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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL VASSALLO,

Defendant and Appellant.

A129625

(Solano County
Super. Ct. No. VCR202566)

A jury found defendant Daniel Vassallo guilty of two counts of forcible rape, along with single counts of assault with a deadly weapon by means likely to produce great bodily injury, making criminal threats, kidnapping, dissuading a witness from testifying, and disobeying a domestic relations court order. The jury also found true an out-on-bail allegation. He was sentenced to a total term of 28 years and four months in state prison.

On appeal, defendant contends the trial court committed multiple errors at trial which cumulatively, if not individually, require a reversal of the judgment. We agree with defendant that the trial court erred in two respects: (1) allowing the admission of certain hearsay evidence, and (2) posing a hypothetical question to an expert witness in an apparent effort to explain an incident in which the victim became hysterical while testifying. We conclude these errors did not adversely affect the jury's verdict. Therefore, the judgment is affirmed.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On January 4, 2010, an amended information was filed charging defendant with four counts of forcible rape (Pen. Code, § 261, subd. (a)(2), counts one, two, six, and nine),¹ along with single counts of assault with a deadly weapon by means likely to produce great bodily injury (§ 245, subd. (a)(1), count three), false imprisonment by violence (§ 236, count four), making criminal threats (§ 422, count five), kidnapping (§ 207, subd. (a), count seven), dissuading a witness from testifying (§ 136.1, subd. (a)(1), count eight), and disobeying a domestic relations court order (§ 273.6, subd. (a), count ten). As to count nine, the information alleged a kidnapping enhancement under section 667.61, subdivisions (a) and (d). As to counts seven through nine, the information alleged that defendant was out on bail at the time of the offenses (§ 12022.1). The case against defendant was based on three separate incidents occurring in January 2007, December 2008, and March 2009.

I. The Prosecution's Case

A. M.S.

M.S. testified that defendant is her former boyfriend. She first dated him for about a month and a half in 2001. The relationship ended because she was 17 years old at the time and her father refused to allow her to date someone who was 20.

In 2006, M.S. contacted defendant on MySpace and drove from Vallejo to Patterson, where he was living at the time. She told him she had been thinking of him for years and had been writing poems about him. She made four trips to Patterson to see him, and eventually he moved up to Vallejo. Their relationship was “pretty heavy” at that time. It was “great” when they first started dating, and she fell in love with him. She became pregnant in 2006, but had a miscarriage. The relationship lasted until 2008, and was “off-again, on-again.”

When M.S.’s parents found out she was pregnant, they insisted she and defendant get married. Initially, he “forced” her to move in with him in a studio apartment. He took her things out of her closet, threw them outside her window and put them in his car.

¹ All further unspecified statutory references are to the Penal Code.

Then she entered his car and he would not let her go. She could not leave the apartment because he was with her all the time. After being in the apartment for one day, he spoke with her father who agreed they could both move into her parents' house.

M.S. had the miscarriage in December 2006 when the pregnancy was at five months. Defendant continued living with her and her parents but the relationship was problematic because her family and friends did not like him. She felt caught in between. During this period he would get mad at her sometimes and would spit or pour water on her. He would also pick her up and throw her as if she were a child, but she did not perceive his behavior as violent. He moved out a few days before Christmas 2006 and they continued to see each other.

1. The January 2007 Incident

In January 2007, M.S.'s father filed for a restraining order against defendant. She had not told her father about any violent behavior, nor did she want the restraining order. Her father took her to the Philippines to keep her away from defendant. While she was there, she continued to have contact with him by telephone.

Late one night towards the end of that month, when they were in an "off" period in the relationship, defendant came to M.S.'s house and threw rocks at her bedroom window to get her attention. He told her that he needed to talk so she went downstairs and opened the door. Suddenly, he pressed a knife hard against her chest. She asked what he was doing with the knife and he said that he wanted to talk to her about the restraining order. He tried to grab her hands and pulled her. When she resisted, he grabbed her around the waist and put her over his shoulder. She did not scream because she was afraid he would use the knife. He took her to the side of a house about three houses down from where she lived and tried to pull down her pants. When she resisted he poked her with the knife on her lower abdomen and her legs. He picked her up again and carried her to his car.

When they got to the car, defendant opened the driver side door and shoved M.S. inside. He then pushed her over to the passenger seat and got on top of her. He pulled her pants down and pulled his own pants down. He had the knife pressed hard to her left side and told her that if she resisted he would use it on her. She told him that she did not

want to have sex, but he forced it on her. Afterwards, he apologized and said that he would not have used the knife on her. She believed him because she did not think he was the type of person to actually use a knife and she was still in love with him. Later, she walked back to her house. She did not tell anyone about the incident because she still loved him and she did not want him to get in trouble. She also was not sure that anyone would believe her if she said she had been raped.

2. The Relationship Continues

After the January 2007 incident, M.S. and defendant continued the relationship but kept it secret because her family and friends disapproved of him. She testified they had a “loving relationship” during this time. The hearing on the restraining order was held in February 2007. When she went to court for the hearing she did not say anything to anyone about the January incident.²

Over time, defendant became controlling and jealous of M.S. He would tell her she was a failure and sometimes told her she was stupid. He also would get angry easily. His behavior became physical in 2007, when he slapped her in the face because he was upset that she had cut her hair. She told him she wanted to leave him and he slapped her again. Afterwards, he apologized and she forgave him.

M.S. also testified that defendant punched her in the face during an argument in August 2008. Afterwards, she told him she wanted to break up. When she went to get treatment for her injuries she told the medical personnel that she had been playing with her cousin and accidentally got hit in the face. She did this so that defendant would not get into trouble. Later that month, she allowed him to enter her bedroom through the window. He asked her if she really wanted to break up with him and she said she did. She went to lie down on the bed and he left the room. When he came back, he was holding a knife in his left hand. She asked him what he was doing with the knife and he said he was going to kill her father. He blamed her father for breaking up their relationship. She told him to put the knife down and that he was scaring her. He then

² The restraining order was denied on February 7, 2007.

held the knife to her throat and asked her if she was going to leave him.³ She told him that she was not going to leave him and that she was sorry she had said mean things to him. Eventually he left the house.

On cross-examination, M.S. admitted that the relationship was a mutually jealous one. In July 2007, defendant was living in American Canyon. When he moved into the house, she demanded to know who else was living there because she did not want him around any other women. She would often demand to see his cell phone and would make him delete any contact information relating to other women. She would also log on and check his e-mail messages. She frequently came to see him while he was at work. When he was working at Wal-Mart, she would go to his job or call him on every one of his breaks. If he didn't answer, she would call repeatedly until he did. She admitted that in 2008 she exercised control within the relationship by dictating where he could live and whom he could talk to. She also badly scratched his arm during an argument at Wal-Mart in December 2008.

3. The December 2008 Incident

On the night of December 31, 2008, defendant and M.S. had a fight over whether he was taking the relationship seriously. She was concerned he was seeing other women. She also thought she might be pregnant again. They had been playing an online computer game together while arguing about their relationship over the phone. Eventually, he hung up on her and logged off the game. At that point she decided to go over to his house. Before she left, she sent him a text message stating: "Answer your phone or you'll regret it." She left her house dressed in her pajamas. She drove to his house, climbed over a six-foot redwood fence, and walked across the backyard. She had entered the property in this manner before because his landlord did not want her in the house.

