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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. EUNSUNG JI, Defendant and Appellant.	B282015 (Los Angeles County Super. Ct. No. BA442067)

APPEAL from a judgment of the Superior Court of Los Angeles County, William N. Sterling, Judge. Reversed and remanded with directions.

Alan S. Yockelson, 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, Victoria B. Wilson and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Eunsung Ji of kidnapping his ex-girlfriend. Ji appeals, arguing the trial court erred in admitting evidence of a prior incident of domestic violence under Evidence Code section 1109. We conclude the argument is forfeited and meritless.

The jury also convicted Ji of the lesser included offense of false imprisonment. We agree with Ji and the People's concession that the conviction must be reversed. Finally, the jury convicted Ji of making a criminal threat. We agree with Ji and the People's concession that, when the trial court stayed execution of sentence for that conviction under Penal Code section 654,[1] the court should not have ordered Ji to serve that sentence concurrently.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Relationship*

M.L. was 29 years old and working as a cello teacher when she met Ji in late December 2014 at a car wash where Ji worked. They began dating and saw each other frequently. Within two months they were discussing marriage and texting about buying an engagement ring, although during this time she also tried five or six times to end the relationship. M.L., however, did not break up with Ji because he cried, asked for another chance, and begged her to stay in the relationship, and she "kind of took pity

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1 Undesignated statutory references are to the Penal Code.

on him." Whenever she tried to end their relationship, Ji was "forceful and very persistent" about staying together. M.L. became concerned about how to deal with the situation.

B. *The Mountain Road Incident*

One evening in April or May 2015, Ji came to M.L.'s house to visit. She sat with him in his car in front of the house and told him she wanted to end their relationship. Ji locked the car doors, preventing M.L. from getting out, and "just drove away." M.L. was scared and wanted to go home. She kept asking Ji where they were going, but Ji did not respond.

Ji drove with M.L. in the car on U.S. Highway 101 for 10-15 minutes to a "road going up to a mountain." She again asked him where they were going. He did not answer. It was dark, and M.L. could not see anything and did not know where they were. Ji stopped the car in "the middle of the mountain" where there were no streetlights, no people, and no one could hear them.

Ji got out, walked around the car, opened the passenger door, and asked M.L. to get out. She refused because she was scared and felt threatened. Ji stood outside the car for a while, and then returned to his seat. He said, "Please don't say that you want to break up. I'll do better. And I'll make [it] up to you." Then he took her home.

C. *Calling and Texting*

Ji went to Korea in August 2015. While he was in Korea, he and M.L. communicated by phone and through a Korean mobile application for sending text messages. M.L. again tried to break up with Ji, but was unsuccessful. In September or October 2015 M.L. decided she wanted to end the relationship, and she

told Ji the relationship was over. Ji "acknowledged" the end of the relationship, but asked to remain friends and continued to call M.L. M.L. tried to avoid Ji, but Ji continued to call her phone until she answered. She tried to block Ji's phone number, but she still received calls from him. If she did not answer his calls, he would use the mobile messaging application to send text messages and ask her why she was not answering her phone.

D. *The Incident at M.L.'s House*

Ji returned to the United States on November 8, 2015. He still believed he and M.L. were getting married because they had broken up and got back together several times before. They spoke on the phone, and M.L. said she did not want to see him. Ji then called M.L. 10 to 20 times, but she did not answer his calls.

The next day, Ji went to M.L.'s house in Orange County, which was in a condominium complex. M.L. saw Ji waiting for the gate to open at the entrance to the complex. He seemed angry and ran toward her car "like a madman." He stood in front of her car and shouted, "Get out of [the] car." M.L. was scared. She honked her horn to attract attention, and Ji stepped to the side, knocked on her car window, and shouted to her to get out of the car. M.L. drove through the gate, parked her car in the garage, went into her house, and told her father what had happened.

Meanwhile, Ji had followed her car and walked past the gate. Ji went to the front door of M.L.'s house and rang the doorbell. M.L.'s family let him inside. Ji threatened to report M.L. to the police "for the charge of hit and run" if she did not come out of the house to talk with him. When she refused, M.L.,

her father, and Ji had a conversation. M.L.'s father expressed sympathy for Ji's situation because Ji's mother was ill in Korea. M.L.'s father told Ji that he should not be obsessed with M.L. anymore and that he should focus on his mother's health. Ji apologized to M.L.'s father, admitted the relationship with M.L. was over, and left.

