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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DEMAR TAYLOR JACOBS, Defendant and Appellant.	B228646 (Los Angeles County Super. Ct. No. KA089801)

APPEAL from a judgment of the Superior Court of Los Angeles County. Carol Williams Elswick, Judge. Affirmed.

Ava R. Stralla, 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, Susan Sullivan Pithey, and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

The Los Angeles District Attorney's Office filed an information on March 29, 2010, charging defendant and appellant Demar Taylor Jacobs with one count of corporal injury to a spouse/cohabitant/child's parent in violation of Penal Code section 273.5, subdivision (a), and one count of criminal threats in violation of Penal Code section 422. It was alleged that defendant had two prior no-probation convictions within the meaning of Penal Code section 1203, subdivision (e)(4). It was further alleged that defendant had served two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).

The trial court bifurcated the prior conviction allegations. The jury found defendant guilty of count one and not guilty of count two. Defendant admitted the truth of the two prior conviction and prison term allegations. He was sentenced to a total of six years in state prison. The trial court ordered a 10-year period for defendant to stay away from the victim, subject to any family law order regarding visitation of their minor children.

Defendant timely appealed. He argues that the trial court abused its discretion by admitting four instances of prior bad acts of domestic violence pursuant to Evidence Code section 1109.[1] He further contends that section 1109 is unconstitutional on its face.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the usual rules of appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), defendant and Deborah Gutierrez (Gutierrez) began dating in around July 2005 or 2006. He moved into her apartment within two or three months. They had a child in July 2009, and another child in July 2010.

1. *Charged Offense – February 25, 2010*

On February 25, 2010, when she was about four months pregnant, Gutierrez returned from shopping to find her car, which defendant had been driving, in the

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

driveway. She walked into the home carrying her baby in a baby carrier and went into her bedroom. Defendant was lying on the living room sofa.

Defendant banged the bedroom door open and grabbed Gutierrez's cell phone from the bed. He looked through her text messages and saw some between her and another man. He got angry and they argued. Gutierrez wanted her cell phone back. Defendant grabbed her arm, and, either she tripped or defendant pushed her, onto the bed.

Defendant walked outside with Gutierrez's cell phone and continued reading her text messages. He left in the car she had been driving with her purse, keys, phone, and money. Gutierrez got her baby, went across the street to the police station, and reported defendant. She was crying and hysterical and afraid that defendant was going to harm her.

Gutierrez told the police that she walked into the house quietly so as not to disturb defendant. He punched a hole in the door when he opened it. Gutierrez had set the baby's car seat just inside the door, and yelled, "'Oh my God. I can't believe you almost hit the baby.'" Defendant replied, "'I don't care. That's not my son. We're all going to die.'"

Gutierrez told the police that defendant had "socked" her in the face, head, and neck more than once. A police officer saw contusions in those areas. She told defendant to stop hitting her. Defendant stated, "'Don't tell me what to do. Shut the fuck up.'" She used defendant's name and tried to calm him down. She told the police officer that defendant said, "'You're going to die tonight. Look into my eyes.'" He also said, "'Fuck, it's all going to go down now.'" Gutierrez told the police that she interpreted that as defendant saying that he was going to end all of their lives together.

Gutierrez told the police that she was afraid that defendant would carry out his threats and harm or kill her and their son. She was particularly fearful because this was the first time that defendant had threatened their son.

Gutierrez further informed the police that she had a protective order against defendant, but she had not been enforcing it because she had taken him back. The police

officer asked if she wanted an emergency protective order for her and her son, and she responded, "'Yes.'"

Paramedics checked and treated Gutierrez, and she declined their offer to go to the hospital. A police officer took photographs of a bump on her forehead, swelling above and to the right of her right eyebrow, and redness on her ear.

Gutierrez pointed out, and the officer saw, a hole in the bedroom door and bedding that had been disturbed during the attack. The officer took photographs of the house. The officer asked Gutierrez to place the baby carrier in the place she had put it when she walked into the bedroom. She did, and the officer took pictures.

Throughout her trial testimony, Gutierrez repeatedly denied physical abuse by defendant or failed to remember any such abuse or minimized his behavior. She explained that he was the father of her children, and she still wanted to be with him. She did not want him to go to jail. The trial court permitted the prosecution to treat her as an adverse witness.