M.S. saw defendant in the kitchen talking on the phone. She banged on the window and he ran out of the room. He opened the window to his bedroom and let her

³ At some point during the relationship, defendant had threatened to kill M.S. if she ever called the police because his ex-girlfriend Tanya Medina had put him in jail before. He told her, "if you call the cops on me, I'm going to kill you because I'm going to end up in jail anyway."

in. She demanded to know who he had been talking to on the phone. He indicated he wanted to have sex. She protested and said she just wanted to talk, but he pinned her hands over her head, pulled her pants down and forced sex on her. She tried to push him off but he was too heavy, and when she raised her voice he put his hands over her mouth and told her to be quiet. Even though someone else was in the house, she did not scream because she was afraid that his landlord would kick him out if he found out she was there and that defendant would blame her for it. Afterwards, she put her clothes on and tried to leave his room, but he made her lie on the bed and used the weight of his body to keep her next to him. He pulled down her pants again and had sex with her against her will.

M.S. told defendant she might be pregnant and wanted to go home to take a pregnancy test. She said this as an excuse to try and get out of his room. He said they should buy a pregnancy test kit together and they left his house through the window. By this time it was about three o'clock in the morning. They walked to their respective cars and started driving. She tried to lose him by driving along the streets, but he kept following her so she got on the freeway and headed north towards Sacramento. They were talking on their cell phones as they were driving, and he told her take an exit but she kept going because she was trying to get away from him. He swerved his car behind her and told her that if she did not exit he would ram her car. She got off the freeway and he told her to park at a gas station. She did not want to stop because she was scared of him, so she drove back on the freeway heading towards Vallejo.

Defendant told M.S. take the exit toward American Canyon so that they could go to Wal-Mart and buy the pregnancy test, but she did not want to get off the freeway there because it was too foggy. When he caught up to her car, he again swerved behind her and at one point she had to move to another lane to avoid getting hit. She ended up on Highway 37 going toward San Rafael. During this time he was yelling at her and threatening to ram her car. At some point he used his car to force her to get off the freeway. He then hit the back of her car and the impact pushed it forward three to five inches. He told her to park or he would kill her. She told him he was scaring her and asked him to calm down. He placed his car in front of hers and got out of his car. He

then punched her driver's side window and tried to open the door. She heard a snapping sound and drove down the street.

Defendant began following M.S. again, and they ended up going the wrong way on a one-way street. As his car came close to the left rear end of her car she heard a crash behind her. She called 911 because she was scared and thought he was going to find her and kill her. She met with a police officer and told him defendant had chased her and tried to drive her off the road. She did not tell the officer that she had been raped.⁴ After the incident, she obtained a restraining order against defendant.

When her 911 call was played for the jury, M.S. appeared to have an emotional breakdown and the court called a recess. She asked that the tape be stopped and, at one point, she fell from her chair and sat on the floor. She was hyperventilating. The jury was excused from the courtroom and medical personnel were called to assist her. In chambers, defendant's counsel stated that he did not believe M.S.'s reactions were genuine. The trial judge expressed his view that she had had "what I would call a post-traumatic stress-induced reaction," but that he did not intend on sharing this opinion with the jurors because it was not evidence and "therefore, is not relevant."

4. The March 2009 Incident

On March 21, 2009, M.S. received an automated message notifying her that defendant had been released from jail.⁵ She started to panic, thinking that he was going to come after her. She then made arrangements to stay over at her aunt's house.

On March 24, 2009, M.S. was supposed to go to her parents' house to drive her mother to a dental appointment.⁶ She arrived at the house before 9:00 a.m. She entered a gate in front of the house and was halfway towards the front door when she heard someone behind her climb over the gate and jump to the ground. She saw that it was

⁴ M.S. did not tell anyone about the alleged rapes until the January 2009 preliminary hearing in this case, when she told a district attorney about the December 2008 rapes. Later, she told Sylvia Martinez, the district attorney investigator, about the January 2007 rape.

⁵ The trial court judicially noticed that defendant posted bail and was released from custody on March 21, 2009.

⁶ Her mother testified that she does not know how to drive.

defendant and screamed, but not loud enough for anyone to hear her. He told her to calm down and come with him and he started grabbing for her clothes. She ran towards the security door that covers the front door to the house and held on to it. He kept trying to grab her. He wrapped his arms around her torso and pulled her away from the door and carried her to her car. He took her keys and pushed her into the car.

Defendant drove the car for a few minutes and parked by a gas station. He said that he loved her and told her about what jail was like. After a minute or two, they drove back to her house to retrieve some things that she had left by the front door because he was scared someone would find them there. He ran to the house and picked up the items. They drove off again and parked a couple of blocks from her house. They were there in the car for about an hour. He told her that he did not want her to testify and that she should leave the county for a day without telling anyone where she was going. He also told her to lie to the district attorney investigators and the police. She said she could not do that. At some point, he began driving again and they went to the Motel 6 in Vallejo.⁷ While they were driving he played her a song by Pink called "Please Don't Leave Me."

When they arrived at the motel, she did not want to get out of the car. Defendant told her not to make a scene and pulled her out. They went into the lobby and got a room. She did not say anything to the motel clerk because she was scared that defendant was going to hit her. After registering, they went to a room and defendant could not open the door, so M.S. opened the door for him. They stayed in the room for several hours. He forced her to have sex by removing her pants, putting her arms behind her head, and using his body weight to pin her on the bed. She tried to get him off and told him to stop, but he did not stop.

Afterwards, defendant began begging her not to testify because the district attorney had found out about a previous rape charge against him made by an ex-girlfriend named Esther. He said if she testified against him he would get 18 years to life in prison. He appeared to be scared and was not aggressive towards her. Two hours later, they had sex again. This time, she consented because he was acting nice and "loving." He told

⁷ On Valentine's Day in February 2007, he had taken her to this same Motel 6.

her he had changed. She felt sorry for him because she knew she was going to testify against him.

After they left the motel, they drove to a park and saw M.S.'s father. Defendant ducked down so her father would not see him and got out of the car. She spoke to her father and told him that she had been with defendant. She did not disclose that she had been taken to a motel for four hours or that she and defendant had had sex. Detectives were at her house when she arrived.

B. M.S.'s Parents

L.S. is M.S.'s mother. She testified that after M.S. miscarried she went to the Philippines and returned around February 2007. On March 24, 2009, she was expecting M.S. to pick her up and drive her to her dental appointment. When she did not arrive, L.S. asked her husband to call her brother's house. It was not unusual for her daughter to spend the night at that house because she sometimes stayed there to visit with her cousins.

U.S. is M.S.'s father. He first met defendant in 2000, when his daughter was still in high school. He met him again in 2006, when his daughter began dating defendant. U.S. accepted the relationship, and when M.S. became pregnant he initially agreed to allow defendant to move into his house. At some point U.S. asked defendant to move out after M.S. told U.S. defendant had accused U.S. of misappropriating defendant's car. There had also been arguments because defendant did not appear to be employed and was not contributing any money. M.S. told her father she was breaking up with defendant. At some point, while the family was in the process of moving to a new house, defendant broke into the old house and demanded to see M.S. U.S. told him she was not there and threatened to call the police.⁸

In December 2006, U.S. applied for a restraining order against defendant because he repeatedly came to the house and knocked loudly on the door, asking to see M.S. One

⁸ Defendant testified that he used to visit M.S. in the house when her parents were not at home. On the date of this confrontation, she was there and defendant was attempting to retrieve some of his belongings that she had stored in her closet.

time, defendant tailed him while he was driving to a doctor's appointment, which scared him. After he filed for the restraining order, he took his daughter to the Philippines for about 20 days. On his application for a continuance of the hearing on the restraining order, he indicated that he would not be returning from the Philippines until the first week of February 2007.

