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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and
Respondent,

v.

JUSTIN ANDREW ZELAYA,

Defendant and
Appellant.

B292892

(Los Angeles County
Super. Ct. No. LA085598)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas Robinson, Judge. Affirmed in part, reversed in part, and remanded.

Victor J. Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews,

Supervising Deputy Attorney General, Gary A. Lieberman,
Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Justin Andrew Zelaya guilty of injury to a cohabitant (Pen. Code, § 273.5, subd. (a) [count 1]),¹ false imprisonment (§ 236 [count 2]), forcible oral copulation (§ 288a, subd. (c)(2)(A) [count 6]), two counts of criminal threats (§ 422, subd. (a) [counts 8 and 9]), two counts of child endangerment (§ 273a, subd. (a) [counts 10 and 11]), and child custody deprivation (§ 278.5 [count 13]).²

In a bifurcated trial, the jury found true the allegation that Zelaya had a sustained prior juvenile petition for robbery (§ 211) for purposes of sentencing under the three strikes law (§§ 667, subd. (d), 1170.12, subd. (b)).³

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

² The jury found Zelaya not guilty of assault with a deadly weapon (§ 245, subd. (a)(1) [count 7]) and kidnapping (§ 207, subd. (a) [count 12]). The court declared a mistrial as to charges of rape (§ 261, subd. (a)(2) [count 3]), sodomy by force (§ 286, subd. (c)(2)(A) [count 4]), and penetration by force (§ 289, subd. (a)(1)(A) [count 5]). The charges in those counts were dismissed.

³ The allegation that Zelaya suffered a prior prison term (§ 667.5, subd. (b)) was dismissed.

The court imposed a sentence of 30 years in state prison, calculated as follows: a term of 6 years, doubled to 12 years pursuant to the three strikes law in count 6; plus a term of one year (one-third the middle term) doubled to 2 years in count 1; plus terms of 8 months (one-third of the middle term) doubled to 16 months each in counts 2, 8, and 9; plus 4 years (full term) doubled to 8 years in count 10; plus 16 months (one-third of the middle term) doubled to 32 months in count 11, plus 8 months (one-third of the middle term) doubled to 16 months in count 13.

Zelaya contends that (1) the trial court erred in admitting evidence of prior violent acts against an ex-girlfriend, (2) the evidence is insufficient to support the felony child endangerment convictions in counts 10 and 11, (3) the trial court erred by failing to instruct on the lesser included offense of misdemeanor child endangerment, (4) the trial court's imposition of a full consecutive term in his conviction for felony child endangerment in count 10 was unauthorized, and (5) the trial court abused its discretion in declining to dismiss a prior strike and sentencing him as a second striker under the three strikes law.

We reverse Zelaya's convictions for felony child endangerment in counts 10 and 11, and remand for the trial court to afford the prosecution the option to retry the greater offenses or to accept a reduction in counts 10 and 11 to the lesser offenses of misdemeanor child endangerment. In all other respects, we affirm the judgment.

FACTS

Prosecution

The Charged Offenses

Victim Angelica E. testified that she met Zelaya in 2015. Later that year, Angelica became pregnant with their daughter, J. Zelaya is the biological father of J., and the stepfather of Angelica's other two daughters, S. and A. On March 17, 2017, the date of the charged offenses, J. was nine months old, S. was three years old, and A. was five years old. Zelaya, Angelica, and the children lived in a two-story apartment in Van Nuys with an internal stairway. Zelaya, Angelica, and the children shared a bedroom upstairs. Zelaya's brother and sister shared another bedroom.

911 Call

On March 18, 2017, at 8:44 a.m., Angelica made a 911 call, which was played at trial. Angelica told the operator, "We need help[.]" "[W]e're trying to run from my ex-boyfriend, he's abusing us and hitting us." She said Zelaya had hit her on her face and body, using his hands and a belt, both on that day and the day before. He did not allow her to leave. She told the operator, "I tried to leave last night It was the only chance I had." When the operator told Angelica to try to calm down, she said, "I know what he's

capable of doing.” She said Zelaya’s mother took J. the night before and that she didn’t know where J. was now. Zelaya forced her to write a letter giving him full custody of J. Angelica said, “I just want my daughter [J.] back.”

Officer Buehler Responds to Angelica’s 911 Call

At around 9:00 a.m., Los Angeles Police Department Officer Stephen Buehler and his partner responded to the Denny’s restaurant where Angelica made the 911 call. Angelica appeared very distraught and fearful. Officer Buehler could tell by the puffiness on her face that she had been crying. Angelica’s hands were shaking, her face was red as if she had been hit, and there was a small abrasion on her right cheek. Based on Officer Buehler’s training and experience, Angelica appeared fully coherent.

Angelica was crying as she told Officer Buehler, “I wrote a letter. I gave away my child. I need to get my child back.” She said Zelaya had assaulted her throughout the night and forced her to write a letter giving him custody of J. She said the assault happened at her apartment, and that Zelaya would still be there. She thought he might be armed. Zelaya had shown her a .22-caliber gun a few days before.

Several officers went to the apartment and arrested Zelaya. The officers did not find a gun, but they did not search the whole apartment.

Physical Examination by Nurse Tapia-Jaffe

Officer Buehler transported Angelica to the Center for Assault Treatment Services. Leticia Tapia-Jaffe, a sexual assault nurse examiner, interviewed Angelica and conducted a physical examination.⁴ Angelica told Tapia-Jaffe that Zelaya had physically and sexually abused her anally, vaginally, and orally. When Tapia-Jaffe asked her what triggered the incident, she answered that Zelaya had asked her daughter, “What has mommy been doing?” Her daughter responded, “[W]e go to her friend’s house.” And “that’s when [Zelaya] got mad ’cuz he told me before, ‘You’re not allowed to have friends.’”

