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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. MARVIN COLLINS, Defendant and Appellant.	B278460 (Los Angeles County Super. Ct. No. BA429303)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig J. Mitchell, Judge. Affirmed.

Maura F. Thorpe, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Allison H. Chung, Deputy Attorney General, for Plaintiff and Respondent.

* * * * * *

A jury convicted Marvin Collins (defendant) of injuring a spouse, cohabitant, or girlfriend through the personal infliction of great bodily injury after he beat his on-again, off-again girlfriend in his duplex apartment. On appeal, defendant argues that the trial court committed numerous instructional and evidentiary errors and also committed reversible error in imposing a six-year prison sentence rather than placing him on probation. We conclude there was no reversible error, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

On a Saturday in August 2014, defendant and his on-again, off-again girlfriend, Cherise Walton (Walton), were hanging out in defendant's duplex apartment. As Walton was getting ready to attend a family birthday party that evening, defendant expressed his disapproval of her outfit; in his view, her skirt and spaghetti strap blouse were too tight, and her blouse displayed too much cleavage. When Walton responded that she would wear what she wanted, defendant physically blocked her exit from the apartment's front door. Undeterred, Walton walked out the apartment's backdoor and hopped the backyard fence. In so doing, however, one of the flip-flops she was wearing fell off her foot and landed in defendant's backyard. Defendant thereafter walked out his front door, but ignored Walton's request to retrieve her shoe. Frustrated, Walton went to her car, put on a pair of high heels she kept in her car, snapped a photograph of her foot in the heels, and forwarded the photo to defendant with a text message, "You would want me to have my flat [shoe] that is in your backyard. See these heels. And it's saying come fuck me. Keep playing with me and snatching up my stuff, my shit. I'm

prepared for your doings." Walton then departed for the birthday party.

The next morning, Walton returned to defendant's apartment to retrieve her flip-flop. After defendant came to the front door in response to Walton's knock, Walton requested her shoe. Defendant said his "dog ate it." Defendant and Walton went inside his apartment, and Walton told him that she no longer "want[ed] to be with him." Defendant then grabbed Walton's keys and cell phone, and in a "hostile" and "upset" voice began to call her a "bitch," a "ho," and "everything in the book."

Then the encounter got physical. Defendant punched Walton in the face with a closed fist and ripped from her body the summer dress she was wearing, leaving her naked but for the sports bra she was wearing. The two fell to the ground, where defendant assaulted Walton with a barrage of punches to her arms, legs, face, and head; pulled her hair; and bit her. Walton squirmed free and ran to the apartment's back bedroom, tearing down a sheet covering one of the bedroom's windows and calling for help. Defendant pulled Walton back to the floor, produced a shotgun from beneath the bed, and told her she was going to die. Defendant's elderly neighbor then banged on defendant's front door, and told them they were being too loud. When Walton started to get up to run to the neighbor's apartment, defendant again pulled Walton back to the floor and "head butted" her in the nose. Walton bit defendant, got up, and ran out of defendant's apartment—still mostly naked—to the elderly neighbor's front door, which was just across from defendant's front door. Defendant grabbed Walton's waist and pulled her back into his apartment, in the process slamming her finger between the door and doorframe. Defendant then took Walton to

the apartment's bathroom to clean up the blood from her wounds. Walton darted out of the bathroom, grabbed her dress, and ran out of the apartment and to her brother's residence a few blocks away.

Minutes later, Walton and her brother returned to defendant's apartment to retrieve her keys and cell phone. By that time, police had responded to a different neighbor's 911 call reporting the sound of a struggle and a woman's screams coming from defendant's apartment. The injuries to Walton's face and finger were observed by her brother, the neighbor who called 911, and the responding police officers, and were also photographed. Walton suffered permanent nerve damage and decreased mobility to her finger, and her nose still requires surgery.

When the police officers responding to the 911 call knocked on defendant's door, he did not answer. Because Walton had reported that defendant had a gun, the officers called the SWAT team. The standoff lasted more than five hours, and ended when defendant peacefully walked out his front door.

Defendant's apartment was subsequently searched, and no firearm was found.

II. Procedural Background

The People charged defendant with (1) injuring a spouse, cohabitant, or girlfriend (Pen. Code, § 273.5, subd. (a))[1] and (2) making a criminal threat (§ 422). The People further alleged that defendant personally inflicted great bodily injury upon Walton (§ 12022.7, subd. (e)).