On the morning of March 24, 2009, U.S. was expecting M.S. to come to the house to take her mother to the dental appointment. After he called his wife's brother and learned that M.S. had left the house, he decided to go out and look for her. Finally, in the afternoon he saw her in her car. She pulled her car over and he got out of his car and walked to her. She told him that defendant had "got her." She appeared to be scared and was shaking.

On cross-examination, U.S. stated that when he learned M.S. was pregnant he was furious. After defendant moved in, U.S. and defendant would argue. He denied ever doing anything physical to defendant.

C. Brenda Hanson

Brenda Hanson met M.S. in July 2007 while they were attending a 16-month nursing school program. M.S. introduced her to defendant. Hanson saw him at school once or twice a week waiting for M.S. to finish class. She noticed M.S. received a lot of calls on her cell phone, even during class time. She told Hanson that the calls were from defendant.

M.S. confided in Hanson that defendant had physically abused her. When asked if other classmates were present when M.S. described defendant's conduct, Hanson replied: "Yeah, our whole class was fully aware of her situation." Defense counsel did not object to this statement. On one occasion, M.S. showed Hanson a bruise on her upper arm that she claimed defendant had caused. Hanson told her she should leave the relationship, but M.S. did not follow her advice. On cross-examination, Hanson testified that M.S. never told her anything about the incident that occurred on December 31, 2008.

D. Nancy Lemon

Nancy Lemon testified as an expert in the area of domestic violence and its effects. Lemon testified that relationships involving domestic violence typically follow a cycle of stages. The abuser is at first very charming, romantic, and attentive. This period is followed by a tension-building stage, in which the abuser becomes moody, critical, and verbally abusive. Eventually, the abuser may display anger or violence. After such an outburst, the abuser apologizes and goes back to being romantic. Women frequently forgive their abusers and go back to them, minimizing the abuser's conduct. This cycle repeats itself, except the level of violence increases over time.

The trial court questioned Lemon as to whether victims of severe domestic abuse ever suffer from post-traumatic stress disorder (PTSD). After Lemon stated that some victims of domestic violence do suffer from PTSD, the court asked her to define PTSD and to state what types of issues could trigger post-traumatic stress in a victim. Lemon testified that anything that reminds a victim of the initial traumatic incident could trigger a response. The court then set forth the following hypothetical: "Let's say you had an alleged victim testifying for hours or days and seemed somewhat coherent, and at some point, for example, a 911 recording of their original was played sort of out of the blue for them, and is it, um, could that trigger a sort of reaction hearing their original voice on the 911?" Lemon responded: "Yes, absolutely." When the court asked which type of reactions typically would be seen, Lemon stated that she was not a mental-health expert, but could testify based on her interviews with battered women who appeared to be suffering from PTSD. At this point, defense counsel objected on the basis that Lemon had not studied post-traumatic stress. The objection was sustained. Defense counsel did not move to strike Lemon's testimony.

E. Esther C.

Esther C. testified that she met defendant in 2004 and they began dating that year. One day, after they had been dating about a month, she went to his trailer and he said he wanted to give her a massage. She did not want one, but she eventually agreed. Her clothes were off for the massage and he tried to initiate sexual contact with her but she

said “no.” She was on her period at the time, but he removed her tampon. She wanted to replace it so she went to the bathroom. She tried to put her clothes on but he grabbed her and they began struggling. She told him to stop but he did not listen. He pinned her on the bed and forced her to have sex. This was not the first time he had engaged in forcible conduct with her. A week or two later, she called the police and made a report. She did not report the conduct earlier because she was “in denial about what happened.” The case did not go to trial. On cross-examination, she stated that due to her religious beliefs she had regretted having pre-marital sex with defendant.

F. Sylvia Martinez

Sylvia Martinez is a district attorney investigator. In January 2009, she interviewed M.S. and took some photographs of the rear bumper of M.S.’s car. On March 24, 2009, a process server told Martinez to call Hanson. Hanson told her that she was concerned because M.S. was supposed to meet with her to study at 2:00 p.m. but never showed up. Martinez spoke with M.S.’s mother who stated that her daughter was supposed to have picked her up at 9:00 a.m. to take her to the dentist but never came. Martinez called M.S.’s aunt and verified that M.S. was not at the aunt’s house. Later that day, she learned M.S. was at her parent’s house. When Martinez saw her, M.S. seemed very upset and appeared to have been crying. Two days later, she met with M.S. and observed she had visible bruising on her arms, ribs, knees, and legs.

Martinez obtained recordings of some phone calls defendant made from jail. One of the calls was played for the jury. In the call, the other party says that defendant had bought something that he should not have bought and he stated that the item was in a shed. Martinez went to defendant’s stepparents’ house, where they retrieved a knife that defendant had referred to in the call. The parties stipulated that some time after 8:00 p.m. on March 23, 2009, he purchased a knife, a backpack, binoculars, a CD by a musician named Pink, a bicycle, and a cell phone from Wal-Mart.

G. Officer Carl Tatem

Police officer Carl Tatem responded to a report of a collision on December 31, 2008. Defendant was present at the scene. His vehicle, which was facing the wrong direction, had collided with two parked cars on a one-way street. He also spoke with M.S. that day. He described her as “very hysterical.” He asked her if she wanted an emergency protective order, but she declined.

H. Adam Solar

Adam Solar is the general manager of the Motel 6 in Vallejo. There are four video surveillance cameras in the hotel lobby. On March 24, 2009, defendant and a woman checked in some time after 10:00 a.m. As defendant spoke with Solar, he noticed the woman was “acting kind of weird” and seemed to be worried. Defendant appeared to be trying to make light of the situation.

Defendant checked out around 4:00 p.m., appearing nervous and agitated. The woman was not with him. He said the police might be looking for him and asked Solar for a copy of the motel’s videotape. Defendant had a mark on the right side of his neck. Later that day, law enforcement officers arrived and took a copy of the surveillance tapes.

I. Vickie Whitson

Vickie Whitson is a registered nurse. At trial, she was qualified as an expert in the area of sexual assault exams. She examined defendant on March 24, 2009. She observed an abrasion on the right side of his forehead and a scratch on the right side of his neck.⁹ She also did a sexual assault exam of M.S. M.S. had bruises on her knees, which were her only injuries. The exam was conducted at 7 p.m. the night of March 24, 2009. She did not find any bruising along M.S.’s thighs, wrists, or face.

⁹ Defendant testified that he cut himself while shaving when he was in jail. He injured his head while he was seated in the backseat of the police car when he hit his forehead on the front seat in frustration.

II. The Defense's Case

A. Mario Cruz

Mario Cruz rented a room in his house to defendant from May 2007 to December 2008. Cruz met M.S. around the time when defendant moved in. Cruz would often witness the couple arguing. He would see them outside his house arguing in their car, and also would overhear them arguing on the telephone. Sometimes, he would see M.S. wait in her car outside the house for hours. She also would call the house phone asking if defendant was around. From the conversations that he heard, he had the impression that M.S. was the aggressor. Cruz did not allow her to come into the house because he felt that she had behaved rudely towards him.