E. *The Surprise Visit in the Parking Garage*

The next day, Ji appeared in the parking structure where M.L. parked her car for work. M.L. was parking in a different place in the structure than she usually did because she believed Ji knew where she parked and she thought that, if she changed parking spaces, he would not be able to find her. She was wrong.

Ji spoke to M.L. about wanting to "restart" their relationship and "things like that." M.L. said, "Because our relationship is over, I want you to go home." Ji kneeled on the ground and pleaded with her. M.L. told him to go away because she wanted to go home. Ji did not prevent M.L. from getting into her car, and she drove away.

F. *The Kidnapping*

On November 18, 2015 M.L. drove her sister's car to work and parked it on a different level of the parking structure than she usually did so that Ji would not be able to find her. Ji, however, found the car, parked next to it, and was standing next to his car when M.L. finished her cello lessons and returned to her car at 9:15 p.m.

M.L. did not want to speak with Ji. Ji, however, had parked his car so close to hers that there was not enough space

for M.L. to get into the driver's side of her car. M.L. thought, "It [is going to] be really hard for me to get home today."

M.L. put her cello into the back seat of her car from the passenger side, because Ji's car was blocking access to the back seat of the driver's side. She asked Ji why he continued to come see her after they had ended their relationship, and stated she had nothing more to say to him. She also asked Ji to move his car so she could get into the driver's side of her car, but he refused. Ji said several times, "Let's start it all over again."

Ji went back to his car and returned with two items: a love letter he said he had written and a gift bag with something in it. Ji kneeled, started to cry, asked M.L. to read the letter, and said he wanted to resume their relationship. M.L. ignored him and walked toward the front passenger side of her car. Ji stood up and took M.L.'s phone from her hand and asked her angrily, "Are you dating with someone else?" M.L. said that was "nonsense," demanded her phone, and took it back from Ji.

Ji suddenly grabbed M.L.'s hair in a fist with his left hand and pushed her shoulder with his right hand. His voice "was filled with anger." He pushed her toward a wall, and then dragged her to the driver's side of his car. M.L. shouted, "Please let me go and let me go home." As she resisted and screamed, he used more force.

Ji lifted M.L. by placing his arm under her chest "really hard" as she faced away from him, opened the driver's side front door with his other hand, and forced her into his car, bruising her legs. She landed in the front seat with her back against the center console and her feet outside the open car door. She kicked Ji when he tried to grab her legs. Ji pushed M.L. between the

driver and passenger seat and forced her into the back seat. He got in, started the car, and backed out of the parking space.[2]

As Ji drove with his left hand, with his right hand he reached behind the driver's seat and held M.L.'s neck by her shirt collar, while she was in the back seat with her head against the driver's headrest and her knees against the back of the driver's seat. Ji squeezed the collar of M.L. clothing tightly, choking her. Ji drove out of the parking structure as he continued to hold the collar around M.L.'s neck. Ji said, "You're dead today. You . . . can't go anywhere." M.L. thought she was going to die.

Ji made a right turn out of the parking garage and stopped at a red light. Ji finally released M.L., and she was able to open the back door and run out of the car.[3] She did not have her wallet or phone with her when she escaped.

G. *The Escape*

As M.L. ran away from Ji's car, she saw several people walking on the street, one of whom was Manuel Rios, a man in his late 30's or early 40's. M.L. was scared, out of breath, and "crying out loud for help." She said to Rios, "Please help me. Help me. Call 911. Please help me." She told Rios what had

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[2] A video recording of the interior of the parking garage captured some but not all of the events of that evening. The prosecutor played the video for the jury while M.L. answered questions about what the video showed. The video did not capture the physical struggle between Ji and M.L.

[3] M.L. and Ji owned the same model car. She knew that the doors locked automatically when the engine started and that pulling the door handle twice unlocked the door.

happened, said Ji had kidnapped her by forcing her into his car, and asked Rios to call the police.