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

A jury convicted defendant of injuring a spouse, cohabitant, or girlfriend and found that he personally inflicted great bodily injury; the jury acquitted defendant of making a criminal threat.

The trial court imposed a prison sentence of six years, comprised of a midterm three-year sentence for the underlying crime and a low term three-year sentence for the great bodily injury enhancement. The court also issued a 10-year criminal protective order.

Defendant filed this timely appeal.

DISCUSSION

I. Instructional Issues

Defendant argues that the trial court erred (1) in not instructing the jury on the defense of habitation, and (2) in giving CALCRIM No. 306 as a sanction for defense counsel's violation of the Criminal Discovery Act (§ 1054 et seq.). We review issues involving jury instructions de novo (*People v. Simon* (2016) 1 Cal.5th 98, 133), but review for an abuse of discretion a trial court's selection of a sanction for a discovery violation (*People v. Bowles* (2011) 198 Cal.App.4th 318, 325).

A. *Defense of habitation instruction*

A trial court has a duty, on its own, to "'instruct [the jury] on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case.'" (*People v. Townsel* (2016) 63 Cal.4th 25, 58, quoting *People v. Martinez* (2010) 47 Cal.4th 911, 953.) Among other things, this duty encompasses the duty to instruct on any defenses to the charged crime(s) if the defendant is relying on that defense. (*Townsel*, at p. 58.) It also includes a sua sponte duty to instruct on any applicable defense, but only if (1) there is substantial evidence supporting that defense, and (2) that defense is not

inconsistent with the defendant's theory of the case. (*Ibid.*; *People v. Abilez* (2007) 41 Cal.4th 472, 517.) These dual prerequisites ensure that a trial court's duty to instruct in the absence of a request from the defense does not "'hamper defense attorneys and put trial judges under pressure to glean legal theories and winnow the evidence for remotely tenable and sophistical instructions.'" (*People v. Sedeno* (1974) 10 Cal.3d 703, 716-717, overruled in part on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142.)

Defendant asserts that the trial court violated its sua sponte duty to instruct on applicable defenses because it did not instruct the jury on the defense of habitation. We reject this assertion.

The defense of habitation excuses criminal liability when the owner or lawful occupant of property uses "reasonable force" to eject a trespasser from his property. (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1360; *People v. Johnson* (2009) 180 Cal.App.4th 702, 709; CALCRIM No. 3475.)

The trial court was not obligated to instruct the jury on this defense because the defense was inconsistent with defendant's theory of the case at trial. Defendant took the stand, and testified that (1) he invited Walton into his apartment on Sunday morning, (2) he subsequently and repeatedly asked her to leave, and (3) he "attempted to . . . escort her out" by "plac[ing] [his] right arm around her." Defendant explained that all of Walton's injuries were of her own doing: Walton ripped off her own dress; she effectively head butted herself after she fell to the ground resisting defendant's escort from the apartment, and his head jerked forward (and hit hers) only after she pulled out some of his dreadlocks; and she slammed her own finger in his front door

accidentally. Critically, defendant steadfastly denied using any force whatsoever. Defense counsel emphasized as much in opening and closing argument when he argued defendant "did not hit this woman." Because the theory of defense at trial was that defendant used *no* force, a habitation instruction premised on the use of reasonable force was inconsistent.

Defendant makes two further arguments.

First, he asserts that he *did* testify to the use of force. However, the record cites he offers refer to his putting his arm around Walton to escort her from the apartment. This may not be a use of force at all, and is at a minimum not a use of force sufficient to explain Walton's many and severe injuries. Indeed, defense counsel explained to the trial court during a conference that he had not requested a self-defense instruction—which is also premised on the use of "reasonable force" (e.g., *People v. Ross* (2007) 155 Cal.App.4th 1033, 1044-1045; see generally CALCRIM No. 3470)—because he "did not want to argue an issue that was inconsistent with what [defendant] said."

Second, defendant contends that substantial evidence supported a habitation defense instruction because: (1) he testified that he asked Walton to leave; and (2) he used force because (a) both he and Walton sustained injuries, which suggests both used force, (b) the jury sent a note during deliberations seeking a "[d]efinition of willful—if mutual combatants," which suggests that at least some jurors thought he and Walton were using force, and (c) "'[d]oubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused'" (*People v. Flannel* (1979) 25 Cal.3d 668, 685). Whether substantial evidence supported a habitation defense instruction is ultimately irrelevant because, as

explained above, that defense was inconsistent with the theory of defense presented at trial. As such, the trial court's sua sponte duty to instruct on that defense was not violated.

