commercial parking lot. The video, which was played for the jury, apparently showed Harlston pulling A.P.'s hair and shoving her into a concrete wall. According to Harlston's opening brief, he was subsequently convicted of several offenses (dissuading a witness, corporal injury to a cohabitant, and false imprisonment) arising out of this incident. A.P. did not testify at trial.

3. *Defense evidence.*

The defense did not present any evidence.

4. *Trial outcome.*

Harlston was convicted of criminal threats, vandalism under $400, battery, and disobeying a court order, with prior prison term and prior serious felony conviction findings (Pen. Code, §§ 422, 594, subd. (b)(2)(A), 243, 166, subd. (a)(4), 667.5, 667, subds. (a)-(i)).[3] He was sentenced to a term of 11 years and 364 days. This sentence consisted of the upper term of three years for the criminal threats offense, doubled pursuant to the Three Strikes Law, plus five years for the prior serious felony conviction enhancement; plus a consecutive term of 364 days custody in any state facility for the vandalism offense. He was also sentenced to concurrent terms for the offenses of battery and disobeying a court order.

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[3] All further statutory references are to the Penal Code unless otherwise specified.

CONTENTIONS

Harlston contends: (1) the trial court erred by admitting evidence that he had committed prior acts of uncharged domestic violence against Domonique, D.R., and A.P.; (2) the jury instruction allowing consideration of his prior uncharged domestic violence evidence to prove propensity was erroneous; and (3) his sentence for battery should have been stayed pursuant to section 654.

DISCUSSION

1. *The trial court's admission of evidence of Harlston's prior acts of domestic violence does not require reversal of his conviction.*

Harlston contends his conviction for having criminally threatened Domonique must be reversed because the trial court erred by allowing evidence of his prior acts of domestic violence against Domonique and two other women. Although one of the prior acts should not have been admitted, we conclude this amounted to only harmless error and affirm his conviction.

a. *No forfeiture of claim on appeal.*

At the outset, the People contend that Harlston is estopped from appealing the trial court's admission of prior domestic violence evidence[4] because, during trial, defense counsel made no objections to this evidence, and during the pretrial evidentiary

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[4] Evidence Code section 1109, subdivision (a)(1) states in relevant part: "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

hearing defense counsel said that she would "submit" the issue "to the [trial] court's discretion."

We do not agree that Harlston is estopped from raising this issue on appeal. There is no forfeiture of an issue on appeal—even if the defendant did not expressly object in the trial court—if the issue was put "on the table" by the prosecution during motions in limine. (*People v. Brenn* (2007) 152 Cal.App.4th 166, 174.) "The whole idea behind the objection requirement is to afford the proponent of the evidence an opportunity to establish its admissibility and assist the court in making an informed decision." (*Ibid.*) An issue can be raised when the trial court considered and ruled on the issue as if an objection had been properly made. (*People v. Abbott* (1956) 47 Cal.2d 362, 372-373.)

Here, the People had an "opportunity to establish [the evidence's] admissibility and assist the [trial] court in making an informed decision" (*People v. Brenn*, *supra*, 152 Cal.App.4th at p. 174) in connection with their Evidence Code section 402 motion, and the trial court issued a tentative ruling that it would allow the evidence. Because the trial court considered and ruled on the issue as if an objection had been made, the issue on appeal is preserved. (*People v. Abbott*, *supra*, 47 Cal.2d at pp. 372-373.) We therefore proceed to the merits of the claim.

b. *No evidentiary error requiring reversal.*

(1) *The prior Domonique incidents.*

During trial, Domonique testified that Harlston had committed five separate acts of domestic violence against her prior to the charged offenses. On appeal, Harlston argues that two of those prior acts—pushing Domonique in the stomach while he was under the mistaken belief that she was pregnant, and choking her after drinking—should have been excluded as unduly prejudicial because they were so inflammatory. He asserts that "those prior incidents, unlike the charged incident . . . were [acts] of extreme physical violence."