Rios said he would call the police, but suggested they go inside his apartment building, which was nearby. As they walked to the apartment building, Ji walked up to them, became argumentative, and said to Rios, "She's my ex-girlfriend" and "All I want to [do] is just to talk to her, so just let her go." Ji also said he was trying to get her back into the car so they could talk. According to Rios, Ji "looked angry" and had an "unsafe attitude."

M.L. was "traumatized and was shaking" and hid behind Rios for protection as they walked to the apartment building. Ji tried to reach around Rios and grab M.L.'s arm, and M.L. asked Rios to keep Ji away from her. Rios stood between Ji and M.L. and asked Ji to stay away. As they walked into the building, a woman came to help, and Ji ran away. M.L. sat down in the lobby of the building, continued to cry, and said Ji had her phone and was going to kill her. Rios called 911.

Ji returned to the apartment building a few minutes later. He knocked on the glass front door of the building with his fist, and shouted from outside, "I just want to talk to you." Eventually, Ji walked away.

H. *The Arrest*

Two police officers arrived, and M.L. told them what had happened. One of the police officers observed M.L. was shaking and on the verge of crying.

Ji returned to the apartment building 20 minutes later, and M.L. told the police, "That's him." Ji walked up to the officers and gave them M.L.'s cell phone and wallet. Ji was calm and cooperative as the police arrested him. The officers obtained and

served Ji with an emergency protective order requiring him to stay away from, and have no contact with, M.L.

The next morning, M.L. received a call from Ji. M.L. immediately called the police. Police officers responded and told her Ji had been released on bail. The officers warned her that, even though Ji had been served with an emergency protective order, he still might come to her house.

I. *Ji's Version*

Ji denied he forced M.L. into his car and drove away with her in it. He said he asked her several times in the parking structure to speak with him, and she said she had nothing to say and was leaving. According to Ji, M.L. voluntarily got into the back seat of Ji's car so they could get coffee and talk. Ji said he was driving to a nearby location of a national coffee chain, and M.L. jumped out of his car while he was stopped at a red light. Ji believed that, had M.L. not jumped out of his car and run away, he and M.L. would have been sitting together drinking coffee. Ji denied saying to M.L., "You're dead, you cannot go anywhere." Ji testified M.L. made up the entire incident so that she would not have to be in a relationship with him anymore.

After M.L. ran from his car, Ji made a U-turn, stopped his car, and calmly approached Rios and M.L. M.L. did not seem upset or scared. When Rios prevented Ji from speaking with M.L., Ji went back to his car. Ji could not understand why Rios and the other people at the scene were preventing him from speaking with M.L.

When Ji returned with M.L.'s phone and wallet, he saw the police officers, but thought they were there for another reason. Ji still wanted to talk to M.L. He gave the phone and wallet to one

of the officers, who placed him in handcuffs. Ji was surprised. Ji also admitted he called M.L. the next day, but said it was an accident and he meant to call "mom" and not "[M.L.]"

Ji denied the mountain road incident occurred. As for the incident at M.L.'s house, Ji explained he had not communicated with M.L. for several months, and parked by the gate at a time he knew she would be returning home. When she arrived, he walked up to the passenger side door of her car as she pressed a button to open the gate. When she did not acknowledge him, he followed her car through the gate before it closed. Later, M.L. called Ji and said she never wanted to see him again.

J. *Charges, Conviction, Sentencing*

The People charged Ji with kidnapping, making a criminal threat, and false imprisonment. The jury found Ji guilty of all three crimes. The trial court imposed the upper term of eight years for the kidnapping conviction, stayed execution of the sentence, and placed Ji on probation for five years, the terms of which included serving one year in county jail. On the conviction for making a criminal threat, the court, pursuant to section 654, imposed and stayed execution of a concurrent, three-year sentence. On the conviction for false imprisonment, the trial court, pursuant to section 654, imposed and stayed execution of a three-year sentence, to be served "in local custody." The court explained, "This was all part of one common plan. And there's nothing to separate these offenses to justify separate sentences that would be in effect, but I am going to impose high term."