B. Rodolfo Jackson

Rodolfo Jackson was defendant's roommate at Cruz's house. He testified that he observed M.S. at the house several times a week. She was there late at night and sometimes he saw her taking a shower. The couple had frequent arguments that appeared to be based on jealousy, and he heard M.S. using foul language. More than once a week, defendant would let Cruz overhear her yelling at him on his cell phone. About three times a week, Cruz would see her inside her car parked near the house. He would sometimes see she was still there after an hour or two had passed. He never saw defendant strike her. He never heard defendant say he was jealous of M.S. or that he did not trust her. He did observe defendant would get angry because he felt she was always bugging him.

C. Jeremiah Bennett

Jeremiah Bennett is a longtime friend of defendant. They also worked together for a time at Wal-Mart. When they were at work, he noticed defendant was frequently on his cell phone with M.S. Sometimes Bennett would be asked to get on the phone to answer M.S.'s questions.

Bennett testified that defendant is not an angry person, even though he had been in juvenile hall. One time he saw defendant hit another friend after that friend had badgered him for over three hours. Defendant was very apologetic afterwards. He never saw him

strike any of his girlfriends and never heard any of them complain that defendant had hit them. He did not think defendant was possessive or controlling with any of his girlfriends.

On cross-examination, the prosecutor asked Bennett if he knew that Tanya Medina had accused defendant of repeatedly beating her, and had told law enforcement that he had held a knife to her throat. She reportedly also claimed he had “threatened to kill her” and beat her up so bad “that her eye was swollen shut.” Bennett testified that he was aware that Medina had accused defendant of beating her because when defendant and Medina broke up she falsely accused Bennett and his girlfriend of having coached her into a sexual escapade. Bennett was not aware of the knife-holding accusation nor of the threat to kill. He never saw defendant strike Medina, nor did he see any injuries on her during the year that they were all friends. The prosecutor also asked Bennett if he was aware Medina had reported to the police that defendant had dragged her from a store and had pushed one of her friends out of the way, and that she had filed restraining orders against him in the State of Virginia. Over defense counsel’s foundational objection, Bennett stated he had heard a conversation about a restraining order but he did not know more about it.

D. Anthony Vassallo

Anthony Vassallo is defendant’s younger brother. Once every couple of months he would hang out with defendant and M.S. Occasionally the couple fought about things like text messages and phone calls. Anthony believed both M.S. and his brother were controlling towards each other and that the relationship was unhealthy. They were required to stay in constant contact so that the other person would know he or she was not with anyone else. Sometimes, Anthony would have to get on the phone to prove to M.S. that defendant was with him. One time he saw M.S. search defendant’s belongings and the history on his computer to see what web sites he had gone on. She would also go through his phone calls and text messages. If she saw a phone number that she did not recognize she would call it and ask who the person was. Sometimes when he and defendant were at their stepparents’ house, he would see M.S. driving around the block

waiting for defendant to come outside. When defendant was dating Medina, Anthony would occasionally see them argue. He never heard Medina accuse defendant of hitting her and never saw any abuse in that relationship.

E. Defendant Testifies

1. Medina and Esther C.

Defendant testified at trial. He stated that he dated M.S. for about one or two months in 2000. Later, he met Medina and they lived together for about two years. During this time, M.S. called him at his mother's house and he told her that he was already in a relationship. He and Medina would argue but there was no physical violence in the relationship. She never made any criminal allegations against him when they were living together in California. Just before he broke up with Medina, he received another call from M.S. She indicated that she wanted to start dating him but he told her he was still in a relationship.

Eventually Medina moved to Virginia. Defendant went there to see her because she had sold him a car but had signed the car over to someone else. He arrived during her lunch break at her job site. Someone attacked him from behind and slammed him against a counter. He ran out of the store and bumped into another person by accident. He was arrested and later admitted to a misdemeanor count of disturbing the peace. Some time later, Medina called him and asked if he wanted to come and see her. He told her not to call him again.

In 2002 or 2003, he met C. and they dated for about five months. She asked him to marry her after they began having sexual relations. He decided she was not the person he wanted to marry and broke off the relationship. There also was a religious conflict in that they were having sex before marriage. About three weeks after they broke up, he was arrested and held in custody for an hour or two but no charges were ever filed.

2. The relationship with M.S.

He heard from M.S. again in 2005, when she contacted him on MySpace. They began dating within a week. At that time he was living with his mother in Patterson. He did not have a car so she would drive three hours from Vallejo every week to see him.

He moved to Vallejo in June 2005. In the winter of 2005, defendant told M.S. that he wanted to meet her parents and they arranged to meet at a restaurant. There was an argument between him and her parents and they did not finish their meal. He didn't see her parents again until some time in 2006.

After defendant moved to Vallejo, he and M.S. were in constant communication. He paid for their cell phones. They also communicated over the Internet. She required him to stay in constant contact because she was very jealous and frequently accused him of seeing other women. He was not allowed to contact other women. She always had a key to his residence and would come by frequently. Sometimes she would take his phone from him and go through his contacts. She also would log onto his computer and go through his e-mail messages. Sometimes she would delete them. Every time before they had sex, she would make him remove his clothes and would examine his entire body, including smelling his penis to see if it smelled like another girl.

After he told M.S.'s parents that she was pregnant, the two of them moved from a studio apartment to her parents' house. He moved out of the home two days after the miscarriage after U.S. threatened him during a physical argument. The night before, U.S. had threatened to kill him and the entire family if he and M.S. continued dating. During the argument, defendant used a tape recorder to record U.S. making the same threat again. After that, the relationship with M.S. continued in secret. He communicated with her by cell phone and on MySpace while she was in the Philippines. When she was at home, he sometimes would throw pebbles at her window so that her parents would not hear the cell phone. She would come outside and they would go to his car to talk. He owned a 1992 Honda Prelude with a very small interior. The car looked like a sports car and had a stick shift and an emergency brake in between the two front seats.

3. The January 2007 Incident

Defendant denied raping M.S. in January 2007, stating that he did not see her at all during that month. He did not see her until February 6, 2007. Subsequently, the relationship resumed and he moved to several different houses, sometimes staying with his stepparents. Each time he moved to a new place, M.S. would come with him to

inspect his room and get a key to the house. At one point he had to move out of a house after M.S. got into a fight with one of his female roommates. On another occasion, she refused to give the landlord the key to the house and accused defendant of cheating with the landlord's sister. When he was at work, she would come to his job site about once a week and she would call every day.

4. The December 2008 Incident

Defendant testified that in December 2008 the relationship was not on good terms. On December 30, 2008, he went home after work and answered her phone call. She had been calling him non-stop. They then logged on to an on-line computer game that allowed them to exchange written messages, like a chat room. After a short time, he hung up the phone because she was yelling at him. She kept calling his phone and she sent a text message that scared him. At around 1:00 a.m., M.S. came to the house while he was in the kitchen talking to a girl on the phone. M.S. knocked on the window and he told the other girl he had to hang up. He then ran to the bathroom to delete the girl's number from his telephone. When he came out of the bathroom, M.S. was not there. He went back to his bedroom and saw the screen was missing from his window and M.S. was peering into Cruz's bedroom. She ran down and climbed into defendant's room through the window. She was very upset.