B. *Discovery violation instruction*

Five days after trial began and after the People rested their case-in-chief, defendant's attorney for the first time disclosed several photographs that defendant allegedly took of his apartment or of his own injuries either during his standoff with SWAT or immediately after his release from jail the next day. The prosecutor objected that this disclosure violated the Criminal Discovery Act because the photographs were not disclosed 30 days prior to trial, even though they were taken long before that. In light of defense counsel's representation that defendant had given him the photographs "in a timely fashion," the trial court concluded that the defense attorney (rather than defendant) had violated his discovery obligations. The court allowed the defense to introduce the photographs into evidence, but gave the jury the following instruction:

"Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial.

"An attorney for the defense failed to disclose[] photographs taken by the defendant within the legal time period.

"In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure.

"However, the fact that the defendant's attorney failed to disclose evidence within the legal time period is not evidence that the defendant committed a crime."

Defendant argues that the trial court erred in giving this jury instruction. He does not dispute the trial court's finding that there was a discovery violation, but contends that the instruction itself—which is set forth in CALCRIM No. 306—is defective.

The Criminal Discovery Act specifically empowers a trial court to "advise the jury of any failure or refusal to disclose and of any untimely disclosure." (§ 1054.5, subd. (b).) In examining a now-superseded standard jury instruction regarding nondisclosure (namely, CALJIC No. 2.28), courts have held that a jury instruction informing the jury of a discovery violation by the defense may be improper if it: (1) implies that *the defendant* is responsible for the violation, at least if *defense counsel* was the person actually responsible for the violation; (2) does not inform the jury that a discovery violation by itself is insufficient to find a defendant guilty of the underlying crime; and (3) tells the jury to "evaluate the weight and significance of a discovery violation without any guidance on how to do so," thereby inviting the jury to speculate on how to factor the violation into its deliberations. (*People v. Bell* (2004) 118 Cal.App.4th 249, 254-257; *People v. Thomas* (2011) 51 Cal.4th 449, 483-484 (*Thomas*); *People v. Cabral* (2004) 121 Cal.App.4th 748, 753; *People v. Saucedo* (2004) 121 Cal.App.4th 937, 940-943; *People v. Lawson* (2005) 131 Cal.App.4th 1242, 1247.)

The CALCRIM No. 306-based instruction in this case does not suffer from these defects. The instruction expressly states that it was the "attorney for the defense" who "failed to disclose[]" the photographs. The instruction also makes clear that the attorney's failure was "not evidence that the defendant committed a crime." And the jury had proper guidance on how to factor the attorney's failure into its deliberations. The

instruction itself told the jury to "consider the effect, if any, of that late disclosure" of the photographs, and our Supreme Court in *People v. Riggs* (2008) 44 Cal.4th 248, 307-308 (*Riggs*) indicated that this aspect of CALCRIM No. 306 gives sufficient direction to a jury. What is more, the arguments of counsel in this case—which we look to in construing instructions (*People v. Franco* (2009) 180 Cal.App.4th 713, 720)—provided further guidance because the prosecutor urged the jury to consider the late disclosure of the photographs when assessing their "accuracy" and "weight."

Defendant asserts that such an instruction is improper unless the prosecution has demonstrated that it was actually prejudiced by the discovery violation, but our Supreme Court has yet to make that a prerequisite to the giving of a discovery violation instruction. (*Riggs*, *supra*, 44 Cal.4th at p. 308 ["reject[ing] [the] contention" that "the sole basis for giving an instruction regarding a discovery violation is an actual effect on the other party's ability to respond to the evidence"]; cf. *Thomas*, *supra*, 51 Cal.4th at pp. 483-484 [noting that discovery violation instruction was improper for several reasons, including because "there was no evidence that the 'tardy disclosure' had actually deprived the prosecutor 'of the chance to subpoena witnesses or marshal evidence in rebuttal'"].) We decline to do so. That the commentary to CALCRIM No. 306 cautions that the instruction should be given only where the prosecution is prejudiced does not alter our analysis, as such commentary—unlike authority from our Supreme Court—is not binding. (*People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7.)

