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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN CHARLES HALVERSON,

Defendant and Appellant.

A131694

(Sonoma County
Super. Ct. No. SCR 573803)

Defendant John Charles Halverson, who had battered his girlfriend, Jane Doe, on some 50 to 60 occasions during their three- or four-year cohabitation, was convicted of injuring a cohabitant with great bodily injury (Pen. Code, §§ 273.5, 12202.7, subd. (e)) based on one particularly severe beating that occurred on November 21, 2009. He contends on appeal that Doe was incompetent to testify due to a brain injury she had received in a car accident in 1994 and that allowing her to testify deprived him of his constitutional right of confrontation. He further claims his attorney provided ineffective assistance of counsel when she failed to object to statements made by Doe to the effect that the attack had occurred on a date several months after the date specified in the charging instrument. Finally, he argues the court abused its discretion in allowing evidence of one prior uncharged incident of domestic violence against Doe. We affirm.

FACTS

On November 21, 2009, the police and an ambulance responded to a 911 call and found Doe with an “extremely swollen” and bruised right eye, bruised arms, and body bruises. The ambulance took Doe to Santa Rosa Memorial Hospital, where she was

found to have five broken ribs. Photographs of her facial injuries, including a clearly blackened eye, were taken at the hospital and admitted in evidence. Doe's medical records referencing the five fractured ribs were also in evidence.

After responding to the 911 call, Santa Rosa Police Officer Chris Bradley returned to the mobile home Doe shared with defendant. He knocked on the door, and defendant came out. Bradley identified himself as a police officer but did not say why he had come. Defendant said, "Oh, man. Not again. You believed her? She fell down. That's how she got hurt." Defendant had a small scratch on the bridge of his nose; other than that, he appeared to be uninjured.

At defendant's trial in May 2010, Doe's mother, Lucille F., testified about going to see Doe the day after she was released from Santa Rosa Memorial Hospital. She saw injuries to Doe's mouth and teeth and bruises on her face and body. Lucille believed this happened in 2009 but could not remember the month.

Lucille also testified about another instance in 2008 when Doe called and asked Lucille to come pick her up. Lucille went to Doe's trailer park and picked her up. Doe had her packed suitcases with her. Lucille observed that Doe had a swollen jaw.

Lucille also testified that Doe had been in a car accident in 1994 in which she had sustained a head injury that had left her with "some forgetfulness." Doe herself also testified about the effects of the car accident—a head-on collision with a propane truck—on her memory.

Doe also testified that around Easter of 2009 she was taken to a medical clinic after defendant hit her with an open hand two to six times. He also shoved her onto the kitchen floor and threw her off the porch onto the ground. He then told her to leave and never come back. She called her mother to come pick her up. Lucille took Doe to the Russian River Clinic; she was then referred to the police, who photographed her injuries. Although Doe testified this attack occurred near Easter in 2009, the prosecutor and defense counsel were both aware that it actually occurred on December 14, 2008.

Doe also testified about injuries she had received when she ended up in Santa Rosa Memorial Hospital after "an all-night session of violence and . . . accusations for

about 14 hours” at defendant’s hands. Defendant accused her of taking his drugs. After throwing her across the bed and onto the floor, he kicked her in the ribs with his steel-toe boots. In addition to slapping her face, he also slapped her back and shoulders. She pleaded with him to just kill her; he said, “I wouldn’t be so kind to you.”

After that assault Doe could not breathe for nearly two minutes. She did not have a phone, so she walked to a liquor store to call an ambulance. She was “[d]oubled over” with pain and “could barely walk.” She responded to police questioning both before the ambulance took her to the hospital and afterwards. At the hospital her injuries were photographed. She testified that she remained hospitalized for four days, and hospital records show she was there three days beginning November 21, 2009.¹

Doe estimated this attack occurred “a couple months” before trial, which would place it in approximately February or March 2010.² However, based on the hospital’s records, as well as other testimony and exhibits, it is clear the assault actually occurred on November 21, 2009. Doe testified that the eye injury shown in Exhibit Nos. 2, 4, and 5 had been sustained when defendant slapped her with his open hand on that occasion; those photographs were taken on November 21, 2009. And November 21, 2009, was the date on which defendant gave police his unconvincing explanation that Doe hurt herself by falling down.