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Admitting Evidence of the Mountain Road Incident Under Evidence Code Section 1109*

Ji argues his convictions should be reversed because the trial court abused its discretion under Evidence Code section 1109 by admitting evidence of the mountain road incident as a prior act of domestic violence. Ji, however, did not object at trial to M.L.'s testimony about the incident. Therefore, he has forfeited the argument. (See *People v. Sivongxxay* (2017) 3 Cal.5th 151, 197 [failure "to raise a timely objection to admission and consideration of . . . evidence" forfeits the claim of error]; *People v. Fuiava* (2012) 53 Cal.4th 622, 670 ["'[i]n the absence of a timely and specific objection on the ground sought to be urged on appeal, the trial court's rulings on admissibility of evidence will not be reviewed'"].)

Ji contends that certain comments by the trial court on the record suggest Ji's trial counsel objected off the record to the admission of evidence of the mountain road incident. Ji points to the following statement by the trial court, made immediately after a recess: "Just we were discussing off the record, it appears to me that the evidence of prior incident where they go to the mountains is sufficient to show false imprisonment. The victim, if that were the case, would be someone who is listed in 6211 of the Family Code, which I think would be required 1109 instruction. I'll hear argument why I shouldn't from the defense later, but to put everybody on notice, it appears that 1109 instruction to be given. Otherwise I'm—I don't know what the evidence was admitted before."

This statement did not preserve Ji's argument. First, it was a statement by the court, not by counsel for Ji. To preserve an argument based on an evidentiary objection, the defendant must have made a record of the objection. An oblique reference to a discussion that may have occurred off the record is not enough. (See *People v. Schmitz* (2012) 55 Cal.4th 909, 934 [burden is on the defendant "to assert his objection and make a record adequate to preserve it for appellate review"]; *In re Kathy P.* (1979) 25 Cal.3d 91, 102 [appellant has the "burden of showing error by an adequate record"]; *People v. Mack* (1986) 178 Cal.App.3d 1026, 1032 [same].) Second, the court made the statement after counsel for Ji had completed her cross-examination of M.L. and before the prosecutor began his redirect examination of M.L. M.L. testified about the mountain road incident during her testimony on direct examination, long before the court made the reference to an off-the-record discussion. Third, the court's statement concerns the propriety of giving a jury instruction about Evidence Code section 1109, not the admissibility of evidence under that statute.[4]

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[4] Ji argues for the first time in his reply brief that, if he forfeited his argument the trial court erroneously admitted evidence of the mountain road incident under Evidence Code section 1109, his attorney provided ineffective assistance. Ji, however, forfeited this argument as well because he did not make it until his reply brief. (See *People v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9 [defendant forfeited his ineffective assistance of counsel argument by raising it for the first time in his reply brief]; *People v. Harris* (2008) 43 Cal.4th 1269, 1290 [defendant's argument in response "to the Attorney General's waiver argument by suggesting for the first time in his reply brief that the failure to

Even if Ji had not forfeited the argument, it would fail on the merits because the mountain road incident qualified as a prior act of domestic violence under section 13700 and Family Code sections 6203, 6211 and 6320. Evidence Code section 1109, subdivision (a), provides that, "in 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." Thus, "[s]ection 1109, in effect, 'permits the admission of defendant's other acts of domestic violence for the purpose of showing a propensity to commit such crimes,'" subject to the court's discretion to exclude the evidence under Evidence Code section 352. (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1232; see *People v. Fruits* (2016) 247 Cal.App.4th 188, 202 ["Evidence Code section 1109 is an express exception to the prohibition against propensity evidence set forth in Evidence Code section 1101, subdivision (a)," and "allows a jury to draw propensity inferences from prior acts"].)[5]

The definition of "domestic violence" in Evidence Code section 1109 is the definition of that term in section 13700, subdivision (b): "abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has

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object amounted to ineffective assistance of counsel" was forfeited and "barred on appeal"].)

[5] We review the admission of evidence of other acts of domestic violence under Evidence Code sections 1109 and 352 for abuse of discretion. (*People v. Ogle* (2010) 185 Cal.App.4th 1138, 1145; *People v. Johnson* (2010) 185 Cal.App.4th 520, 531.)

had a dating or engagement relationship." (See Evid. Code, § 1109, subd. (d)(3).) Section 13700, subdivision (a), defines "abuse" as "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another." Where, as with the mountain road incident, the prior act of domestic violence occurred within five years of the charged offense, the definition of domestic violence in Evidence Code section 1109 includes the definition of that term in Family Code sections 6211 and 6320, which define domestic violence as, among other things, placing "a person in reasonable apprehension of imminent serious bodily injury to that person or to another," or threatening, harassing, telephoning, or "disturbing the peace of the other party." (See Evid. Code, § 1109, subd. (d)(3); *People v. Garcia* (2017) 16 Cal.App.5th 979, 991-992; *People v. Kovacich* (2011) 201 Cal.App.4th 863, 894.)