During the time she was in his room, she grabbed his phone and saw that he had deleted a call. She threw the phone down and grabbed his box cutter off of the desk and waved it at him, threatening to cut him if she ever caught him cheating. He took the box cutter away from her and after awhile they talked about the relationship. They had consensual sex. At some point his phone rang and she tried to take it from him. She was crying and told him that she was pregnant. They left the house so that he could walk her to her car. Then he went to his car to escort her home. It was about 2:40 a.m. and the weather was foggy. They were speaking on their cell phones. She pulled her car to the corner and he began following her.

M.S. told defendant they were going to go to her grandmother's place at the Strawberry Apartment complex so that she could retrieve a used pregnancy test to show

him that she was definitely pregnant. They ended up at a different apartment complex and defendant told her he was going home because he didn't want to wait for her there. She followed him and said they should go to the Wal-Mart to get a pregnancy test so that she could show him right there. She turned ahead of him and got on the freeway headed towards Fairfield. She missed the turn off to the Wal-Mart. They got off at the next exit and turned around. During this time, they were arguing about the girl that he had been talking to earlier. At some point, he became concerned because it was very foggy and asked her to pull over so that he could get in the car and drive her home. She did not stop.

Eventually they got off the highway and were driving in the area where her parents' house was. Defendant denied ever hitting her car. Instead of pulling over so that they could drive in the same car, she stopped in the middle of the street. He got out of his car and he went over and knocked on her window. She told him to call her on the phone and started driving. He walked back to his car and started following her. At this point, they were arguing on the phone. She went the wrong way down a one-way street and he yelled at her to pull over. He was concerned because she was pregnant. Eventually, he threatened to spend New Year's Eve with the other girl if she did not stop. She slammed on her brakes and he swerved to avoid hitting her, instead hitting two parked cars. She drove off. He called his insurance company and asked the neighbors to call the police. The police came and arrested him.

5. The March 2009 Incident

At the preliminary hearing in this case, defendant learned for the first time that he was being accused of rape. He was released on bail on March 22, 2009. He bought some items at Wal-Mart, including a bicycle, two pre-paid cell phones, binoculars, a knife, and a music CD. He bought the cell phones so that he could give one to M.S. and they could talk without meeting in person. He knew there was a restraining order in place. He bought the binoculars so that he could spot her car from a distance and leave the phone and the CD next to the car. After spending a night in the shed behind his stepparents' house, he rode the bicycle to the house where he believed M.S. was staying. He took the

backpack, the binoculars, the cell phones, and the CD. He did not take the knife, which he had intended to give to his stepfather.

He drove his bicycle to the house in the morning and saw her car arrive about ten minutes later. There were a lot of people around because a school is nearby and it was a school day. Instead of just leaving the cell phone and the CD by her car, he decided to speak with her. They talked for about 10 or 15 minutes and then they went to her car. She did not scream and he did not carry her away from the house. He tried to put the bicycle in the back seat of her car but it did not fit so they drove about a hundred yards and he placed the bike behind a bush. After that, they drove down another street and parked. He told her that he had not been cheating on her and that he was scared of the accusations that were being made against him. He then realized he had left his backpack in front of her house and they drove back to get it.

Eventually they went to the Motel 6. While they were in their room they talked about the relationship and he told her about his experience in jail. M.S. said that she loved him. He called his mother and asked M.S. to talk to her. At that point, she remembered that she had to take her mother to an appointment. He wanted her to go but she wanted to stay and have sex. Afterwards, they got dressed and M.S. looked through the contacts on his cell phone and found a girl's phone number. At that point, she became angry.

They left the motel and drove back to M.S.'s house. When defendant went to get his bicycle he saw it was gone. He got back in the car so she could take him to his house. She told him to put his seat back in case her parents saw her. She saw her father and defendant got out of the car. She spoke to her father, who then left. Defendant went to her and asked her if her father had seen him. She nodded and seemed scared. He ran back to the hotel and asked someone there to hold the security tape for him. He went home and later was arrested. He was taken to the hospital and then to the police station.

On cross-examination, defendant admitted he had yelled at M.S. He also had ordered her around, insulted her, and had given her ultimatums. He also took an anger management class in 2007 to show her that he was sorry for comments he had made to

her father. He sent her messages on MySpace asking for forgiveness for things like associating with other girls and yelling at her.

Defendant was upset with U.S. because he felt U.S. had contributed to the miscarriage by forcing M.S. to scrub the kitchen floor with bleach when she was supposed to be on bed rest, and by making her eat fish that contained mercury. He denied that he failed to pay rent to U.S. when he was living in the house. He denied ever forcing M.S. to have sex and said he never held a knife on her. He believed she had fabricated her testimony.

Defendant admitted he was convicted of assault and disturbing the peace after the incident that occurred with Medina in Virginia. When he went to see Medina she had a restraining order against him. He claimed she agreed to see him, and that he checked in with a police officer before he went to meet her. The person who pushed him against the counter when he went in the store was Medina's boyfriend and the person whom he bumped into on the way out was her roommate Candace Johnson. He denied dragging Medina out of the store.

F. Dawn Traylor

Dawn Traylor is married to defendant's stepfather. When defendant was living at her house in 2006, M.S. would come over once or twice a month. Traylor would also overhear their phone conversations. Often, M.S. accused defendant of cheating on her and lying. Traylor would sometimes have to get on the telephone to verify that defendant was with her, even to the extent of having him take a photo of her with his cell phone, which he would then send to M.S. M.S. would call the house phone or Traylor's cell phone to try to contact defendant. If they didn't answer, M.S. would sometimes drive by the house looking for him.

When defendant was released from jail in March 2009, Traylor and her husband picked him up and drove him to their house. After he was arrested again and was in jail, she had a phone conversation with him where they discussed the knife that he had purchased at Wal-Mart. She learned of the knife when she found a receipt from Wal-Mart in the bedroom where he was staying.

III. Verdicts

On February 3, 2010, the jury found defendant guilty of one count of rape on December 31, 2008 (count one), assault with a deadly weapon by means likely to produce great bodily injury on December 31, 2008 (count three), making criminal threats on December 31, 2008 (count five), kidnapping on March 24, 2009 (count seven), dissuading a witness on March 24, 2009 (count eight), and one count of rape on March 24, 2009 (count nine). The jury also found true the out-on-bail enhancement, and the misdemeanor count of disobeying a domestic relations court order (count ten). The jury was unable to reach verdicts on count two (one of two charged December 2008 rapes), count four (false imprisonment on December 31, 2008), and count six (the January 2007 rape), as well as on the kidnapping enhancement. The trial court declared a mistrial as to those counts and struck the enhancement. This appeal followed.¹⁰

DISCUSSION

I. Evidence of Bad Acts as to U.S.

In his appeal, defendant claims the trial court abused its discretion in overruling his objections to evidence of bad acts committed against U.S. As noted above, U.S. claimed defendant broke into a house while the family was in the process of moving. Defense counsel objected to this testimony on relevance grounds. The prosecutor argued that the evidence was relevant to show defendant was “the one that’s doing the harassing of [the] family.” The trial court opined that the evidence was “thinly relevant,” and overruled the objection. U.S. also testified that defendant had tailed him one time when he was driving to a doctor appointment. The prosecutor asked him how he felt when he was being followed. Overruling a relevance objection, the witness indicated he felt “scared.” When asked if this was a reason for seeking the restraining order, the trial court overruled a leading objection and U.S. responded in the affirmative.