Defendant attempted to rely upon a theory of self-defense by insinuation. As part of that theory, defense counsel attempted to portray Doe as a violent woman, who had twice physically attacked her ex-husband in 2004. At trial Doe could not remember any such event.

By the time of closing argument, defense counsel had abandoned the self-defense angle and simply attacked Doe’s credibility due to her memory impairment, her admitted use of methamphetamines, and her prior felony drug conviction.

¹ At the preliminary examination she testified she was in the hospital three days.

² At the preliminary examination held December 9, 2009, Doe testified the attack occurred on November 21, 2009.

The jury deliberated for one hour and 19 minutes before reaching a guilty verdict on the domestic violence charge (Pen. Code, § 273.5) and finding the great bodily injury enhancement true.³

DISCUSSION

I. Doe's competence to testify

Defendant contends Doe was incompetent to testify. Defendant raised that issue at trial and a section 402⁴ hearing was conducted, after which the court found Doe was “competent, and she’s not disqualified under [section] 701.” Considering both the section 402 testimony and the preliminary hearing transcript, the court noted Doe “can’t recall names and dates, but it appeared she . . . could recall incidents”

Under section 700 all witnesses are presumed competent. Section 701, subdivision (a) creates an exception if the witness is “(1) [i]ncapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him” or “(2) [i]ncapable of understanding the duty of a witness to tell the truth.” A party challenging a witness’s competence has the burden of proof by a preponderance of the evidence, and the trial court’s determination will be upheld in the absence of a clear abuse of discretion. (*People v. Lewis* (2001) 26 Cal.4th 334, 360; *People v. Anderson* (2001) 25 Cal.4th 543, 573 (*Anderson*).)

In addition, section 702 precludes even a competent witness’s testimony “concerning a particular matter” if he or she lacks “personal knowledge” of the subject matter. “Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.” (Evid. Code, § 702, subd. (a).) “[T]he capacity to perceive and recollect particular facts is subsumed within the issue of personal knowledge.” (*Anderson, supra*, 25 Cal.4th at p. 573.) “The testimony must be

³ Defendant was originally charged with also violating section 136.1, dissuading a witness, based on Doe’s report that he threatened to harm her children if she reported the November 21, 2009 assault to the police. This charge was dismissed at the People’s request because Doe did not recall any such threat while testifying at trial.

⁴ Statutory references unless otherwise indicated are to the Evidence Code.

excluded unless ‘there is evidence sufficient to sustain a finding’ that the witness has such personal knowledge.” (*Ibid.*, italics omitted.) “Evidence may be excluded for lack of personal knowledge ‘ “only if no jury could reasonably find that [the witness] has such knowledge.” ’ (*Anderson, supra*, 25 Cal.4th 543, 573, italics omitted.) Thus, ‘ “if there is evidence that the witness [can perceive and recollect the events at issue], the determination whether he [or she] in fact perceived and does recollect is left to the trier of fact.” ’ (*Id.* at pp. 573-574, italics omitted.)” (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1140, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 23.)

Defendant claims Doe’s testimony was inadmissible under sections 701, subdivision (a)(1) and 702.

Factual background

Before trial defense counsel requested a hearing to evaluate Doe’s competence because she “suffers from a traumatic brain injury which impacts her ability to recall events.” The court conducted a hearing under section 402 outside the jury’s presence. Doe testified she had been injured in a car accident in 1994 and had been left “damaged, mentally, a little bit.” She was able to correctly identify the year of her testimony, but not the month, date, or day of the week. However, she testified she could remember the physical assaults by defendant:

“Q: In terms of your ability to remember, do you remember the physical assaults that occurred between you and Mr. Halverson?

“A: Yes.

“Q: And that short-term memory problem you have, does that affect, in any way, your ability to talk about what you remember happening during those physical assaults?

“A: No, because physical experiences, I can remember acutely, because they happened to me.”

The court ruled she was competent and allowed her to testify.

Doe also testified before the jury about her car accident and her memory impairment, as did her mother. Doe admitted to the jury she was “not good with timing.”

During her opening statement, the prosecutor also informed the jury of Doe’s mental limitations, and specifically her difficulty with dates: “Now you will hear evidence that Jane Doe has had some experiences in her life. As a result of some of these experiences, Jane Doe suffers from short-term memory loss. And there’s also a history of some drug use. What this means is Jane Doe, you may find, is not the greatest historian. You may find her testimony will also be difficult to follow and understand, and you may, at some point, begin to question her credibility. . . .”