Evidence Code section 1101 makes inadmissible "evidence of a person's character or a trait of his or her character . . . to prove his or her conduct on a specified occasion." However, evidence of prior acts of domestic violence offered pursuant to Evidence Code section 1109 is admissible to show the defendant's propensity to commit domestic violence unless there is a probable danger that undue prejudice will substantially outweigh the probative value of this evidence. (*People v. Callahan* (1999) 74 Cal.App.4th 356, 368; *People v. Soto* (1998) 64 Cal.App.4th 966, 984.) Evidence Code section 1109 makes past acts of domestic violence highly probative. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1338; see *People v. Johnson* (2000) 77 Cal.App.4th 410, 419 [" 'The propensity inference is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases.' "]; *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139 ["The evidence was extremely probative, showing defendant's propensity for violence against domestic partners."].)

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) "The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.) "[W]hen ruling on a section 352 motion, a trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under Evidence Code section 352." (*People v. Williams* (1997) 16 Cal.4th 153, 213.) "The court's exercise of discretion under Evidence Code section 352 will not be disturbed on appeal unless the court clearly abused its discretion, e.g., when the prejudicial effect of the evidence clearly outweighed its probative value. [Citation.]" (*People v. Brown* (1993) 17 Cal.App.4th 1389, 1396.) Such rulings are reversed only upon " 'a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues*, *supra*, at pp. 1124-1125.)

Procedurally, we note that the record does not include an express statement by the trial court that it undertook such an analysis regarding prior acts of domestic violence against Domonique, in particular, the choking and the pushing incidents. However, the record is replete with discussion on the broader Evidence Code section 352 issue raised initially by the People's motion and discussed at length both during the pre-trial hearing

and at the trial itself. Thus, "we are willing to infer an implicit weighing by the trial court on the basis of record indications well short of an express statement." (*People v. Padilla* (1995) 11 Cal.4th 891, 924, disapproved on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Harlston argues that the choking and pushing incidents were much more violent, and therefore more inflammatory and prejudicial, than the charged misdemeanor battery for simply pushing his finger into Domonique's forehead. In so contending, Harlston overlooks the fact that he was charged with both battery *and* criminal threats arising out of a single incident.[5] Domonique testified that during this incident she became afraid for her life because Harlston threatened to snap her neck and put her in a body bag. Domonique testified that "this time it seem[ed] like it was ten times worse than any argument, anything we've ever had," causing her to believe Harlston would in fact carry out his threat. Harlston also exerted enough force on Domonique's car door to bend it out of shape and prevent it

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[5] Based on both Monique's and Domonique's testimony, the threat and the finger to the forehead appear to have been either simultaneous or very close in time. Monique testified, "One of the things I heard was him threaten to break her neck, and when he put his finger on her forehead and I told him not to touch her . . . ." When Domonique was asked, "Just do your best to remember what, if anything, he was saying when he was pushing you in the forehead," she replied, "I think that's when he was threatening to snap my neck." In Harlston's multiple punishment claim (addressed below), he argues that his battery sentence should have been stayed pursuant to section 654 "[b]ecause the criminal threat was committed as part of the same course of conduct as the battery." We agree.

from closing, such that Domonique had no way to safely lock herself in her car to escape the threat. When the act of pushing his finger into Domonique's forehead is viewed together with his threat of snapping her neck and putting her in a body bag, and also viewed along with the damage to her car door, the prior choking and pushing incidents do not seem unduly inflammatory.

In sum, when Harlston's charged acts are viewed in context, they amounted to conduct much more egregious than simply pushing his finger against Domonique's forehead. Accordingly, we conclude the trial court did not abuse its discretion by admitting evidence of those two prior domestic violence incidents.