Tapia-Jaffe photographed Angelica’s injuries. Angelica’s right cheek was raised and red, and appeared to have damage to the underlying tissue. She also had bruises and abrasions on her arms, legs, and buttocks.

When Tapia-Jaffe attempted to do a genital examination, Angelica complained of pain or discomfort, so Tapia-Jaffe was unable to use a speculum in the examination. She observed what appeared to be dried blood on the outside of Angelica’s genitalia. Angelica said she may have been menstruating. The nurse also noticed abrasions on the tissue in front of Angelica’s hymen. She attempted to

⁴ The videotaped interview was played for the jury.

examine Angelica's anus, but Angelica was not comfortable with her examining that part of her body, so she stopped.⁵

Officer Buehler Interviews Angelica

Later that day, Officer Buehler interviewed Angelica. She told him that at around 8:00 p.m. on March 17, she, her children, Zelaya, and his friend Robert went in Zelaya's car to visit her sister at a motel. Zelaya drove, Robert sat in the front passenger seat, and Angelica and the children sat in the back seat. As he drove, Zelaya asked A. where "mommy had been spending all her time lately." A. said, "With a guy." Zelaya got angry, stopped the car, and punched Angelica in the face a number of times with a closed fist. He turned the car around and went back to their apartment.

At the apartment, Zelaya opened the car door and pulled Angelica out of the car by her hair. He threw Angelica to the ground, punched her in the back of the head multiple times, and kicked her. He then demanded that she give him her phone. When Angelica refused, Zelaya continued to assault her as she lay face down on the ground. Angelica screamed and pleaded for Zelaya to stop. She ultimately gave him the phone. When neighbors began to look, Zelaya told Angelica to get inside the apartment.

⁵ The parties stipulated that Angelica's urine sample contained methamphetamine. It was not possible to determine the amount or when it had been ingested.

Angelica got the children and went inside. While she and the children were upstairs, Angelica overheard Zelaya on the phone with his mother asking her how to compose a letter to confer all custodial rights over J. to him. Zelaya then came upstairs and demanded that Angelica write the letter. When Angelica refused, Zelaya hit her across the face with a leather belt. Zelaya again demanded that Angelica write the letter, and she again refused. He threatened to kill her if she refused again. Angelica wrote three letters relinquishing custody of J. at Zelaya's direction.

Later, Zelaya and Robert were talking downstairs in the apartment while Angelica was upstairs. After a few minutes, Angelica did not hear them talking anymore and assumed they had left. She packed a bag and put shoes on the children. As she was leaving the apartment, Zelaya yelled for her to go back inside. Angelica complied. Between 9:30 and 10:00 p.m., Zelaya's mother arrived and took J.

Zelaya told Angelica to come downstairs. He said he was going to take Robert home to Panorama City and that she was coming with him. Angelica went upstairs and began waking S. and A. Zelaya told her to stop and said, "They shouldn't have to suffer because of what you did." Angelica pleaded with Zelaya to let her bring the children. She was afraid to leave them alone in the apartment. Zelaya demanded that Angelica come with him alone, and she eventually complied.

Zelaya, Angelica, and Robert got into the car and drove to Panorama City. After Zelaya dropped Robert off, Angelica

sat in the front passenger seat. As Zelaya drove back to their apartment, he demanded that Angelica orally copulate him. She said she did not want to. He responded, "You have to, bitch, all because you wanted to have friends." Zelaya pushed her head down into his groin area, and forced his penis inside her mouth. After three to five minutes, Angelica was able to push away from Zelaya. Zelaya ordered, "Suck my dick now. You have to. You're going to do it." She complied.

When they arrived at their apartment, Zelaya pushed Angelica's head away and told her to go inside. As she walked to the apartment, Zelaya followed closely behind her. He kicked or punched her multiple times on the lower part of her legs and the small of her back.

Once inside the apartment, Zelaya made Angelica take a cold shower, which he knew she disliked doing. When Angelica locked the bathroom door, Zelaya yelled, "Don't ever lock the fucking door, bitch. You don't get to do anything unless I say so."

After Angelica finished showering, Zelaya told her to take her clothes off and get on all fours on the bed. She said she did not want to have sex, but Zelaya insisted, so she complied. Zelaya strapped on a large dildo, inserted it into Angelica's vagina, and inserted his penis into her anus. Angelica told Zelaya that it hurt and asked him to stop, but Zelaya thrust into her rapidly and said, "This is what you get for having friends." The sexual assault lasted about 20 minutes.

The next morning Zelaya sexually abused Angelica again, and then fell asleep. Angelica woke S. and A. and fled the apartment. As they ran to the Denny's restaurant, one of A.'s sandals fell off. Angelica did not pick up the sandal, because she was afraid that Zelaya might wake up and catch them.⁶

After Officer Buehler interviewed Angelica, Zelaya's mother returned J. to Angelica at the police station.⁷

Post-Arrest Communications between Zelaya and Angelica

Although a protective order issued after he was arrested prohibited Zelaya from having contact with Angelica, Angelica sent Zelaya letters and spoke with him on the telephone while he was jailed pending trial.