On February 28, 2010, about three days after the charged incident, defendant drove up to the house and yelled at Gutierrez to come outside. She said that she was going to call the police, and defendant drove away. She was scared and reported the incident. Officers canvassed the area and arrested defendant a couple of blocks away.

2. *Prior Offense – August 27, 2006*

Pomona Police Officer Daniel Gomez testified that on August 27, 2006, Gutierrez reported an incident involving defendant after they had been living together for about two months. She was crying.

Gutierrez said that she and defendant had argued, and it turned physical. Defendant pulled her hair. When she broke free, defendant pushed her down. While holding her on the bed, defendant covered her face with a pillow for about a minute. Gutierrez said that it was painful and that she had difficulty breathing. As he held the pillow over her face, defendant said that he was going to "'fuckin' kill her.'"

Gutierrez told Officer Gomez that there had been prior incidents that she did not report, but this time she was afraid that he would carry out his threat. Defendant had fled in Gutierrez's rental car. She had repeatedly told defendant not to take her car.

Officer Gomez saw a bruise on Gutierrez's bicep and redness around her neck; he took photographs.

At trial, Gutierrez again denied defendant's abuse, minimized this incident, and failed to remember what she had told the police.

3. *Prior Offense – June 7, 2007*

On June 7, 2007, defendant was not living with Gutierrez, but would come and go from her place. Her brother, Dicarlo, was staying with her temporarily.

Gutierrez and defendant had been arguing that day in telephone conversations and text messages. She did not remember telling the police officer that defendant had said, "'I'm going to mark you.'" She did not recall saying that that frightened her because she knew that his comment meant that he was going to have her killed. She did not remember defendant texting, "'I will kill you,'" but she gave the police her telephone.

Gutierrez parked in her parking spot and saw defendant there. They argued and physically fought. She was not sure if she told the police that defendant had asked why the seat of her car was so far back and accused her of being with another man. She did not remember telling the police that she did not answer, and that defendant grabbed her by the throat and forced her to the ground. She did not recall yelling at defendant to get off of her or him saying, "'Who do you think you're fucking with?'" She did not remember defendant letting her get up and wanting to see her cell phone.

Gutierrez had left her cell phone at home with Dicarlo. Defendant went to Gutierrez's apartment, and she followed. Defendant tried to get her cell phone from Dicarlo. Defendant fought with Dicarlo to try to get the phone. Gutierrez tried to separate them. She yelled, "'Get off of him. Leave him alone.'"

As Gutierrez was trying to pull defendant off of her brother, defendant bit her thumb hard and would not let go. She bit defendant's face or ear to try to get him to let go of her thumb. She did not recall telling the police that defendant then bit her arm.

Gutierrez did not remember telling the police that defendant went into her bedroom and said that he was going to leave. She did not remember telling him, "'No, you're not going anywhere.'" She did not remember that he punched the bedroom wall and made a hole. She did not recall standing in her bedroom doorway and defendant pushing her.

A police officer took photographs of the injuries to Gutierrez's thumb, arm, and neck, as well as the damage to her bedroom wall.

Defendant was arrested and went to jail over this incident. A restraining order was issued on July 23, 2007, which is set to expire on July 23, 2012.

Gutierrez was again evasive in her trial testimony about this incident. She admitted whatever she told the police officer was the truth.

4. *Prior Offense – September 13, 2009*

Gutierrez testified that she made a false complaint against defendant in September 2009. She reported that defendant had hit her. She told the police that defendant had assaulted her in the past. She did not remember telling the police that she had a restraining order against him.

Gutierrez had been having problems with defendant and asked him to leave the apartment. Defendant was upset.

Gutierrez testified that she lied when she reported that defendant had grabbed her around the throat and choked her. She lied when she said that she struggled to get away, and the baby started crying. She lied when she said defendant let go when the baby cried.

Gutierrez testified that she lied when she said that defendant went into their bedroom and got a rifle. She lied when she reported that defendant threatened to "blow [her] brains out." She lied when she said that defendant pointed the rifle at himself and threatened to blow his own brains out. She lied when she said that she tried to calm him down.