(2) *The 2007 D.R. and 2010 A.P. incidents.*

Harlston argues the trial court erred in admitting evidence about the 2007 D.R. and 2010 A.P. incidents because the jury was not told he had been convicted in each incident. We disagree.

As the People properly point out, the invited error doctrine bars Harlston from raising this issue on appeal because at trial he intentionally sought to *exclude* evidence of those convictions. (See *People v. Russell* (2010) 50 Cal.4th 1228, 1250 ["[T]he doctrine of invited error applies when a defendant, for tactical reasons, makes a request acceded to by the trial court and claims on appeal that the court erred in granting the request."]; *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 [under invited error doctrine, if party's conduct causes judicial error, party is estopped from raising error on appeal].)

The record demonstrates that the prosecutor sought to present evidence of Harlston's prior domestic violence convictions, but defense counsel argued that evidence should be excluded.[6] The trial court ultimately agreed with defense counsel, concluding that such evidence would be "more prejudicial than probative."

In light of Harlston's having urged the trial court *not* to admit evidence of the ensuing convictions, he cannot—under the invited error doctrine—claim on appeal that the court erred by ruling in his favor.

Moreover, even assuming arguendo that the invited error doctrine did not apply, we would not find any error. While we acknowledge the possibility that jurors might be inclined to punish a defendant like Harlston, falsely believing that he had gone unpunished for his prior conduct (see *People v. Falsetta* (1999) 21 Cal.4th 903, 917 (*Falsetta*) ["prejudicial impact of [other crimes] evidence is reduced if the uncharged offenses resulted in actual *convictions* and a prison term, ensuring that the jury would not be tempted to convict the defendant simply to punish him for the other offenses"]), there is a countervailing prejudice if jurors know the defendant has previously been convicted of a very similar crime. "There is little doubt exposing a jury to a defendant's prior criminality presents the possibility of prejudicing a defendant's case and rendering suspect the outcome of the trial." (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580.)

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[6] As noted, above, in the A.P. incident Harlston had been convicted of dissuading a witness, corporal injury to a cohabitant, and false imprisonment. In the D.R. incident, he had apparently been convicted of criminal stalking.

We conclude the trial court did not abuse its discretion by excluding evidence of Harlston's prior domestic violence convictions.

(3) *The 2004 D.R. incident.*

Evidence Code section 1109, subdivision (e), expressly makes conduct more than 10 years old presumptively inadmissible "unless the court determines that the admission of this evidence is in the interest of justice." The "interest of justice" requirement under this section does not "necessitate[ ] an inquiry different in kind from that involved in a determination under [Evidence Code] section 352." (*People v. Johnson* (2010) 185 Cal.App.4th 520, 539.) When applying such an analysis, the Legislature intended to allow admission of evidence whose probative value weighs more heavily than what is normally sufficient for admission under Evidence Code section 352. (*People v. Johnson*, at p. 539.)

The record here is devoid of any discussion of balancing the probative value versus prejudicial effect regarding the 2004 D.R. incident. In fact, the trial court does not at any time articulate the factors it used to determine why the 2004 incident should be allowed in, or how it would serve the "interest of justice." (Compare *People v. Johnson*, *supra*, 185 Cal.App.4th at pp. 537-539 [10-year rule complied with where it had been briefed and trial court specifically referred to "interest of justice" standard in its ruling].) Accordingly, we agree with Harlston that the trial court abused its discretion by admitting this evidence.

(4) *The single error in admitting the 2004 D.R. incident does not require reversal.*

The evidence against Harlston was extremely strong. The prosecution witnesses were apparently quite credible and Harlston did not put on a defense case. Because it is not reasonably probable that Harlston would have been acquitted absent evidence of the 2004 D.R. prior domestic violence incident, we conclude the error in admitting evidence of the 2004 D.R. incident was harmless. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 671 [harmless error test for wrongful admission of evidence is *Watson*[7] standard: is it reasonably probable a more favorable result would have been reached without the error?].)