In a letter dated June 23, Angelica asked Zelaya, "Do you really love me or are you just saying that because you're locked up?" She also wrote that there could be no more "fighting, arguments, lying, cheating No more hitting. I do miss you. Regardless it's the past and all we can do now is just move forward and be there for each other and for [J.]"

⁶ Officer Buehler later located the sandal.

⁷ On March 21, 2017, the prosecutor and Los Angeles Police Department Detective Lisa Householder conducted a videotaped interview of Angelica, in which she gave a similar account of events. The interview was played for the jury.

On a separate page, Angelica wrote, “To whom it may concern. I, Angelica . . . , am dropping all the charges in the criminal case regarding [Zelaya]. There was no sexual assault. I was mad that day, but it was consensual.”

During a recorded jail call on July 5, 2017, Zelaya and Angelica said they loved and missed each other. Zelaya said, “I know why you . . . went with other men and did what you did.” Angelica responded, “I didn’t do nothing. [¶] . . . [¶] They’re just my friends, that’s all I did.” After Angelica referred to Zelaya’s infidelity, he assured her, “I want you to know [¶] . . . [¶] that I love you and . . . we’re gonna make things work, okay?” Angelica agreed.⁸

Angelica’s Testimony

Angelica testified that she had used crystal methamphetamine on March 17, 2017. She had used methamphetamine every day for nine years. Zelaya and Angelica got into an argument in the car that night because Zelaya thought Angelica was cheating on him with another man. They yelled at each other, but the argument did not get physical. When they returned to the apartment, Angelica “might have” hit Zelaya, thrown his stuff, and told him she was leaving.

⁸ Angelica testified that Zelaya had cheated on her with other women, and she had cheated on him with another man.

Later that night, after the argument, Zelaya and Angelica had consensual sex. Zelaya strapped on a large blue dildo, inserted it into Angelica's vagina, and inserted his penis into her anus. According to Angelica, she and Zelaya had anal, vaginal, and oral sex "[a]ll the time," and used dildos. They had rough sex, including choking and hitting, which she liked.

The same day, Angelica wrote a document giving Zelaya custody of J. She testified, "We both decided when we didn't want to be together he would keep her." Angelica claimed she was not ready to be a mother to J. She voluntarily wrote, "I, Angelica . . . , mother of [J.], hereby as of March 17th, 2017, give full legal custody to her father [Zelaya]."

After Zelaya fell asleep, Angelica took S. and A. and ran to a Denny's restaurant, where she called the police. J. was with Zelaya's mother. Angelica left her cell phone, money, and keys at the apartment. She lied when she reported what happened to the police because she was angry and high.

Expert Testimony

Dr. Mindy Mechanic, a professor of psychology at California State University, Fullerton, testified as an expert on intimate partner violence. She explained that victims regularly recant statements to the police: "[W]e deal all the time with issues of recantation with abused women where

they'll make a police report, get involved with [the] prosecution and then they'll change their mind, and that can happen either because the abuser has manipulated them or pushed them into doing that or . . . their feelings could change.”

Prior Uncharged Offenses Against Andrea L.

At trial, Andrea L.’s testimony regarding uncharged offenses against her was introduced pursuant to sections 1101, subdivision (b), 1108, and 1109. Andrea dated Zelaya from about 2011 to 2015. Their relationship was sometimes violent. In 2012, Zelaya drove Andrea to Venice Beach in her car, despite the fact that she did not want to go. When they arrived, Andrea got out of the car, but Zelaya pulled her back inside. When Andrea tried to get out again, Zelaya put his hand under her shorts, grabbed her vagina and squeezed it, cutting her. Andrea got out of the car, and Zelaya drove away. Andrea reported the incident to the police.

On another occasion in 2012, Zelaya discovered pornography on Andrea’s phone. He got upset and threw the phone against the windshield of her car. Then he got on top of the car and smashed the windshield with his feet. Someone notified the police. Zelaya told Andrea to contact the police and drop the charges.⁹

⁹ To Andrea’s knowledge, Zelaya was not prosecuted for either of these incidents.

Zelaya threatened to pull an intrauterine device out of Andrea's body on multiple occasions. He also insisted on driving her to and from work so he knew who she was talking to.

Andrea testified she was still a little afraid of Zelaya. She did not know what he was capable of, or if he would feel revengeful toward her for talking to the police and testifying.

Defense

Zelaya testified on his own behalf. Andrea was his high school sweetheart, who he dated for over five years. Andrea went to Venice Beach with him willingly. They began arguing while walking to the beach. Andrea said she didn't want to be in the car with him, so he drove away. He did not grab Andrea's vagina. He was arrested and released in connection with the incident a few days later.

Zelaya met Angelica in the "drunk tanks" in jail. They started dating after he was released from prison. He never told Angelica that she could not have friends.

On March 17, 2017, S. and A. told Zelaya that Angelica had been in the bed with another man. He got upset because the children were "exposed to that." He was not upset that Angelica was unfaithful. He also had an intimate relationship with someone else. They did not have a physical fight in the car. He did throw Angelica's phone because he was angry that she was not helping him with the children. He also pushed Angelica. Angelica was being

“very dramatic,” and “threw herself on the staircase.” Inside the apartment, Zelaya and Angelica continued to argue and threw things at each other.

Angelica threw a belt at him and missed. Zelaya threw the belt back at her and it hit her in the face. He did not know how Angelica got a bruise on her arm. He did not punch or kick her. He was not involved with Angelica writing the letters that relinquished custody of J. to him. After they stopped fighting, Zelaya and Angelica had consensual sex, which included choking and slapping.