While she and defendant did in fact argue and the baby did begin crying, defendant took her keys and left. She was not sure but reported that he also took some of her mail.

Gutierrez went to her neighbor's apartment with the baby.

She reported the incident about two to three days after it had occurred. The police took photographs of injuries on Gutierrez's neck. Gutierrez admitted having injuries, but testified that the injuries were from a fight she had with a woman with whom defendant was cheating. She described that fight as pulling hair, scratching, and rolling around in the street.

5. *Prior Offense – September 16, 2009*

A couple of days after Gutierrez reported that defendant had choked her, she was sitting in front of her apartment with her neighbor, Erika Johnson (Johnson). (Defendant showed up and asked to see his son. Gutierrez refused. Defendant cursed at the two women. He also cursed toward Johnson's apartment. Defendant said something like, "'Come on, mother-fucker. Get your mother fuckin' ass out here so I can kick your ass.'" Johnson's boyfriend, Pedro, went outside. Defendant argued and fought with Pedro. After defendant got up from the ground, he pulled a knife from his pocket and pointed it at Pedro.

Defendant was angry after the fight and, as he was leaving, he told Gutierrez, "'Let me see my son.'" Gutierrez said, "'When you're in a better state of mind.'" When the police saw Gutierrez, she was shaking and appeared frightened.

Either Gutierrez or a friend called the police. Gutierrez did not recall telling the police that she had a restraining order against defendant.

DISCUSSION

I. *The evidence of the prior offenses was properly admitted*

Defendant claims that the trial court abused its discretion when it admitted the four prior domestic violence offenses. Although defendant admits that the offenses qualified as prior domestic violence offenses under section 1109, he claims that they should have been excluded under section 352.

A. Standard of review and applicable law

Section 1109, subdivision (a)(1), provides, in relevant part: "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of

the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

"By its incorporation of section 352, section 1109, subdivision (a)(1) makes evidence of past domestic violence inadmissible only if the court determines that its probative value is 'substantially outweighed' by its prejudicial impact." (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531.) The trial court has broad discretion "'in assessing whether [the] prejudicial effect [of evidence] outweighs its probative value.'" (*People v. Jones* (2011) 51 Cal.4th 346, 373.)

"'"The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense."'" (*People v. Johnson*, *supra*, 185 Cal.App.4th at pp. 531–532.) "Section 1109 was intended to make admissible a prior incident 'similar in character to the charged domestic violence crime, and which was committed against the victim of the charged crime or other similarly situated person.' [Citation.] Thus, the statute reflects the legislative judgment that in domestic violence cases, as in sex crimes, similar prior offenses are 'uniquely probative' of guilt in a later accusation. [Citations.] Indeed, proponents of the bill that became section 1109 argued for admissibility of such evidence because of the 'typically repetitive nature' of domestic violence. [Citations.] This pattern suggests a psychological dynamic not necessarily involved in other types of crimes. [Citation.]" (*People v. Johnson*, *supra*, at p. 532, fn. omitted.)

"'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. Not only is there a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity. Without the propensity inference, the escalating nature of domestic violence is likewise masked.'" (*People v. Johnson*, *supra*, 185 Cal.App.4th at p. 532, fn. 8.)

B. Analysis

The trial court did not abuse its discretion in determining that the probative value of the evidence of defendant's prior bad acts was not substantially outweighed by its prejudicial impact.[2] (*People v. Johnson, supra,* 185 Cal.App.4th at p. 531.) The prior offenses were markedly similar to the charged offense, favoring admissibility. (*Id*. at pp. 531–533.) Admissibility was further supported by corroborating evidence of the prior offenses, "which reduced the danger of fabrication." (*Id*. at p. 533.) Each of the prior offenses was supported by either photographic evidence or an additional witness. And, defendant was convicted of at least one of the prior offenses. "[T]he fact that the prior misconduct had resulted in conviction—ultimately proved beyond a reasonable doubt to the court—reduced the likelihood that defendant could have produced evidence to rebut the witnesses' testimony." (*Id*. at p. 533.) The jury here knew that defendant had gone to jail after the June 2007 offense, so it would not have been inclined to punish him for the prior offense in this case. Therefore, any unfairness in requiring defendant to mount a defense against an offense that resulted in a conviction "was not a legitimate consideration in this case." (*Ibid*.; see also *People v. Jennings, supra,* 81 Cal.App.4th at p. 1315 [the knowledge that the defendant had already been punished for his prior transgression "substantially mitigate[d] the kind of prejudice usually associated with the introduction of prior bad act evidence"].) Last, the relatively close proximity in time between the prior incidents and the present offense favors admissibility. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.) The prior offenses occurred between August 2006 and September 2009; the charged offense occurred in February 2010.