After summarizing some of the other evidence, she also told the jury, “Now regardless of how Jane Doe testifies in this courtroom, how she comes across, *whether she’s able to remember dates or not*, the evidence, once you combine everything that’s presented, will, in fact, show the defendant is guilty of the crimes for which he’s been charged.” (Italics added.)

In closing argument, defense counsel used to defendant’s advantage the ambiguity of the testimony about dates: “The confusion regarding dates, the confusion regarding what may or may not transpire, the confusion about something happened in Easter of 2009, something happened in the beginning of the year 2010—but where is the evidence that says my client did something to [Doe] in November of 2009?”

The prosecutor’s closing rebuttal summed up the problem: “Jane Doe can’t remember dates, unfortunately.”

Ability to communicate to the jury

Defendant cites examples purportedly demonstrating Doe’s inability to express herself coherently so as to be understood by the jury. During the section 402 hearing the prosecutor asked Doe about an incident when defendant had assaulted her a few days before the charged offense. Doe testified he “usually” had “an angry aura around him” and threw her to the floor. The answer was stricken. The prosecutor then asked her if he had done anything else physical to her. She responded, “Um, a few strikes (indicating), like ‘shut up,’ you know.” The prosecutor then asked what Doe meant by a “few strikes”

and “[h]ow did he physically touch you?” She answered, “Um, usually within the head.” Defense counsel objected that Doe’s answer—“usually”—was nonresponsive. The court sustained the objection and struck the testimony. As the prosecutor tried to get clarification from Doe, the court instructed her to listen to the question. Doe said, “Okay. I’m sorry. It’s—I’m trying to remember the physical experience because it’s hard to create it, verbally. I’m trying to find a way to do that.”

Defendant claims in the foregoing excerpt Doe “acknowledged [her] inability” to communicate intelligibly. On the contrary, while she expressed some frustration and difficulty with articulating her experience, we see no evidence of incompetence in this exchange.

Defendant concludes from the foregoing excerpt that “Doe confuses internal and external.” He even goes so far as to say Doe was “delusional” because she referred to an “angry aura” around defendant and said he hit her “within the head.” Defendant is grasping at straws. We do not take Doe’s reference to an “aura” literally, and we will not find her incompetent because she used the preposition “within” when she evidently meant “upon” (or “within the area of the head”). There is absolutely no reason to consider these statements delusional.

As noted above, when Doe was asked whether defendant had done anything physical to her she said, “a few strikes (indicating), like ‘shut up,’ you know.” From this defendant concludes Doe confused “verbal and physical.” Defendant’s appellate counsel ignores completely the all important parenthetical “(indicating).” This, of course, means the witness made some gesture to illustrate her testimony regarding the “strikes.” She evidently demonstrated for the court the manner in which defendant struck her, and then added the perceived message of the blows: to tell her to “shut up.”

This case is unlike *People v. Lyons* (1992) 10 Cal.App.4th 837, 842-844, where the witness Mina testified that she had a third orifice between her vagina and anus (stipulated to be untrue) and accused the defendant, on trial for shooting her after an act of sexual intercourse, of killing her husband by blowing up an airplane. The Attorney

General admitted her testimony was “ ‘contradictory and fantastic.’ ” (*Id.* at p. 844.)
Mina, it turned out, may have had multiple personalities. (*Id.* at p. 843.)

In contrast, there was nothing inherently unbelievable about Doe’s testimony, and her phrasing of her answers gives us no reason to believe she was delusional. Indeed, it is absolutely clear to us that, despite her memory limitations, Doe made a conscientious effort to convey her recollections, mostly with success. Defendant’s attempt to portray her as hopelessly confused to the point of harboring delusions and being unable to distinguish truth from fantasy is worse than unconvincing.

Next defendant turns to Doe’s trial testimony to show she was incompetent. Again his seed falls on rocky ground. Doe was testifying about the charged offense, describing it as “an all-night session of violence and . . . accusations for about 14 hours.” The prosecutor asked Doe if she could remember any of defendant’s specific accusations. She replied, “[m]ostly about stealing stuff” The prosecutor asked her to repeat her answer and she said, “Nothing I did not do I was being accused of, so I can’t put them in a category where I can tell them.” Almost immediately after the quoted passage Doe recalled defendant had accused her of stealing his drugs.