After they dropped off Robert, Zelaya asked Angelica to “suck [his] dick” in the car. He did not tell her that she had to do it.

Zelaya admitted he had a prior conviction for burglary in 2013, and a sustained juvenile petition for robbery in 2010. Regarding the prior burglary, Zelaya testified: “I was drunk and I was with two other of my buddies, and we stole beer[.]” As to the prior robbery, he testified: “I was . . . drinking my malt liquor, and the two people that I was with were younger than I was and they stole a hat from somebody, and since I was the oldest one with them I took the blame.”

DISCUSSION

Prior Acts of Violence against Andrea

At trial, evidence of Zelaya's prior acts of violence against his former girlfriend, Andrea, were admitted over his objection. Zelaya contends that the trial court erred by admitting the prior acts evidence, which was not relevant under Evidence Code section 1101, subdivision (b), due to the dissimilarities between the charged crimes and the prior acts. Zelaya further contends that the evidence was not probative of his propensity to commit sex offenses or offenses involving domestic violence (Evid. Code, §§ 1108 & 1109, respectively), and that the evidence was unduly prejudicial under Evidence Code section 352. He asserts that the error deprived him of his constitutional right to a fair trial because the evidence implied that he had a propensity to commit crimes.

Because the trial court admitted the prior offense testimony under Evidence Code sections 1101, subdivision (b), 1108, and 1109, error exists only if the testimony is inadmissible under all of those sections. (See *People v. Branch* (2001) 91 Cal.App.4th 274, 280–281 (*Branch*).) We review the trial court's decision whether to admit evidence, including evidence of other crimes, for abuse of discretion (*People v. Leon* (2015) 61 Cal.4th 569, 597 (*Leon*)), and conclude that the trial court did not abuse its discretion in admitting the prior acts evidence.

Evidence Code Section 1101, subdivision (b)

Generally, evidence of uncharged misconduct is not admissible to prove a defendant's predisposition to commit such conduct, except as allowed by statutory exceptions. (§ 1101, subd. (a).) Evidence Code section 1101, subdivision (b), permits the introduction of evidence that "a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

"To be admissible [under Evidence Code section 1101, subdivision (b)], the evidence must be relevant to some material fact which is in issue, must have a tendency to prove that fact, and must not contravene other policies limiting admission, such as Evidence Code section 352." (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 753–754, fn. omitted.) "The second element requires a factual examination of similarities between the charged conduct and the prior conduct to determine whether the prior conduct ""logically, naturally, and by reasonable inference"" establishes the disputed fact. ([*People v. Thompson* (1980) 27 Cal.3d 303,] 316.)" (*People v. Gillard* (1997) 57 Cal.App.4th 136, 160.)

Zelaya’s contention that the past acts against Andrea were improperly admitted addresses only the second and third elements—similarity of the acts to the charged offenses, and their prejudicial effect as evaluated under Evidence Code section 352.

Similarity of the Prior Acts and Charged Crimes

Zelaya’s argument that the prior acts and the charged crimes are dissimilar focuses on differences in degree rather than differences in the nature of his conduct. He acknowledges that both the prior acts and the charged crimes were against an intimate partner, but emphasizes that his relationship with Andrea was not as intimate as his relationship with Angelica—i.e., Andrea was a girlfriend, they did not live together, and they had no children together, whereas he and Angelica lived together and had an infant child together. He argues that the incidents with Andrea took place in public and were brief, in contrast to the charged crimes against Angelica, which included a “prolonged series of sex offenses and physical assaults” that occurred while he held her captive in their apartment. Finally, the charged crimes included offenses against his stepchildren in addition to those against Angelica, whereas Andrea was the only victim of the prior acts.

We are not persuaded. Both the charged crimes and the prior acts were against long-term intimate partners—Zelaya dated Andrea for between four and five years, and he

lived with Angelica with whom he had a child. In both cases, there was evidence that Zelaya harbored the same motive—he felt that the relationship he had with the victim was threatened, and used physical, sexual violence in an attempt to control the victim and punish her for acting against his wishes. There was also evidence that he prevented the victims from leaving the scene, in both cases keeping the women in a vehicle against their will, and in Angelica’s case also forcing her to stay inside their apartment. That the prior acts against Andrea were less severe does not undermine these striking similarities.

As to his argument that the prior acts are not relevant to his crimes against Angelica’s children, we agree with the People that Zelaya’s “commission of additional offenses in the current case cannot plausibly inure to his benefit, as he suggests.” It would be illogical to prevent the People from presenting relevant evidence in cases where the defendant is charged with committing additional crimes against additional victims and is arguably more culpable. The jury was properly instructed under CALCRIM No. 375 that it must evaluate the similarities between the prior acts and the charged crimes before finding that the prior acts supported the conclusion that Zelaya had a common motivation or plan; that they were not to conclude that Zelaya had bad character or was predisposed to commit a crime based on the prior acts; and that the prior acts evidence was only one factor to consider among many and insufficient to support a conviction in the absence of other

evidence. We presume the jury understood and followed the instructions and used the prior acts in making determinations only with respect to the charged crimes with which they were sufficiently similar. (See *People v. Davis* (2005) 36 Cal.4th 510, 537 [jury is presumed to understand and follow instructions].)

Evidence Code Section 352

“[E]ven if evidence of uncharged crimes is relevant for a purpose other than the defendant’s character or disposition, before admitting the evidence a trial court must also find it has probative value that is not substantially outweighed by its potential for undue prejudice under Evidence Code section 352.” (*People v. Gutierrez* (2018) 20 Cal.App.5th 847, 859–860 (*Gutierrez*); see also *Leon, supra*, 61 Cal.4th at p. 599.)