2. *Jury instruction was not erroneous.*

The jury was instructed with CALCRIM No. 852, in pertinent part, as follows: "If you decide that the defendant committed the uncharged domestic violence, you may but are not required to conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and based on that decision also conclude that defendant was likely to commit and did commit criminal threats, vandalism, battery and disobeying a court order, as charged here. [¶] If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of prior domestic violence. The People must still prove each charge beyond a reasonable doubt. [¶] Do not consider this evidence for any other purpose except for this limited purpose."

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[7] *People v. Watson* (1956) 46 Cal.2d 818.

Harlston contends CALCRIM No. 852—which allowed the jury to consider the prior acts of uncharged domestic violence as evidence of his propensity to commit the charged offenses—was erroneous and prejudicial because it went beyond the intent of Evidence Code section 1109. Harlston also claims the instruction impermissibly reduced the People's burden of proof below the required beyond-a-reasonable-doubt standard. These claims are without merit.

"Evidence of prior criminal acts is ordinarily inadmissible to show a defendant's disposition to commit such acts. (Evid. Code, § 1101.) However, the Legislature has created exceptions to this rule in cases involving sexual offenses (Evid. Code, § 1108) and domestic violence (Evid. Code, § 1109). Our Supreme Court has held that Evidence Code section 1108 conforms with the requirements of due process. ([*Falsetta*, *supra*, 21 Cal.4th at p. 915].) It has also ruled that CALJIC No. 2.50.01, an instruction explaining the application of section 1108, is proper. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012 [130 Cal.Rptr.2d 254, 62 P.3d 601].) The analysis in *Falsetta* has been used to uphold the constitutionality of Evidence Code section 1109 [citations] and the analysis in *Reliford* has been used to uphold the constitutionality of the corresponding CALJIC instruction, CALJIC No. 2.50.02 [citation]." (*People v. Reyes* (2008) 160 Cal.App.4th 246, 251.)

"[T]here is no material difference between the language found constitutional in CALJIC No. 2.50.02 and that in CALCRIM No. 852. In fact, CALCRIM No. 852 is expressed in clearer language and makes more certain the manner in which such evidence may or may not be used by the jury. The reasoning of the cases analyzing CALJIC No. 2.50.02 is equally applicable

to the validity and propriety of CALCRIM No. 852. [¶] CALCRIM No. 852 makes clear the evidence of uncharged acts of domestic violence may only be considered at all if it has been established by a preponderance of the evidence and explains what is meant by that burden of proof. The instruction also explains that if that burden is not met, the evidence must be disregarded entirely. [¶] As with CALJIC No. 2.50.02, CALCRIM No. 852 explains that *if* the jury finds the defendant committed the uncharged acts, it *may* but is not required to conclude the defendant was disposed to or inclined to commit domestic violence and may also conclude that the defendant was likely to commit and did commit the crimes charged in the case. Also as with CALJIC No. 2.50.02, CALCRIM No. 852 clarifies that even if the jury concludes the defendant committed the uncharged acts, that evidence is only one factor to consider, along with all the other evidence and specifies that such evidence alone is insufficient to prove defendant's guilt on the charged offenses. CALCRIM No. 852 then goes on to state that the People must still prove each element of every charge beyond a reasonable doubt. . . . [¶] The authority defendant relies on to support his arguments are cases based on the pre-1999 version of CALJIC No. 2.50.02. (*People v. James* (2000) 81 Cal.App.4th 1343, 1349; [citations].)" (*People v. Reyes*, *supra*, 160 Cal.App.4th at pp. 251-252, fns. omitted.) Harlston's reliance on *James* is, accordingly, unpersuasive.