This perhaps inartful, perhaps mispunctuated, passage does nothing to convince us that Doe was incompetent or that the court abused its discretion in allowing her to testify. We construe her comment more or less as follows: “Nothing. I did not do [what] I was being accused of, so I can’t put [the accusations] in a category where I can tell [the jury].” While slightly ungrammatical it is by no means incomprehensible.

Even if it evidenced some confusion, it was certainly not the first time a jury was exposed to technically ungrammatical, ambiguous, or even momentarily indecipherable testimony. We trust juries to sort out all variety of complex matters. We are confident the jury in this case construed this comment as we do: Doe initially could not remember the exact nature of defendant’s accusations on this particular occasion because, whatever they were, they were untrue. In the end she remembered his accusation: that she had taken his drugs.

We reject defendant's attempt to portray Doe as incompetent. We certainly find in the record no support for defendant's claim that Doe was delusional, unable to communicate intelligibly, or unable to distinguish reality from hallucination. There was no error in allowing her to testify.

Personal knowledge of the charged offense

1. References to charged offense as having happened in 2010

Defendant argues that, even if Doe was competent, she should not have been allowed to testify because she was unable to recall the charged offense and therefore had no "personal knowledge" as required by section 702, subdivision (a). He recites that she could remember no incident occurring on November 21, 2009, or even during that month. And from this, he concludes she did not remember the attack for which defendant was on trial. That is a most selective—and artificial—reading of the record. Doe did recall an attack, which she believed occurred in February or March 2010. This, in light of the other evidence, was obviously a reference to the charged offense.

It is perhaps worth noting at this point that we view the trial testimony before the jury as reflecting only two incidents of domestic violence by defendant against Doe. One evidently occurred in December 2008, but Doe thought it occurred in 2009 (either near Easter or in the fall). That was the incident in which she was knocked onto the kitchen floor, thrown off the porch, and hit in the head. Her mother picked her up afterwards and took her to the Russian River Clinic.

The second incident was the charged offense, which occurred on November 21, 2009 (although Doe thought it occurred in February or March 2010). We reach this conclusion based on our review of the entire record. Defendant attempts to select particular excerpts and to suggest there was testimony about multiple incidents of abuse. But we will not read into Doe's confusion about dates a likelihood that the jury believed she was testifying about many different assaults. We are quite sure the jury understood that, while Doe was confused about the dates, she testified to only two assaults.

That the "2010" assault was the same incident as the November 21, 2009 assault is clear from the injuries Doe described and those described by other witnesses who saw her

shortly after the attack (Lucille and Officer Bradley), as well as by the medical records and photographs documenting the attack. Counsel, outside the jury's presence, specifically discussed this with the court.

The details of the attack show they were one and the same. The prosecutor told the jury that defendant "hit Jane Doe in her eye and kicked her in her ribs." Doe remembered being kicked in the ribs (and five of her ribs were fractured in x-rays taken on November 21, 2009). She testified she had then been taken to Santa Rosa Memorial Hospital. Her primary complaint at the hospital was "[a]ssault," and her description of her injuries at trial was consistent with the "post assault" injuries noted by the medical professionals at Santa Rosa Memorial Hospital during her hospitalization beginning November 21, 2009. Officer Bradley testified about responding to her 911 call on November 21, 2009, and described her "extremely swollen" eye and bruised face. Consistent with these observations, Doe testified defendant hit her in the face. Photographs of her facial injuries were taken on November 21, 2009. Her mother saw her after the charged assault in 2009 and described her injuries consistently with those described by Doe with respect to the "2010" assault.

Doe admitted she had trouble with dates; she could not identify the month, date or day of the week during her testimony. She did not know the President's name. The jury was clearly on alert that she had memory deficits as a result of her 1994 car accident. During the section 402 hearings, Doe specifically told the court she had "a problem with . . . dates" , and she told the jury she was "not good with timing." The prosecutor acknowledged as much to the judge and jury.

The jury could either have believed that Doe's dating of the incident in early 2010 was correct (which is highly improbable) and that what she was describing was an unrelated incident (as the defense now contends), or else it could have concluded that the incident she described was the one that occurred on November 21, 2009, and she simply had the date wrong. We are confident the jury concluded the latter—as have we.