Evidence Code “[s]ection 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.’ We review a challenge to a trial court’s choice to admit or exclude evidence under section 352 for abuse of discretion. [Citation.] We will reverse only if the court’s ruling was ‘arbitrary, whimsical, or capricious as a matter of law. [Citation.]’ [Citation.]”

(*People v. Branch* (2001) 91 Cal.App.4th 274, 281–282 (*Branch*).)

“In *Ewoldt*, the Supreme Court discussed a number of factors that should be considered in making a judgment, pursuant to section 352, about admissibility of evidence of uncharged offenses, where introduction is sought under section 1101, subdivision (b). ([*People v. Ewoldt* [(1994)]7 Cal.4th [380,] 404–406.) In *Harris*, the Third District applied the same criteria to admission of evidence proffered under section 1108. ([*People v. Harris* [(1998)]60 Cal.App.4th [727,] 737–741.) As cast by the *Harris* court, the probative value of the evidence must be balanced against four factors: (1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses. (*Ibid.*)” (*Branch, supra*, 91 Cal.App.4th at p. 282.)

Zelaya argues that it was an abuse of discretion to admit the prior acts evidence because it was unduly prejudicial. In addition to relying on the dissimilarities between the incidents, which we have already considered as a basis for inadmissibility and rejected, Zelaya argues that the prior acts against Andrea were particularly inflammatory. He argues that Andrea’s testimony that he threatened to pull an intrauterine device out of her body was a “graphically specific violent threat [not] presented in the evidence of the charged crimes.” It is true that there was no

evidence that Zelaya verbally threatened Angelica in such a graphic way; there was instead evidence presented that he actually perpetrated horribly graphic sexual violence on Angelica, simultaneously sodomizing and raping her despite her pleas for him to stop. We cannot conclude that evidence of the graphic threat of specific violence is inflammatory in comparison to evidence of the actual commission of such violence. Zelaya further argues that the public nature of the incidents with Andrea was inflammatory because it “suggested that [Zelaya] felt no need to limit his antisocial conduct to the members of his own household.” This argument presumes that it is somehow less reprehensible to terrorize one’s family members in the privacy of the home than to terrorize someone with whom you are arguably less intimate in public. We do not agree with this presumption or find the argument in any way persuasive.

The possibility that the jury would assure Zelaya’s punishment for the prior acts by convicting him in the present case was not significant enough to outweigh the strong probative value of the evidence. In fact, the jury did not convict Zelaya of rape (§ 261, subd. (a)(2) [count 3]), sodomy by force (§ 286, subd. (c)(2)(A) [count 4]), or penetration by force (§ 289, subd. (a)(1)(A) [count 5]), and those charges were ultimately dismissed.

The trial court did not abuse its discretion in admitting the prior acts evidence under Evidence Code section 352. With respect to Zelaya’s constitutional argument, “[a]pplication of the ordinary rules of evidence generally

does not impermissibly infringe on a . . . defendant's constitutional rights.' [Citation.] [Zelaya] has not persuaded us that his case presents an exception to this rule." (*People v. Prince* (2007) 40 Cal.4th 1179, 1229 (*Prince*).)

Evidence Code Sections 1108 and 1109

Although the evidence need only be admissible under a single Evidence Code section to be properly admitted, it is notable that the evidence that Zelaya grabbed Andrea's vagina is also admissible as evidence of a prior sexual offense under Evidence Code section 1108, subdivision (d)(1)(A), and evidence of domestic violence under Evidence Code section 1109, subdivision (a)(1).

Evidence Code section 1108, subdivision (a) provides that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code s]ection 1101, if the evidence is not inadmissible pursuant to [Evidence Code s]ection 352." Evidence Code section 1108, subdivision (d)(1)(A) permits admission of conduct proscribed under Penal Code section 243.4, subdivision (e)(1), which provides that "[a]ny person who touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery." For the purpose of this section, "'sexual abuse' includes the

touching of a woman's [intimate parts], without consent, for the purpose of insulting, humiliating, or intimidating the woman, even if the touching does not result in actual physical injury." (*In re Shannon T.* (2006) 144 Cal.App.4th 618, 622, fn. omitted.) Here, evidence was adduced that during a heated public argument, Zelaya grabbed Andrea's vagina. This conduct was nonconsensual touching of a private area of Andrea's body for the purpose of public humiliation and intimidation and is therefore admissible as evidence of Zelaya's propensity to commit other sexual offenses.

Evidence Code section 1109, subdivision (a)(1) permits admission "in a criminal action in which the defendant is accused of an offense involving domestic violence, [of] evidence of the defendant's commission of other domestic violence" "Domestic violence" as used in Evidence Code section 1109 is defined by Penal Code section 13700 (Evid. Code, § 1109, subd. (d)(3)), and "means 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 had a dating or engagement relationship" (§ 13700, subd. (b)). "Abuse" means 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." (§ 13700, subd. (a)). The prosecution presented evidence that Andrea and Zelaya were in a dating relationship, and that he grabbed Andrea's vagina with

sufficient force to cut her, placing her in reasonable apprehension of imminent serious bodily injury to herself. The evidence was admissible as evidence of Zelaya's propensity to commit domestic abuse.