¹⁰ Defendant has also filed a petition for habeas corpus. We exercise our discretion to take judicial notice of the habeas pleadings and address the arguments contained therein in the context of the appeal, as we agree with the People that the arguments can be resolved within the four corners of the appellate record.

Defendant claims this evidence was inadmissible under Evidence Code section 1101, subdivision (a), which provides that, subject to certain exceptions not applicable here, evidence of a person's character or a trait of his character, including specific incidents of his conduct, is inadmissible to prove his conduct on a specified occasion. He contends the evidence was not introduced to show that he was harassing the family. Rather, he claims the evidence was offered to prove that defendant had, in fact, committed the charged offenses.

We note defendant did not file a motion in limine as to evidence of the two incidents he now challenges on appeal. Nor did he make an objection at trial based on Evidence Code section 1101, subdivision (a). Instead, the objections at trial were that the prosecutor's questions were leading and that the testimony lacked relevance or elicited hearsay. Accordingly, defendant's present argument is waived on appeal. (*People v. Kennedy* (2005) 36 Cal.4th 595, 612, disapproved of on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

In any event, the evidence of defendant's conduct towards U.S. was not introduced to show that he was predisposed to engage in criminal activity, but instead to explain why U.S. would want to get a restraining order against him. Hence, the analysis is properly considered under Evidence Code section 352. Under section 352, a trial court may "exclude otherwise relevant evidence when its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time." (*People v. Riggs* (2008) 44 Cal.4th 248, 290.) " 'Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." ' ' " (*Ibid.*) We conclude no such intolerable risk was present here. The jury had defendant's testimony that the two incidents did not happen, and U.S.'s view that they did. We find no abuse of discretion.

II. Brenda Hanson's Testimony Regarding Defendant's Abuse of M.S.

Defendant next claims the trial court erred in overruling his objection to Hanson's hearsay testimony about what M.S. had told her regarding defendant's allegedly abusive behavior. Hanson initially testified at a hearing held pursuant to Evidence Code section

402. At that hearing, she stated M.S. had disclosed defendant was abusing her. Defendant objected to this testimony on hearsay grounds. The prosecutor asserted the testimony was not being offered for the truth that the abuse actually happened. Instead, the testimony was being offered to show that M.S. had confided in someone about the abuse. The court overruled the objection and held the testimony was admissible because it corroborated M.S.'s testimony.

On appeal, defendant renews his claim that Hanson's testimony about what M.S. told her was hearsay. He also asserts there is no exception for hearsay testimony that "corroborates" a victim's testimony. The People claim this testimony was not offered for the truth and that it was relevant to counter defendant's attack on M.S.'s credibility by showing she did not simply fabricate the charges upon defendant's arrest, but had told someone else of the abuse at an earlier time. While we agree the testimony was erroneously admitted, we do not find the error prejudicial.

Under the hearsay rule, subject to several exceptions, "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated" is generally inadmissible. (Evid. Code, § 1200, subd. (a).) On appeal, "an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question" (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

We agree with defendant that Hanson's testimony was introduced for its truth, namely, that defendant was abusing M.S. We are not persuaded by the People's assertion that the testimony was offered merely to show M.S. reported the abuse to another person. Further, we note that when this testimony was elicited no limiting instruction was given to the jury with respect to how it should treat the hearsay. When evidence is admissible for one purpose but inadmissible for another purpose, the court should instruct the jury as to the limited purpose for which it may consider the evidence. (Evid. Code, § 355.) Hanson's testimony that the entire class knew about the abuse further compounds the

error. While Hanson might be able to testify as to what she had observed, her testimony about what others in the class knew was speculative and therefore inadmissible.

The exclusion of this evidence, however, would not have led to a result more favorable to defendant. “[T]he applicable standard of prejudice is that for state law error, as set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 (error harmless if it does not appear reasonably probable verdict was affected).” (*People v. Cudjo* (1993) 6 Cal.4th 585, 611; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1152 [applying *Watson* harmless-error analysis to allegedly erroneous admission of prior crimes evidence].) We note that during the cross-examination of Hanson, defense counsel went into significant detail regarding an incident in which M.S. had reportedly called her some time prior to December 2008, complaining that defendant had tied her to a chair all day and held her hostage. According to Hanson, M.S. also said he had hit her in the head and was tailing her at that moment. Significantly, M.S. never testified that this incident occurred. The cross-examination thus went beyond what the prosecutor had wanted to cover and effectively cast doubt on M.S.’s credibility. It is also significant that the prosecutor subsequently declined to elicit any re-direct testimony from Hanson. We further note that during closing arguments, the prosecutor did not refer to Hanson’s statement that the entire class knew M.S. was being abused. We conclude the error was not prejudicial.

III. Alleged Judicial Misconduct

Defendant asserts he was denied his rights to due process and a fair trial because some of the trial court’s actions and rulings suggested the judge had a pro-prosecution bias. Specifically, defendant claims the court improperly sustained hearsay objections to testimony offered to show M.S.’s bias and motivation to lie, improperly overruled objections made by the defense, made disparaging and sarcastic comments to defense counsel, improperly handled M.S.’s reaction to the playing of the 911 tape, improperly questioned Lemon regarding PTSD, and dismissed jurors’ concerns regarding the court interpreter’s rendition of U.S.’s testimony. The People observe defense counsel never raised the issue of judicial bias and assert the claim is waived, citing to *People v. Snow* (2003) 30 Cal.4th 43, 78. Defendant asserts that he did raise concerns about the court’s

neutrality and that an objection would not have been effective as his claim of bias is not based on a single event and is apparent only when the record is considered as a whole. Assuming the claim is not waived, we conclude that while certain incidents do suggest some judicial bias, the conduct was not so pervasive as to deprive defendant of his right to a fair trial.

As to the complaint about the trial court's rulings sustaining the prosecutor's hearsay objections, defendant himself observes much of the material that was excluded by the court's rulings came into evidence anyway. Therefore, regardless of whether the court was biased in making its rulings, he suffered no prejudice thereby. Defendant also contends the court's rulings conveyed to the jury that it did not credit his defense and that it was biased towards the prosecution. However, the rulings were not pervasive and therefore do not, standing alone, support a claim of judicial bias. Regarding the charge that the court improperly overruled evidentiary objections made by defense counsel, much of this argument repeats arguments we have already addressed concerning Hanson's alleged hearsay testimony and U.S.'s testimony regarding defendant's prior conduct. Other instances noted in defendant's brief appear to be isolated and, in our view, do not evidence a pro-prosecution bias.

We also do not share defendant's concerns regarding the court interpreters' apparent difficulties with U.S.'s testimony. Defendant does not give any indication as to the manner in which testimony was allegedly misinterpreted, nor does he explain how the allegedly improper interpretation affected the trial. While he faults the court for failing to hold a hearing to determine whether the interpreters were accurate, he never requested such a hearing and hence his claim is forfeited. (*People v. Romero* (2008) 44 Cal.4th 386, 411.)

Defendant also points to an exchange that occurred during his cross-examination. The prosecutor asked him about the knife he testified he had purchased as a gift for his stepfather. The prosecutor offered to re-play the tape of the jail call between defendant and his stepmother in which the knife was discussed. Defendant noted that the tape had already been played for the jury. The prosecutor then asked, "Could I play it for you?"