At a minimum, Ji's conduct during the mountain road incident disturbed M.L.'s "peace" and harassed her (see Fam. Code., § 6203), and probably also placed her in reasonable apprehension of imminent bodily injury (§ 13700, subd. (a)). M.L. testified that Ji locked her in his car and drove her to a dark, isolated location where they could not be seen or heard, refusing along to the way to tell her where they were going or why. Ji asked M.L. to get out of the car, which she refused to do because she felt threatened and believed it was safer to stay in the car. M.L.'s testimony about the mountain road incident was admissible under Evidence Code section 1109. (See *People v. Brown*, *supra*, 192 Cal.App.4th at p. 1234, fn. 15 ["Family Code section 6211 defines domestic violence 'more broadly' than the more restrictive provisions of Penal Code section 13700"]; *People*

v. Ogle (2010) 185 Cal.App.4th 1138, 1144 ["[s]ection 1109 applies if the offense falls within the Family Code definition of domestic violence even if it does not fall within the more restrictive Penal Code definition"]; see, e.g., *People v. Kovacich*, *supra*, 201 Cal.App.4th at pp. 894-895 ["'stalking a former spouse is domestic violence for purposes of section 1109 as defined by Family Code section 6211'"].)

Ji argues the People did not "prove by a preponderance of the evidence, that this event occurred," because "[t]he only evidence the People had regarding this incident was [M.L.'s] testimony," and she "was not credible as a witness regarding this testimony." Such a credibility determination, however, was for the jury. M.L.'s testimony about the incident was sufficient for the court to admit the evidence; it was up to the jury to decide whether her testimony was sufficiently credible to use as propensity evidence. (See *People v. Garcia*, *supra*, 16 Cal.App.5th at p. 990 ["[i]n the context of uncharged offenses, the jury must find that an offense was committed by a preponderance of the evidence before it may be considered for propensity"]; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1030 ["the proper standard for proving past conduct is by a preponderance of the evidence," and "the evidence of defendant's past conduct was sufficiently established by the testimony of [the victim]"].) As the People put it, "the question of whether the incident actually happened was for the jury to decide *after* hearing the evidence."

Ji also argues the mountain road incident "did not amount to a false imprisonment because [Ji] never intentionally restrained or confined [M.L.] and never forced her to go anywhere she did not want to," and because M.L. "voluntarily got into [Ji's] car to talk to him about their relationship." Whether Ji's conduct

on that day amounted to false imprisonment, however, is not the test under Evidence Code section 1109 for the admissibility of M.L.'s testimony about the incident. As noted, under Evidence Code section 1109, section 13700, and Family Code sections 6203 and 6211, the "evidence of the defendant's commission of other domestic violence" does not have to amount to false imprisonment, so long as it meets the much broader definition of domestic violence in the applicable Penal Code and Family Code statutes.

Nor did the trial court abuse its discretion under Evidence Code section 352.[6] Again, Ji did not object to M.L.'s testimony about the mountain road incident under Evidence Code section 352, thereby forfeiting any argument the trial court abused its discretion under that provision. (See *People v. Valdez* (2012) 55 Cal.4th 82, 138 ["[i]nsofar as defendant argues the evidence was inadmissible under Evidence Code section 352 because its potential to cause undue prejudice substantially outweighed its probative value, defendant forfeited this argument by failing to

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[6] Ji does not separately argue on appeal that the evidence of the mountain road incident was inadmissible under Evidence Code section 352. Ji only makes the argument indirectly, by pointing out (correctly) that "Evidence Code section 1109 incorporates Evidence Code section 352." (See *People v. Brown*, *supra*, 192 Cal.App.4th at p. 1233 ["[e]ven if the evidence is admissible under section 1109, the trial court must still determine, pursuant to section 352, whether the probative value of the evidence is substantially outweighed by the probability the evidence will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury"].)

object on this basis at trial"]; *People v. Ervine* (2009) 47 Cal.4th 745, 777 [defendant forfeited argument under Evidence Code section 352 "by failing to assert it below"]; *People v. Holford* (2012) 203 Cal.App.4th 155, 169 ["[t]he requirement of a specific objection under section 353 applies to claims seeking exclusion under section 352"].)