Admission of evidence under Evidence Code sections 1108 and 1109 is subject to the trial court's determination that the evidence is admissible under Evidence Code section 352. (Evid. Code, §§ 1108, subd. (a), 1109, subd. (a).) This requires analysis of the same factors that are considered when determining whether Evidence Code 352 prohibits admission of evidence under Evidence Code section 1101, subdivision (b). (*Branch, supra*, 91 Cal.App.4th at p. 282.) As we have discussed, the trial court's admission of the evidence as more probative than prejudicial was not an abuse of discretion, and we see no reason to deviate from the general rule that application of the ordinary rules of evidence does not generally violate a defendant's constitutional rights. (*Prince, supra*, 40 Cal.4th at p. 1229.)

Child Endangerment

Zelaya presents three arguments with respect to his convictions for felony child endangerment in counts 10 and 11: (1) the evidence was not sufficient to demonstrate that his conduct resulted in a likelihood of great bodily injury or death, as required to support the felony child endangerment convictions; (2) the trial court erred by failing to sua sponte instruct on the lesser included offense of misdemeanor child

endangerment; and (3) the trial court's imposition of a full consecutive term in count 10 was unauthorized.

Although we disagree that the evidence was insufficient to support Zelaya's convictions for felony child endangerment, we agree that the court erred by failing to instruct on the lesser included offense of misdemeanor child endangerment, and we conclude that there is a reasonable probability that he would have obtained a more favorable result had the jury been fully instructed. We therefore remand to give the prosecution the option to retry the greater offenses or to accept a reduction in counts 10 and 11 to the lesser offenses of misdemeanor child endangerment. In light of our disposition with respect to his first two contentions, it is not necessary to reach Zelaya's argument that his sentence was unauthorized in count 10.

Legal Principles

Section 273a, subdivision (a), provides for felony punishment of "[a]ny person who, under circumstances or conditions likely to produce great bodily harm or death . . . willfully causes or permits [a] child to be placed in a situation where his or her person or health is endangered." "Misdemeanor status is given to the commission of the same acts 'under circumstances or conditions *other* than those likely to produce great bodily harm or death.' (Pen. Code, § 273a, subd. [(b)], *italics added*.) Section 273a does not focus upon actual injury produced by abusive actions but

‘rather upon whether or not the attendant circumstances make great bodily injury likely. Occurrence of great bodily injury is not an element of the offense.’ [Citation.] It is the likelihood of foreseeable injury, rather than whether such injury in fact occurs, that is relevant. [Citation.] The statute is intended to protect children from situations in which the ‘probability of serious injury is great.’ [Citation.]” (*People v. Lee* (1991) 234 Cal.App.3d 1214, 1220 (*Lee*)).

“Felony child abuse ‘can occur in a wide variety of situations: the definition broadly includes both active and passive conduct, i.e., child abuse by direct assault and child endangering by extreme neglect. *Two threshold considerations, however, govern all types of conduct prohibited by this law:* first, the conduct must be willful; *second*, it must be committed “under circumstances or conditions likely to produce great bodily harm or death.” (§ 273a, subd. [(a)].) Absent either of these elements, there can be no violation of the statute.” [Citation.]” (*Lee, supra*, 234 Cal.App.3d at pp. 1220–1221.)

“Section 273a, subdivision [(a)] requires that ‘defendant’s conduct must amount to a reckless, gross, or culpable departure from the ordinary standard of due care; it must be such a departure from what would be conduct of an ordinarily prudent person under the same circumstances as to be incompatible with a proper regard for human life [¶] [M]ere inattention or mistake in judgment is insufficient to support a criminal conviction.’ [Citations.] The term ‘willful’ does not require intent to injure the child, but

“‘implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.’” [Citations.]” (*Lee, supra*, 234 Cal.App.3d at p. 1221.) “[L]ikely’ as used in section 273a means a substantial danger, i.e., a serious and well-founded risk, of great bodily harm or death.” (*People v. Wilson* (2006) 138 Cal.App.4th 1197, 1204 (*Wilson*).)

Analysis

Sufficiency of the Evidence of Likelihood of Great Bodily Injury

At trial, the prosecutor proceeded on the theory that Zelaya’s act of forcing Angelica to leave her three-year-old daughter S. and her five-year-old daughter A. alone in an apartment with stairs and other potential dangers constituted felony child endangerment. Counts 9 and 10 reflect one count of child endangerment as to each child. The jury heard evidence of the children’s ages and of the existence of an internal stairway leading to the second floor where the children slept. Officer Stephen Beuhler testified that Angelica told him that on the night of March 17, 2017, Zelaya told her to come with him to drive his friend Robert home. Angelica went to the upstairs bedroom and started to

wake S. and A. to bring them with her,¹⁰ but Zelaya demanded that she leave them alone in the apartment. She complied out of fear that Zelaya would become violent with her. The jury was also played a recording of Angelica telling Tapia-Jaffe that Zelaya demanded that Angelica go with him when he drove his friend home, and ordered her not to wake up the two girls. The jury also heard a recording of Angelica relaying the same information to Detective Householder. She also told the detective that she did not want to leave the children alone but that she had no choice because she feared Zelaya would hit her. In his own testimony, Zelaya explained that as part of the family's normal routine, he would drive to pick up Angelica at the end of her work at 11:00 p.m. and bring all three girls with him before putting them to bed, unless there was some other family member or friend in the apartment to watch the children during the five to ten minutes it would take to get Angelica.

Following the close of evidence, the defense moved for a judgment of acquittal under section 1118.1. The prosecution argued: "The child endangerment law requires that the People prove that the defendant placed the children in a situation in which they were in danger, that it was reckless and a gross departure from the way an ordinarily careful person would act, and this is a gross departure and shows disregard for their safety. It's irrelevant whether or not they were actually physically harmed."