II. Evidentiary Issues

Defendant contends that the trial court erred in (1) excluding, as hearsay, the elderly neighbor's testimony that he overheard defendant telling Walton to leave, and (2) admitting, under Evidence Code section 1109, evidence that defendant had criticized the clothing of, and assaulted, a prior girlfriend. We review these evidentiary rulings for an abuse of discretion. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 405.)

A. *Hearsay*

The trial court held that defendant's elderly neighbor would not be permitted to testify that he heard defendant tell Walton to "get the fuck out" of his apartment because that statement was hearsay.

A statement is "hearsay" if it "was made other than by a witness while testifying at the hearing and . . . *is offered to prove the truth of the matter stated*." (Evid. Code, § 1200, subd. (a), italics added.) Unless an exception applies, hearsay is inadmissible. (*Id.*, subd. (b).) As the italicized language indicates, whether a particular statement is hearsay turns on the purpose for which it is introduced: Thus, if a statement is "admitted for a nonhearsay purpose" that is relevant, the general rule barring hearsay does not apply. (E.g., *People v. Cooper* (2007) 148 Cal.App.4th 731, 747.)

The trial court did not abuse its discretion in excluding the neighbor's testimony that he heard defendant tell Walton to "get the fuck out" of his apartment because that statement is only relevant if it is "offered to prove the truth of the matter stated"—namely, that defendant actually wanted Walton to leave his apartment (such that Walton was a trespasser whom, under the

habitation defense, defendant could use reasonable force to eject). Defendant counters that "[r]equests and words of direction *generally* do not constitute hearsay" (*People v. Garcia* (2008) 168 Cal.App.4th 261, 289, citing *People v. Jurado* (2006) 38 Cal.4th 72, 117, italics added), but the neighbor's testimony in this case is an exception to the general rule because defendant's words support a habitation defense only if they are true; the mere fact that they were said and that Walton heard them is not relevant.

Any error in excluding the neighbor's testimony is in any event not prejudicial because the testimony is relevant solely to a habitation defense which, as we explain above, was not—and should not have been—before the jury.

B. *Prior domestic violence incidents*

In the People's case-in-chief, the prosecutor called Sanova Anderson (Anderson) as a witness. Anderson dated defendant for eight to ten years prior to 2012, and she testified that (1) defendant, in May 2011, cut her jeans from her body with a pair of scissors because he thought they were too tight; (2) defendant had "hit" her on "three different occasions"; and (3) during the time they lived together, defendant would sometimes prevent her from leaving, sometimes by hiding her phone or her purse. Before she began her testimony, the trial court instructed the jury that, if the People proved this "uncharged domestic violence" by a preponderance of the evidence, that it "may, but [was] not required to, conclude . . . that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit" the charged crime of inflicting corporal injury.

Defendant argues that the trial court abused its discretion in admitting Anderson's testimony.

Although "evidence of a person's character or a trait of his . . . character . . . is [generally] inadmissible when offered to prove his . . . conduct on a specified occasion" (Evid. Code, § 1101, subd. (a)), "evidence of [a] defendant's commission of other domestic violence" may be admitted to show that he engaged in domestic violence as charged in the current case (*id.*, § 1109, subd. (a)(1)). In deciding whether to admit other incidents of domestic violence to prove a defendant's propensity, a court must assess (1) whether the uncharged incident meets the definition of "domestic violence" (*id.*, subds. (a)(1) & (d)(3)); (2) whether the probative value of the uncharged incident is substantially outweighed by the danger of undue prejudice under Evidence Code section 352, while "consider[ing] . . . any corroboration and remoteness in time" (*id.*, subds. (a)(1) & (d)(3)); and, if the uncharged incident "occurr[ed] more than 10 years before the charged offense," (3) whether admission of the uncharged incident "is in the interest of justice" (*id.*, subd. (e)). There are two definitions of "domestic violence": If the uncharged incident occurred within five years of the charged offense, courts may use the broader definition of "domestic violence" set forth in Family Code section 6211; if the uncharged incident occurred more than five years earlier, courts are to use the narrower definition set forth in section 13700. (Evid. Code, § 1109, subd. (d)(3).)