Our conclusion is particularly compelling given the fact that Gutierrez recanted her prior statements, largely denied and minimized defendant's abuse, and failed to

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[2] Notably, the trial court expressly weighed any prejudice against probative value, and we believe that the record reflects that the trial court understood and fulfilled its responsibilities under section 352. (*People v. Williams* (1997) 16 Cal.4th 153, 213; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1315.)

remember almost everything. Her testimony made the evidence of the prior offenses even more probative as they helped show that Gutierrez's report of abuse was true.

In urging us to reverse, defendant argues that the prosecutor spent an inordinate amount of time on the prior incidents. Even if the prior offense evidence consumed a sizable amount of time, that factor did not make the evidence inadmissible. In fact, it appears that the primary reason for the amount of time spent on the prior offenses was the result of Gutierrez's uncooperativeness. Throughout the trial, she refused to answer questions, added lengthy nonresponsive statements to her answers, denied prior statements, failed to recall much at all, and was generally uncooperative. The trial court ultimately declared her to be an adverse witness. The nature of her testimony required repeated admonitions and lengthy follow-up questions. The result was that her testimony consumed far more time than if she had been cooperative and direct. Because Gutierrez was the victim and primary witness for the charged offenses as well as the prior offenses, and there were four prior offenses, it is not surprising under these circumstances that the propensity evidence ended up taking so much time.[3]

Furthermore, at the time the trial court ruled that the evidence of the prior offenses was admissible, it could not have known how much time would be consumed by the supporting evidence. Admission of the prior offenses evidence was determined before Gutierrez testified at trial.

It follows that the trial court acted within its discretion when it admitted evidence of the prior offenses pursuant to sections 1109 and 352. (*People v. Waidla* (2000) 22 Cal.4th 690, 723–724.) It also follows that defendant's trial was not rendered fundamentally unfair by the admission of this evidence; thus, defendant's due process change fails. (*People v. Snow* (2003) 30 Cal.4th 43, 90 [application of section 352 did not infringe defendant's constitutional right].)

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[3] As defendant notes, the supporting witnesses' testimony for the prior offenses was brief.

C. Harmless error

Even if the trial court had erred in admitting the challenged evidence, that hypothetical error does not compel reversal as it is not reasonably probable that the result at trial would have been different without the prior offense evidence. (*People v. Harris* (1998) 60 Cal.App.4th 727, 741.)

The evidence presented against defendant was strong. Immediately after the attack, Gutierrez ran down the block to the police station. She was hysterical and crying when she arrived. She told the police officer that defendant had punched a hole in the bedroom door, grabbed her, pushed her onto the bed, and "socked" her in the face, head, and neck several times. When the police officer went to her home, the physical state of the house, particularly the hole in the bedroom door and disheveled bed, supported Gutierrez's report. Moreover, her physical injuries corroborated her statement to police; she had a bump on her forehead, swelling above her eye, and redness on her ear. At trial, Gutierrez recanted her prior statements and denied defendant's physical abuse. Her change of heart was apparently motivated by her desire to get back together with defendant and keep him out of jail.

And, we cannot ignore the fact that the jury found defendant not guilty of the criminal threats count. Had the propensity evidence been unduly prejudicial, the jury likely would have found defendant guilty of both counts.

II. *Section 1109 is constitutional on its face*

Defendant challenges the constitutionality of section 1109 on its face. As defendant recognizes, his facial constitutional attack of the statute has been rejected. (See, e.g., *People v. Johnson*, *supra*, 185 Cal.App.4th at p. 529.) Defendant offers no new argument or reason to find differently here. Consequently, we likewise reject this argument.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