¹⁰ By this time, Zelaya's mother had already come to the apartment and left with nine-month-old J.

The defense responded that “leaving minors alone while asleep in the house may not be good parenting, but I don’t think that rises to the level of a serious felony as contained in counts 10 and 11. Otherwise we’d be locking up all the parents.” In the absence of a favorable ruling, defense counsel requested that the trial court exercise its discretion to reduce counts 10 and 11 to lesser included offenses.

The court noted that an argument could be made that there was a likelihood of great bodily harm depending on what the children did while alone. Defense counsel responded, “there’s nothing before the court to suggest the condition of the apartment had something that would make having sleeping children there subject to great bodily injury.”

The trial court denied the motion, stating: “There’s many reasonable ways for people to imagine that a child can be injured or worse when left alone in an apartment. There’s water, there’s electricity, there’s all sorts of things that can happen, which is why children aren’t supposed to be left alone. I think that’s common sense.

When the defense later renewed the motion, the trial court again denied it.

On appeal, Zelaya argues there was insufficient evidence that the children were endangered under circumstances or conditions likely to produce great bodily harm or death because there was no evidence of dangerous conditions in the apartment. He asserts that his due process

rights were violated because he was not convicted on proof beyond a reasonable doubt of every fact necessary to constitute the offenses.

When determining whether the evidence was sufficient to support a conviction, we “review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

We disagree with Zelaya that no evidence was offered to demonstrate that the apartment was dangerous. There was testimony that the apartment had an internal stairway and the children were left in the bedroom on the second floor (at the top of the stairway), which could have posed a serious danger of great bodily injury or death to either child. It is commonly understood that toddlers and small children are likely to hurt themselves on stairs and should not be permitted to use them without supervision. Zelaya himself testified that under normal circumstances the children were not left alone in the apartment, but rather taken at 11:00 p.m. with him to pick up Angelica at her workplace, a fact that supports they were not safely left alone. Angelica’s reluctance to leave her children is a further indication that the conditions in the apartment made it unsafe to leave them alone. There is danger inherent in leaving a small child unsupervised for a significant period of time. A

reasonable person could conclude that leaving the two young girls alone in an apartment with stairs and the possibility of danger from other common items present in the home while the adults drove from Van Nuys to Panorama City created “a serious and well-founded risk, of great bodily harm or death.” (*Wilson, supra*, 138 Cal.App.4th at p. 1204.) Viewing the evidence in the light most favorable to the prosecution, we conclude that substantial evidence supports the verdicts in counts 10 and 11.

*Duty to Instruct on Misdemeanor Child
Endangerment*

Zelaya further contends that the trial court erred by failing to sua sponte instruct on the lesser included offense of misdemeanor child endangerment in counts 10 and 11. We agree.

A trial court has a duty to instruct sua sponte on all lesser included offenses, where there is substantial evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 162 (*Breverman*).) Misdemeanor child endangerment differs from felony child endangerment only in that the acts of endangerment occur “under circumstances or conditions *other* than those likely to produce great bodily harm or death.” (§ 273a, subd. (b), *italics added*.)

While there is substantial evidence to support a finding that the circumstances in which Zelaya left the children were likely to produce great bodily harm or death, it would not be unreasonable for a juror to find that the circumstances did not create this level of risk. The trial court implicitly acknowledged this when ruling on the sufficiency of the evidence supporting counts 10 and 11 in the motion for acquittal, stating: “Whether the jury finds [that the conditions may produce great bodily injury or death] to be likely, which is the standard, the second element of the offense, that’s up to the jury. I don’t think it would be unreasonable for them to find that it’s likely. I don’t think they’re the strongest counts ever, but I think there’s enough to go to the jury on them.” Because a reasonable juror could find that the conditions were other than those likely to produce great bodily injury or death, the trial court erred in failing to instruct on misdemeanor child endangerment.

Although we disagree with Zelaya that the error was of federal constitutional magnitude and therefore reversible unless harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18), we agree that the error was prejudicial under the less stringent, reasonable probability standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Breverman, supra*, 19 Cal.4th at pp. 164–179 [erroneous failure to instruct on lesser included offense is state law error only, reviewable under the *Watson* standard].) That is, there is a reasonable probability that the error affected the

jury's guilty verdicts on counts 10 and 11. The evidence presents a close case. As defense counsel argued, there was little evidence of specific dangers present in the apartment. It is reasonably likely that, had it been properly instructed, the jury may have reached a result more favorable to Zelaya on both counts.

Because the error goes only to the degree of the offenses for which Zelaya was convicted, we may reduce the convictions to the lesser degree and affirm the judgment as modified. (*People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1223, citing § 1260.) However, our reversal is based on trial error, so principles of double jeopardy do not bar re-trial. (*People v. Shirley* (1982) 31 Cal.3d 18, 71 [“double jeopardy clause does not prohibit retrial after a reversal premised on error of law”].) We therefore remand to give the prosecution the option to retry the greater offenses or to accept a reduction in counts 10 and 11 to the lesser offenses of misdemeanor child endangerment.

Three Strikes Law

Zelaya contends that the trial court abused its discretion in refusing to dismiss his prior strike and sentencing him as a second striker under the three strikes law. This contention is without merit.