Harlston complains that CALCRIM No. 852 "unduly focuses on the evidence of a prior *conviction* as it relates to his disposition."[8] (Italics added.) However, the instruction says nothing about a "prior conviction," but only talks about "prior conduct." Harlston also argues that because Evidence Code section 1109 "makes no mention of disposition or character," we should adopt a version of the instruction that makes no mention of these factors. However, it is clear that California law has accepted the proposition that the entire point of Evidence Code sections 1108 and 1109 is to allow evidence of a defendant's character which tend to demonstrate that he had the disposition to commit the charged offense.

"[Evidence Code] [s]ection 1101(b) provides that '[n]othing in this section' prohibits the admission of uncharged acts to prove a fact 'other than [a person's] disposition to commit such an act.' Section 1101(b) is not an exception to section 1101(a). Section 1101(a) prohibits the use of character to prove conduct. Section 1101(b) provides for the admission of uncharged acts when relevant to prove some other disputed fact. The true exceptions to section 1101(a) are set out in Evidence Code sections . . . 1108, and 1109." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 406, fn. omitted; see also *People v. Merriman* (2014) 60 Cal.4th 1, 40, italics added ["the sexual assaults evidence would have been cross-admissible pursuant to Evidence Code section 1108 *to show defendant's propensity* to commit the rape and forcible oral copulation upon which both the

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[8] This claim is particularly ironic because, at trial, Harlston asked the trial court not to inform the jury that he had sustained convictions for his prior acts of domestic violence.

murder charge and the special circumstance allegations were based"].)

We conclude the trial court did not err by instructing the jury with CALCRIM No. 852.

3. *Sentence for battery should have been stayed pursuant to section 654.*

Harlston contends his sentence for battery should have been stayed pursuant to section 654 because it was committed as part of the same course of conduct as the criminal threats offense. Harlston argues these two offenses were merely part of a single course of conduct with a single intent and objective, namely, to frighten Domonique. We agree.

Section 654 prohibits multiple punishment for crimes based on the same act or omission.[9] "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on other grounds in *People v. Correa* (2012) 54 Cal.4th 331, 334.) " '[T]he purpose of section 654 "is to insure that a defendant's punishment will be commensurate with his culpability." ' [Citation.] 'It is [the] defendant's intent and objective, not temporal proximity of his

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[9] Section 654, subdivision (a) provides, in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

offenses, which determine whether the transaction is indivisible.' [Citation.] ' "The defendant's intent and objective are factual questions for the trial court; [to permit multiple punishments,] there must be evidence to support [the] finding the defendant formed a separate intent and objective for each offense for which he was sentenced." ' [Citation.]" (*People v. Capistrano* (2014) 59 Cal.4th 830, 886, fn. omitted.)

"The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them. [Citations.] 'We must "view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" ' " (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312-1313; *People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585 [trial court's finding, whether explicit or implicit, may not be reversed if supported by substantial evidence]; see *People v. Hester* (2000) 22 Cal.4th 290, 294 [where burglary perpetrated in order to commit assault, section 654 prohibited multiple sentencing]; *People v. Milan* (1973) 9 Cal.3d 185, 196 [under section 654 the defendant could "not be punished for both the kidnaping of Burney for the purpose of robbery with bodily harm and the murder of Burney which was the indivisible culmination of the infliction of bodily harm"]; *In re Henry* (1966) 65 Cal.2d 330, 332 [because assault and robbery of liquor store owner was indivisible transaction, section 654 prohibited punishment for both crimes].)

Viewed in context, Harlston aggressively pushed his finger into Domonique's forehead while simultaneously, or immediately thereafter, threatening to harm her. Hence, the evidence demonstrated this was all an "indivisible course of conduct" with a single objective: to place Domonique in fear for her life. The finger to the forehead served to emphasize Harlston's verbal threat. Accordingly, the trial court erred by imposing two unstayed sentences, and the proper course was to stay imposition of sentence on the battery pursuant to section 654.

DISPOSITION

The judgment is partially reversed to stay imposition of sentence on the battery conviction. In all other respects, the judgment is affirmed. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

ALDRICH, J.

GOSWAMI, 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.