Most, though perhaps not all, of the uncharged incidents qualify as domestic violence. Defendant's prior act of cutting Anderson's jeans from her body with a pair of scissors *as she wore them*, put Anderson "in reasonable apprehension of imminent serious bodily injury"; as such, it qualified as domestic violence

under both the broader and narrower definitions. (Fam. Code, § 6203, subd. (a)(3) [so defining "abuse," for purposes of Family Code section 6211]; § 13700, subd. (a) [defining "abuse" to include "placing another person in reasonable apprehension of imminent serious bodily injury"].) Defendant's prior acts of hitting Anderson constitute "intentionally or recklessly caus[ing] or attempt[ing] to cause bodily injury," which also constitutes abuse—and hence domestic violence—under both definitions. (Fam. Code, § 6203, subd. (a)(1); § 13700, subd. (a).) Defendant's act of preventing Anderson from leaving their residence by blocking her exit or hiding her phone or purse may not meet either definition of domestic violence, although its admission might have been admissible to prove a common scheme or "plan" under Evidence Code section 1101, subdivision (b) had a limiting instruction along those lines been given; admission of these background facts was not, in any event, prejudicial given the propriety of admitting the acts of bona fide domestic violence of which they were a part.

The trial court also considered the admissibility of these incidents under Evidence Code section 352. Although the trial court did not explicitly engage in a "section 352 analysis" on the record, defendant objected that Anderson's testimony presented "a huge 352 question," and the trial court overruled that objection after examining whether Anderson's proffered testimony had a "proximity in time" and "similarity in conduct" to the charged offenses. Both temporal proximity and similarity are part of a "section 352 analysis." (*People v. Jandres* (2014) 226 Cal.App.4th 340, 355-356 (*Jandres*) [looking to similarity, as part of Evidence Code section 352 analysis]; *People v. Robinson* (2011) 199 Cal.App.4th 707, 716 [same, as to whether uncharged act is

"remote in time"].) Because a trial court need not ""expressly"" set forth its section 352 analysis as long as the record "'affirmatively demonstrate[s] that the court'" engaged in that analysis (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1275; *People v. Corella* (2004) 122 Cal.App.4th 461, 471), we conclude that the court's reference to the factors relevant to the section 352 analysis affirmatively demonstrates that the court engaged in the required balancing.

Apart from criticizing the trial court's failure to set forth its Evidence Code section 352 analysis on the record, defendant offers two further reasons why, in his view, the court's section 352 analysis was erroneous. He argues that the prosecutor did not spell out on the record the factual details of the three prior incidents when defendant "hit" Anderson; without those details, defendant argues, the court could not engage in meaningful section 352 analysis. Prior to trial, the prosecutor provided defendant with a written report disclosing those details; the prosecutor, at a pretrial hearing, mentioned his intent to have Anderson testify to "incidents prior to" the jeans cutting incident; and, just prior to Anderson's testimony, indicated that the "previous incidents" involved defendant "batter[ing] or "mistreat[ing]" Anderson. Prior to allowing Anderson to testify regarding these three incidents, the prosecutor had disclosed the specific facts to the defense, and the court knew enough about the incidents—namely, that they were acts of physical violence—to engage in an Evidence Code section 352 analysis regarding their similarity to the charged offenses (and hence their probative value) and their prejudicial impact. Defendant next asserts that the jeans-cutting incident was not sufficiently similar. We reject this assertion, as the uncharged incident and charged offense

may be different but still similar enough to admit under Evidence Code section 1109. (*People v. Hernandez* (2011) 200 Cal.App.4th 953, 966 [similarity under section 1109 is less than under section 1101, subdivision (b)]; cf. *Jandres*, *supra*, 226 Cal.App.4th at pp. 354-355 [attempted kidnapping not similar enough].) What is more, both events involved defendant's resort to violence and fear to enforce his notions of proper attire for women.

It is unclear whether the trial court was required to engage in any analysis of whether admitting the uncharged incidents was "in the interest of justice." That requirement applies only if an incident predates the charged offense by more than ten years. In this case, defendant and Anderson dated for eight to ten years ending in 2011, and Anderson did not recall the specific dates of the three incidents when he hit her; consequently, it is possible that one or more of the incidents occurred between 2001 and 2004—that is, more than ten years before the August 2014 offense charged in this case. Even if we assume that the trial court was required to engage in an "interest of justice" analysis, that analysis involves the same considerations as an Evidence Code section 352 analysis (*People v. Johnson* (2010) 185 Cal.App.4th 520, 539); because the court engaged in the latter, it also engaged in the former.