Legal Principles

Under Penal Code section 1385, the trial court has discretion to strike a prior felony conviction allegation in furtherance of justice. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529–530.) The trial court “must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.) While a trial court must enter a statement of reasons in the minutes of the court when dismissing a prior conviction, the trial court is not required to “explain its decision not to exercise its power to dismiss or strike.” (*People v. Carmony* (2004) 33 Cal.4th 367, 376, quoting *People v. Benevides* (1998) 64 Cal.App.4th 728, 734.) ““The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977–978.)” (*People v. Barrera* (1999) 70 Cal.App.4th 541, 554.) We review the

trial court's exercise of discretion for abuse of discretion.
(*Romero, supra*, 13 Cal.4th at p. 530.)

Proceedings

In a bifurcated trial, the jury found true the allegation that Zelaya had a sustained prior juvenile petition for robbery (§ 211) for purposes of sentencing under the three strikes law (§§ 667, subd. (d), 1170.12, subd. (b)). Zelaya moved to dismiss his prior strike under *Romero*, arguing that the most serious charges in the instant case had been dismissed, and that the prior strike was a juvenile matter in which he had not been afforded the same constitutional rights as an adult.

At the hearing on the *Romero* motion, the court noted that it had read the motion and considered the matter. The defense submitted on the motion. The prosecutor argued that Zelaya misrepresented the facts underlying his sustained juvenile petition for robbery, and submitted a copy of the police report made regarding that offense. Zelaya represented at trial that he was taking the blame for other juveniles, but the police report reflected that he was the primary aggressor, demanded money from the victim, assaulted the victim and hit him over the head four times, and threatened to pull a gun on the victim.

The prosecutor argued that there had been “no break” in Zelaya’s criminal conduct, which was violent, not “minimal.” He had a sustained juvenile petition for assault

with a deadly weapon in 2008 (§ 245, subd. (a)(1)), followed by the sustained petition for robbery that qualified as a strike in 2010. In 2012, he was charged with two counts of robbery in which he fought with a security guard and a store clerk, and had benefitted when the charges were reduced to grand theft person, and later further reduced to a misdemeanor pursuant to Proposition 47. She asserted that the sustained juvenile petition was an appropriate strike prior, and that there were no factors to mitigate its import. Based on Zelaya's age and the serious nature of the offense it was not unconstitutional for the sustained juvenile petition to be the basis for a prior strike conviction.

Defense counsel clarified that he was not arguing that the use of the sustained juvenile petition was unconstitutional, but only that it carried fewer constitutional protections. He argued that as far as the factual basis of the 2012 robbery was concerned, police reports are not "accept[ed] . . . at face value," and if the prosecution had wished to demonstrate that the robbery was a "horrible act," they could have proven the underlying facts at trial. The police report was insufficient. Defense counsel argued that the instant case was "in essence a domestic violence situation . . . [and] the court can fashion a substantial sentence that will be appropriate without the application of the strike law."

The trial court ruled:

"I don't agree with you, [defense counsel]. The question for the court at a *Romero* motion is whether or not

the defendant, based upon the totality of the circumstances, including not only the current crime but the strike prior at issue and the rest of his background, including his criminal history, is outside the spirit of the three-strikes law as it can be reasonably interpreted to have been intended in its application, and I don't see that he's outside the spirit of it at all.

"It seems to me that he's exactly the type of criminal defendant that this law was intended for. He is a repeat offender, a regular repeat offender. It's over a number of years, multiple incidents that involve violence, and he's gone into custody for them, he's gotten out, and he's continued to prey on people in this community.

"And I think it would -- I'm fully aware that I have the discretion to strike the strike in this case, but I almost think it would be an abuse of discretion to exercise it in a case like this where it's so clear that his criminality is continuing, it is ongoing, it's serious, it is violent, and then in particular in this case where he preyed upon a loved one, helpless as she was, as well as the children, over an extended period of time.

"I don't see that it would be appropriate under the law to strike the strike, and so I'm going to respectfully deny your motion."

Analysis

Zelaya contends that the trial court abused its discretion because his case is outside the spirit of the second

strike sentencing provisions of the three strikes law. He asserts that “nothing about the circumstances of the current offenses compel[s] the conclusion that [Zelaya] will forever be immune to rehabilitation.” He argues that the crimes were not “particularly aggravated” offenses, as they did not involve infliction of great bodily injury, the use of a deadly or dangerous weapon, or the arming or use of a firearm. He was young at the time that he committed all of the crimes and was subject to the impulsiveness and poor decision-making that attends youth. Zelaya would also have a strong motivation to rehabilitate himself to be a father to his two-year-old daughter.

These potentially mitigating factors are only part of the calculus, however. The determination that a defendant falls outside of the spirit of the three strikes law is not dependent upon a finding that he or she will not “forever be immune to rehabilitation.” Trial courts may only strike a strike in rare situations. Although the court is not required to state its reasons for declining to strike a strike, the trial court did in this instance. The court relied on defendant’s consistently recidivist behavior, his repeated commission of violent crimes over a number of years even after incarceration, and his choice to prey on defenseless loved ones—a woman and two small children. The trial court’s observations are amply supported by the record. In light of these facts, we cannot say that the trial court’s refusal to strike the prior strike conviction was an abuse of discretion.

DISPOSITION

We reverse Zelaya's convictions for felony child endangerment in counts 10 and 11, and remand for the trial court to afford the prosecution the option to retry the greater offenses or to accept a reduction in counts 10 and 11 to the lesser offenses of misdemeanor child endangerment. In all other respects, the judgment is affirmed.

MOOR, J.

We concur:

RUBIN, P. J.

KIM, J.