Even if Ji had preserved the argument, the trial court did not abuse its discretion in impliedly ruling that the potential for undue prejudice of the mountain road evidence did not substantially outweigh its probative value. Quoting *People v. Johnson* (2010) 185 Cal.App.4th 520, Ji concedes that ""[t]he principal factor affecting the probative value of an uncharged act is its similarity to the charged offense."" (*Id.* at p. 531.) The reason: "'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 another 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. [Citation.] Indeed, proponents of the bill that became section 1109 argued for admissibility of such evidence because of the "typically repetitive nature" of domestic violence. [Citation.] This pattern suggests a psychological dynamic not necessarily involved in other types of crimes.'" (*People v. Fruits*, *supra*, 247 Cal.App.4th at p. 202.)

The probative value of the mountain road incident was high because the uncharged and charged offenses were very similar. On both occasions, Ji used the same instrumentality (his car, with the doors locked) and methodology (driving without saying

where he was going) on the same victim (M.L.). (See *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1120 [trial court did not abuse its discretion under Evidence Code sections 352 and 1109 in admitting evidence of prior incidents of domestic violence where there were "remarkable similarities between the prior incident and charged offense"]; *People v. Hoover*, *supra*, 77 Cal.App.4th at p. 1029 [trial court did not abuse its discretion under Evidence Code section 352 in admitting evidence of other incidents of domestic violence under Evidence Code section 1109 because, "in view of the fact that the subject evidence involved defendant's history of similar conduct against the same victim, the evidence was not unduly inflammatory"]; see also *People v. Brown*, *supra*, 192 Cal.App.4th at p. 1237 [prior acts of domestic violence were admissible under Evidence Code sections 352 and 1109 because "the facts and circumstances of defendant's relationship with [his girlfriend] were indicative of defendant's "'larger scheme of dominance and control'" which he attempted to exercise over [her]"].) The incident also showed how Ji's acts of domestic violence escalated from driving M.L. in his car against her will after she voluntarily got into the car to driving with M.L. in his car against her will after using force. (See *People v. Garcia*, *supra*, 16 Cal.App.5th at p. 990 [""""[t]he propensity inference [of Evidence Code section 1109] is particularly appropriate in the area of domestic violence *because on-going violence and abuse is the norm in domestic violence cases*,""" and the prior act """"*is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity*, [and] [w]ithout the propensity inference, the escalating nature of domestic violence is likewise masked"""].) Finally, the mountain road incident was near in time to the charged incident, was less

inflammatory than the charged incidents of kidnapping and making a criminal threat, and consumed very little trial time. (See *People v. Fruits*, *supra*, 247 Cal.App.4th at p. 206 [no abuse of discretion under Evidence Code section 1109 where the evidence of prior abuse "was not so much more inflammatory [than the charged offense] that it caused Evidence Code section 352 prejudice"]; *People v. Hoover*, at p. 1029 [no abuse of discretion under Evidence Code sections 352 and 1109 where the "subject evidence was also not remote" and "its presentation was not confusing or time-consuming"].)

Finally, Ji does not argue that, even if the evidence of the mountain road incident was admissible, the trial court erred in giving former CALCRIM No. 852 regarding evidence of uncharged domestic violence.[7] Although Ji objected to the instruction in the trial court, he does not independently challenge the instruction on appeal. Ji argues the instruction helped make the alleged error in admitting evidence under Evidence Code section 1109 prejudicial, but he does not argue the court erred in giving the instruction, other than to argue the "section 1109 evidence regarding driving up the mountain did not amount to a