At that point, defense counsel asked what the purpose of this would be, and whether it was for impeachment. The trial court responded, “Definitely impeachment; you can play it. Do you want me to spell it out for you?” This unfortunate remark does appear to be somewhat sarcastic and inappropriate. However, as defendant himself notes, the reason for his purchase of the knife was not particularly relevant to the charged offenses as it was undisputed that he did not possess a knife while he was with M.S. on March 24, 2009. Accordingly, the remark does not, standing alone, appear to have prejudiced defendant.

While we do not see any problems with the way in which the trial court dealt with M.S.’s reaction to the playing of the 911 tape, we are troubled by the court’s subsequent questioning of Lemon concerning PTSD. As noted ante, outside the presence of the jury and just prior to Lemon’s testimony, the court indicated its belief that M.S. had just experienced a post-traumatic reaction to the hearing of the 911 call. The court also stated it would not mention this belief to the jury as it would not be relevant. When questioning Lemon, however, the court asked her a hypothetical question that restated exactly what had just occurred during M.S.’s testimony and asked if the extreme reaction could have been caused by PTSD. We agree with defendant that this questioning suggested to the jury that the court found M.S. to be credible, and that it believed she had experienced a genuine post-traumatic reaction caused by the alleged severe domestic abuse to which she had been subjected by defendant. Defendant had strenuously disputed M.S.’s version of the events she testified to, and her lack of credibility was his central defense at trial.

Although the trial court’s single disparaging remark to defense counsel and its questions to Lemon regarding PTSD were unfortunate, these relatively isolated incidents are insufficient to establish misconduct. “ “[O]ur role . . . is not to determine whether the trial judge’s conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge’s behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect,

trial.” ’ ’ (*People v. McWhorter* (2009) 47 Cal.4th 318, 373.) Here, the conduct was not so severe as to have denied defendant a fair trial.¹¹

IV. Errors Relating to Medina

Defendant raises three claims of error centered on testimony regarding Medina. He claims the prosecutor improperly questioned Bennett about defendant’s alleged prior domestic violence and asserts that the admission of this evidence violated his right to confront and cross-examine witnesses. He further asserts that he was denied effective assistance of counsel based on his counsel’s failure to object to M.S.’s testimony about statements defendant made to her concerning Medina.

On July 16, 2009, the People filed a pre-trial “Motion to Admit Evidence of Prior Sexual Offense & Prior Acts of Domestic Violence,” in which the People sought to admit evidence, pursuant to Evidence Code sections 1108 and 1109, of alleged prior uncharged acts committed by defendant against former girlfriends C. and Medina. As to Medina, the People sought to admit several acts of domestic violence allegedly committed by defendant from 2001 to 2003. At trial, C. testified but Medina did not.

A hearing on the motion was held on August 31, 2009. At that time, the prosecutor advised that his office had been in contact with Medina and that she was in fear for her safety and did not want to testify. He indicated that unless she had a change of heart, the district attorney’s office was not going to seek court orders regarding her non-appearance. The trial court noted that the Medina incidents might have qualified as evidence of modus operandi under Evidence Code section 1101, subdivision (b), but that the issue was “purely academic.” The prosecutor agreed, stating that “without her being here, I don’t really have the necessary means to establish that” Defense counsel requested that the court nonetheless rule on the motion so that he would know whether he needed to prepare for Medina’s potential testimony. The court held that based on its review of the facts as alleged, evidence of prior domestic violence as to Medina would be admissible under Evidence Code section 1109.

¹¹ We note the jury did not find defendant guilty of two of the charged rapes. This suggests that the jury carefully considered M.S.’s veracity.

A. Cross-examination of Bennett

During trial, references to incidents of defendant's alleged violence towards Medina were made in the prosecutor's cross-examination of Bennett, as detailed above. The incidents were covered in even greater detail during the prosecutor's cross-examination of defendant.

As a general rule, evidence of a defendant's prior bad acts is considered highly prejudicial and is inadmissible because of the danger the jury will convict merely because of the defendant's propensity to commit crimes regardless of whether his or her guilt is proven beyond a reasonable doubt. (*People v. Alcala* (1984) 36 Cal.3d 604, 630-631; Evid. Code, § 1101.) An exception to this rule arises when a defense witness, other than the defendant, testifies to the defendant's good character traits. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1173 (*Ramos*)). In such a case, the prosecutor may ask the witness if he or she has heard of acts by the defendant inconsistent with those character traits, as long as the prosecutor has a good faith belief that the acts actually took place. (*Ibid.*) The rationale for permitting this cross-examination is that it tests the validity of the witness's good character testimony. (*People v. Hempstead* (1983) 148 Cal.App.3d 949, 954 (*Hempstead*)).

The rule allowing cross-examination of good character witnesses regarding bad acts does not make actual evidence of the bad acts (independent of the character witness's opinion or reputation testimony) admissible. (*People v. Felix* (1999) 70 Cal.App.4th 426, 431-432.) Thus, the prosecutor may only ask the cross-examination questions in the "have you heard" form; the prosecutor may not ask the witness if they know about the bad acts. (*People v. Marsh* (1962) 58 Cal.2d 732, 745-746.) Again, the latter form of the question is precluded because of the danger it will be used "to introduce evidence of specific wrongful acts by inquiries as to knowledge of such acts" (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 248, p. 319.) Similarly, the prosecutor's examination is confined to the answers given by the witness; it is misconduct for the prosecutor to attempt to elicit more details about the bad acts by further questioning or to offer into evidence independent proof of the bad conduct. (*People v. Neal* (1948) 85

Cal.App.2d 765, 770 (*Neal*); 3 Witkin, Cal. Evidence, *supra*, Presentation at Trial, § 248, p. 320.) Underlying these restrictions on the scope of the cross-examination is the principle that the prosecutor may not use this avenue of character witness impeachment to present evidence of the defendant's prior bad acts as established fact. (*Neal, supra*, 85 Cal.App.2d at p. 770.) In the present case, while it appears there was some factual basis for the prosecutor's questions, it was also clear that without Medina's presence the allegations could not be established.

While defendant does not identify his claim as one for prosecutorial misconduct, it appears this is the basis of his complaint. The Supreme Court has summarized the standards under which we evaluate prosecutorial misconduct: "A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law *only if it involves the use of deceptive or reprehensible methods* to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44, italics added.)

The defendant may not complain on appeal of the prosecutor's misconduct unless he timely objected at trial "and also requested that the jury be admonished to disregard the perceived impropriety." (*People v. Thornton* (2007) 41 Cal.4th 391, 454.) If the defendant objected, or if an objection would not have cured the harm, we ask whether the improper conduct was prejudicial, that is, whether it is reasonably probable a result more favorable to the defendant would have occurred if the prosecutor had refrained from the misconduct. (*People v. Haskett* (1982) 30 Cal.3d 841, 866.) Here, defense counsel did not object, and he did not request a relevant jury instruction.