Defendant raises one further challenge to the admission of this evidence—namely, that the trial court's failure to require the prosecutor to state on the record the specific details underlying the three "hitting" incidents deprived defendant of his right to question prospective jurors regarding those prior, uncharged incidents. Although a criminal defendant certainly has the right to question prospective jurors "to test the jury for bias or partiality" (*People v. Chapman* (1993) 15 Cal.App.4th 136, 141),

that right does not entitle a defendant to question prospective jurors on how they would react to each item of evidence to be presented at trial. Indeed, if such a right existed, all evidentiary rulings would have to be made prior to voir dire; that is not the law. Furthermore, defendant has not set forth what additional questions he would have asked the jury; without this showing, he cannot establish prejudice. (*People v. Taylor* (2010) 48 Cal.4th 574, 638; see generally Code Civ. Proc., § 223 [requiring showing of prejudice for improper limitations on voir dire].)

III. Sentencing

At his sentencing hearing, defendant personally addressed the trial court and used that opportunity to complain that he had not "been given a fair opportunity" to contest the charges. The court subsequently commented that it was not persuaded by defendant's "version of what happened within his home" for two reasons: (1) if that version were "accurate," the court pondered aloud, "why in the world did he refuse to come out for . . . almost five hours" while holding "law enforcement at bay"?; and (2) Walton's injuries as observed by neutral witnesses "were absolutely consistent with her testimony at trial." The court also noted its agreement "with the People's representation" that defendant had expressed "absolutely zero remorse" for the incident with Walton. However, due to defendant's "minimal criminal history" and the letters of support from defendant's friends and family, the court rejected the People's request for a longer prison sentence of eight years and instead imposed a six-year prison sentence.

Defendant asserts that the trial court's sentence is invalid because (1) the court improperly penalized him for exercising his constitutional rights not to answer his front door and to go to

trial, and (2) the court erred in not sentencing him to probation rather than prison. We review a trial court's imposition of sentence for an abuse of discretion (*People v. Sandoval* (2007) 41 Cal.4th 825, 847), although we examine the constitutional validity of a sentence de novo (see *People v. Acosta* (2018) 20 Cal.App.5th 225, 229, review granted Apr. 25, 2018, S247656).

Neither of defendant's arguments has merit.

It is well settled that a court may not "punish a person for exercising a constitutional right." (*In re Lewallen* (1979) 23 Cal.3d 274, 278, citing *Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363.) It is also well settled that a defendant has the right not to answer his door when the police knock (*Kentucky v. King* (2011) 563 U.S. 452, 469-470) and that a defendant has a right to go to trial to proclaim his innocence, such that a court may consider lack of remorse for a defendant who goes to trial only if the evidence of his guilt was overwhelming (*People v. Key* (1984) 153 Cal.App.3d 888, 901; *People v. Leung* (1992) 5 Cal.App.4th 482, 507). Read in context, however, the trial court did not refer to defendant's decision not to answer the door as a reason to punish him, but rather a reason to credit the People's version of events over defendant's. What is more, in documenting its many reasons for crediting the People's version, the court was explaining why, in its view, the evidence overwhelmingly supported the jury's guilty verdict on the injury to a spouse, cohabitant, or girlfriend count—thereby making reliance on defendant's lack of remorse appropriate.

Where, as here, a crime involves the infliction of great bodily injury, a court may place a defendant on probation only in an "unusual case[]." (§ 1203, subd. (e)(3).) Whether a case is "unusual" turns on whether there are any "'fact[s] or

circumstance[s] indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case.'" (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 832; see also Cal. Rules of Court, rule 4.413(c)(1).) Defendant proffers a few reasons why this case is, in his view, unusual—(1) the jury believed the case was one involving "mutual combat"; (2) Walton provoked the incident; (3) Walton's injuries were accidental; (4) Walton's nose may not be "broken" and may not have been caused by the head butt; and, more generally, (5) this case is less severe than other corporal injury to a spouse, cohabitant, or girlfriend cases. None of these reasons renders this case unusual. The first is based on a jury note, not a jury finding—and the trial court (correctly) informed the jury that neither party "presented evidence of mutual combat." The second and third reasons are based on defendant's version of the facts, which the jury necessarily rejected. The fourth reason is unsupported by any evidence in the record. And the last reason is invalid because a case's "unusual"-ness does not turn on whether worse cases exist, but whether *this* case is outside the typical "heartland" for such a crime; in our view, the trial court did not abuse its discretion in concluding defendant's case was not.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