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[7] "The Judicial Council's Advisory Committee on Criminal Jury Instructions in 2017 adopted separate instructions for charged and uncharged offenses offered to prove disposition to commit domestic violence. (CALCRIM Nos. 852A, 852B.) CALCRIM No. 852A, applicable to uncharged offenses offered to prove a propensity to commit domestic violence, uses a preponderance of the evidence standard. CALCRIM No. 852B, applicable to charged offenses offered to prove a propensity to commit domestic violence, requires proof beyond a reasonable doubt." (*People v. Garcia*, *supra*, 16 Cal.App.5th at p. 988, fn. 8.)

false imprisonment sufficient to give the section 1109 evidence jury instruction." Similarly, Ji asserts the trial court "did not have sufficient proof by a preponderance of the evidence to give the section 1109 instruction using this evidence as a prior domestic violence incident," but only in the context of arguing M.L.'s testimony did "not suggest by a preponderance of the evidence that [Ji] falsely imprisoned [M.L.] on a previous occasion." As discussed, both the factual assertion (i.e., M.L.'s testimony was not sufficient to show the mountain road evidence was a prior act of domestic violence) and the premise (i.e., Ji's prior act of domestic violence had to be false imprisonment to be admissible) are incorrect.

B. *Ji's Conviction for False Imprisonment Must Be Vacated*

Ji argues, the People concede, and we agree Ji's conviction for false imprisonment must be vacated. False imprisonment is a lesser included offense of kidnapping. (*People v. Delacerda* (2015) 236 Cal.App.4th 282, 296; *People v. Chacon* (1995) 37 Cal.App.4th 52, 65; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1121.) A defendant cannot be convicted of both kidnapping and false imprisonment of the same victim during the same offense. (See *People v. Ratcliffe* (1981) 124 Cal.App.3d 808, 820 ["[i]f both the false imprisonment count and kidnapping count relate to the same act, double conviction . . . is prohibited"]; see also *People v. Jandres* (2014) 226 Cal.App.4th 340, 362 ["a defendant cannot be convicted of both an offense and a lesser offense necessarily included within that offense, based upon his or her commission of the identical act"].) Therefore, the conviction for false imprisonment must be reversed. (See *People v. Milward* (2011)

52 Cal.4th 580, 589 ["'[w]hen the jury expressly finds defendant guilty of both the greater and lesser offense . . . the conviction of [the greater] offense is controlling, and the conviction of the lesser offense must be reversed'"]; *People v. Jandres*, at p. 343 ["[d]efendant's conviction for false imprisonment must be vacated" because "he cannot be convicted of both kidnapping for rape and its lesser included offense of felony false imprisonment"].)

C. *The Trial Court Should Have Stayed Execution of the Sentence on Ji's Conviction for Making a Criminal Threat Without Imposing a Concurrent Term*

Ji argues, the People concede, and we agree the trial court should have stayed execution of Ji's sentence on his conviction for making a criminal threat. As noted, the trial court imposed and stayed pursuant to section 654 the upper term of three years for Ji's conviction for making a criminal threat, finding Ji's crimes were part of "one common plan." The trial court also stated regarding the sentence on the conviction for making a criminal threat, "That's to be a concurrent sentence if it's ever imposed."

The last statement was error. A sentence stayed under section 654 is not served concurrently. (See *People v. Duff* (2010) 50 Cal.4th 787, 796 ["'the imposition of concurrent sentences is precluded by section 654 [citations] because [under such a sentence] the defendant is deemed to be *subjected* to the term of *both* sentences although they are served simultaneously'"]; *People v. Deloza* (1998) 18 Cal.4th 585, 592 ["[s]ection 654 does not allow any multiple punishment, including either concurrent or consecutive sentences"]; *People v. Alford* (2010) 180 Cal.App.4th 1463, 1468 ["[i]mposition of concurrent sentences is not the

correct method of implementing section 654, because a concurrent sentence is still punishment"].) Therefore, the trial court must correct the sentence on Ji's conviction for making a criminal threat to reflect that execution of the three-year sentence is stayed pursuant to section 654, but is not a concurrent term.

DISPOSITION

The judgment is reversed. The conviction for kidnapping is affirmed. The matter is remanded with directions to vacate the conviction for false imprisonment and to vacate the order for Ji to serve his stayed sentence for making a criminal threat concurrently with his sentence for kidnapping.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.*

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