In any event, to warrant reversal the challenged conduct must be prejudicial. "What is crucial to a claim of prosecutorial misconduct is . . . the potential injury to the defendant." (*People v. Benson* (1990) 52 Cal.3d 754, 793.) When the claim "focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks

in an objectionable fashion.” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841 (*Samayoa*); see also, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 960.) To answer that question, we examine the prosecutor’s statement in the context of the whole record, including arguments and instructions. (*People v. Hill* (1998) 17 Cal.4th 800, 832 (*Hill*); *People v. Morales* (2001) 25 Cal.4th 34, 44.) “In conducting this inquiry, we ‘do not lightly infer’ that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements.” (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved of on other grounds as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 420–421; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 647.)

While the prosecutor questioned Bennett rather extensively regarding Medina’s allegations, the jury was informed that the prosecutor’s statements could not be used as evidence. The jury was not instructed as to how to consider cross-examination of a character witness (see CALCRIM No. 351).¹² However, it was instructed that the questions asked by the attorneys are not evidence. We will assume the jury followed this instruction. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1234.) Further, in his closing argument, the prosecutor told the jury that the references to Medina were not evidence and that they should not consider them as evidence in making their decision: “The evidence about Tanya Medina, that is not evidence. I didn’t—Tanya Medina was not here to testify. There could be a variety of reasons why; you shouldn’t speculate as to why, but that’s not evidence for you to consider to prove whether or not in fact he’s guilty of these crimes. That evidence was brought up for other, more limited purpose-type things. For example, when his good friend comes in here and says, ‘Oh, he’s not a violent guy at all.’ Really? Were you aware of all these other accusations, about the fact that—and does that change your opinion based on the fact that three women are accusing him of these things? And that’s why you got to hear that information, but you should not, and [defense counsel] is correct, that is not, because I didn’t prove to you that that

¹² The court has no sua sponte duty to give an instruction on cross-examination of character witnesses; however it must be given on request. (*Hempstead, supra*, 148 Cal.App.3d 949 at p. 954; *People v. White* (1958) 50 Cal.2d 428, 430–431.) The record shows defendant did not request such an instruction.

happened to Tanya Medina, you should not consider for that purpose of guilt here.” We thus conclude that even if misconduct was committed, there is no likelihood of prejudice as the jury was properly informed as to how to consider the information regarding Medina.

B. Right to Confrontation

Defendant claims the prosecutor’s cross-examination of Bennett as to Medina’s accusations violated his Sixth Amendment right to confront and cross-examine witnesses.¹³ He acknowledges he never objected on this ground below. Further, he notes there is no definitive law holding that impeachment of a character witness with a defendant’s alleged acts of prior misconduct constitutes a violation of the defendant’s right to confrontation.

As defendant did not raise the confrontation objection at trial, and it is forfeited. A prosecutor’s reference to extrajudicial statements not admitted at trial may constitute a denial of the defendant’s Sixth Amendment right to confront witnesses requiring reversal (*People v. Harris* (1989) 47 Cal.3d 1047, 1083), but the claim must be preserved. To preserve a claim of prosecutorial misconduct for appeal, the defendant must timely, and on the same ground, make an assignment of misconduct and request that the jury be admonished to disregard the impropriety. (*Samayoa, supra*, 15 Cal.4th 795 at p. 841.) Defendant’s confrontation clause claim is forfeited because he raises it for the first time on appeal. Even assuming the claim is not forfeited, we find it lacks merit.

The confrontation clause is limited to testimonial statements; for testimonial evidence to be admissible, the witness must be unavailable and there must have been a prior opportunity for cross-examination. (*Michigan v. Bryant* (2011) __ U.S. __, 131 S.Ct. 1143, 1153.) Without providing an exhaustive classification of all conceivable statements, in *Davis v. Washington* (2006) 547 U.S. 813, the Court offered some guidance for determining when statements are testimonial: “Statements are nontestimonial when made in the course of police interrogation under circumstances

¹³ The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” (U.S. Const., 6th Amend.)

objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” (*Id.* at p. 822.)

In the present case, the prosecution did not introduce any direct evidence, testimonial or otherwise, of Medina’s accusations against defendant. Thus, the cross-examination of Bennett did not *elicit* testimonial hearsay. Instead the references to Medina were contained only within the prosecutor’s questions. “[*Crawford v. Washington* (2004) 541 U.S. 36] itself states that the confrontation clause ‘does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.’ [Citation.]” (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.) Here, the prosecutor informed the jury that Medina’s accusations were not to be used for their truth. We conclude defendant’s right to confrontation was not implicated under these circumstances.

C. Ineffective Assistance of Counsel

Defendant also claims that his counsel was ineffective in failing to object to M.S.’s testimony about statements he made to her concerning Medina. A criminal defendant is constitutionally entitled to effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 684–685 (*Strickland*)). To show denial of that right, a defendant must show (1) his or her counsel’s performance was below an objective standard of reasonableness under prevailing professional norms and (2) the deficient performance prejudiced the defendant. (*Strickland*, at pp. 687, 691–692; *People v. Ledesma* (1987) 43 Cal.3d 171, 216–217.) To show prejudice, a defendant must show there is a reasonable probability that he or she would have received a more favorable result had his or her counsel’s performance not been deficient. (*Strickland*, at p. 694; *Ledesma*, at pp. 217–218.) “When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the [trial counsel’s] errors, the factfinder would have had a reasonable doubt

respecting guilt.” (*Strickland*, at p. 695.) “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*People v. Williams* (1997) 16 Cal.4th 153, 215.) It is the defendant’s burden on appeal (or in a petition for writ of habeas corpus) to show that he or she was denied effective assistance of counsel and is entitled to relief. (*Ledesma*, at p. 218.) “[T]he burden of proof that the defendant must meet in order to establish his [or her] entitlement to relief on an ineffective-assistance claim is preponderance of the evidence.” (*Ibid.*)

It is not necessary for us to examine the performance prong of the test before examining whether the defendant suffered prejudice as a result of counsel’s alleged deficiencies. (*Strickland, supra*, 466 U.S. at p. 697.) “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed.” (*Ibid.*) Here, we conclude it is not reasonably probable that the jury would have reached a different result had defendant’s counsel objected to M.S.’s statements about Medina. As he himself acknowledges, the testimony as to what he had said regarding Medina was brief, and did not include any specific information regarding his alleged acts against Medina.¹⁴ Because he cannot show prejudice, the ineffective assistance claim fails.

V. Cumulative Effect of Errors at Trial

Defendant contends the cumulative effect of the errors in his trial requires that we reverse the judgment. “[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.” (*Hill, supra*, 17 Cal.4th at p. 844.) While we have concluded the trial was not error-free, in light of our findings above, we find no such prejudicial impact in this case.

¹⁴ Medina was mentioned briefly during M.S.’s testimony. During the prosecutor’s direct examination, he asked, “Did the defendant, as these years going through your relationship, did he ever tell you what would happen to you if you called the police?” She answered, “He said he’ll kill me because, um, his ex-girlfriend, Tanya Medina, put him in jail before. I don’t know anything about his girlfriend that —.” The prosecutor continued, “Okay. He said he would kill you, and that he —” She answered, “Because he didn’t want to end up going in jail: ‘If you call the cops on me, I’m going to kill you because I’m going to end up in jail anyway.’” A few other references to Medina were made during defendant’s cross-examination of M.S.

DISPOSITION

The judgment is affirmed.¹⁵

Dondero, J.

We concur:

Marchiano, P. J.

Margulies, J.

¹⁵ By separate order filed this date, we deny defendant's habeas corpus petition.