Though Doe's memory was imperfect there was plenty of other evidence to fill in the gaps. There was no basis for excluding her testimony on grounds that she had no

capacity to perceive or recollect or had no “personal knowledge” of the attack within the meaning of section 702.

2. Doe’s use of “usually” or “generally” in describing a prior assault by defendant

Defendant also cites several instances in which Doe used the word “usually” or “generally” to describe what defendant did to her, rather than restricting her answers to his actions on the date in question. The background is as follows: Doe had testified at the preliminary examination that defendant had also assaulted her two to four days before the incident that sent her to Santa Rosa Memorial Hospital (i.e., November 17-19, 2009). For ease of reference we shall call this the “November 17 assault.” Doe had testified at the preliminary hearing that defendant also kicked her in the ribs on that occasion.

At the start of trial, defense counsel announced an intention to claim self-defense and to introduce evidence of Doe’s prior violent conduct toward her ex-husband, which had apparently resulted in a simple battery conviction in 2004. The prosecutor then sought permission to introduce evidence of the November 17 assault, not in her case in chief, but in rebuttal. The prosecutor intended to offer such evidence only if the defense introduced evidence of Doe’s own violent character. (§ 1103, subd. (a)(1) & (a)(2).) The court granted her permission to use the incident in rebuttal, but she never did elicit testimony about it.

When asked at the section 402 hearing about what had precipitated the November 17 assault, Doe answered, “It’s generally where I’m accused of something I may not—may or may not have done” Almost immediately afterwards, she repeated, “It’s usually I’m accused of something I may or may not have done” Again, in describing the November 17 assault she said, “Well usually—it’s an angry aura around him. Throws me on the ground—” And finally, when asked where he hit her she said, “Um, usually within the head.” From these answers defendant concludes that Doe had no memory of the actual events of November 21, 2009, and thus should have been disqualified from testifying. (§ 702, subd. (a).)

All of these generalizations occurred during a section 402 hearing,⁵ and thus were never heard by the jury. The only issue is whether they somehow demonstrate Doe's incompetence so as to make the court's allowing her to testify an abuse of discretion.

To begin with, we note the second two statements were stricken from the record on defense motion and thus were not relied upon by the court in ruling on Doe's competence.

The incident about which Doe was generalizing was the November 17 assault, not the November 21 assault which landed her in the hospital. And even if she did not recall the details of the earlier incident, that does not show she failed to recall the more serious November 21 attack. Moreover, considering the record as a whole, it is evident that Doe could remember details of the November 17 assault, as she demonstrated after the prosecutor explained to her why it was inappropriate to use words such as "usually."

"[Prosecutor]: . . . When you start an answer with 'usually,' it's not answering my question. I need to know specifically, on this particular incident, how did Mr. Halverson strike you?

"A: Um, shoved me to the floor so I couldn't move (indicating) and a slap (indicating).

"Q: And you've indicated with your hand—in a backwards type motion with your hand open. Is that how he struck you?

"A: Yeah.

"Q: And what part of your body did he strike?

"A: My head.

"Q: How many times did he strike your head?

"A: Twice.

"Q: And aside from throwing you to the floor and striking you in your head twice, did Mr. Halverson touch you in any other physical way?

⁵ The Attorney General points out that all of the statements were made during a section 402 hearing to determine the admissibility of the 2008 prior similar act, not during the section 402 hearing to determine Doe's competence.

“A: No. The shove to the floor, yeah, but no, not really.”

The foregoing passage disproves defendant’s premise that Doe was unable to remember specific details of specific assaults and was simply generalizing. Once she was directed to answer with regard to a specific incident she did so. That she generalized at times during the section 402 hearing about the completely separate November 17 assault lends little or no support to the defense theory that she therefore could not remember the more serious beating that occurred on November 21, 2009.

Right of confrontation

Doe could not recall testifying at a preliminary hearing in this matter and was also unable to remember testifying at a preliminary examination in January 2009 (some 16 months before trial), which had occurred as part of the prosecution of defendant for the attack on Doe that occurred on December 14, 2008. Because she could remember none of her prior testimony, defendant claims he was deprived of his right of confrontation and his conviction must be reversed.

But Doe testified at trial and was available for cross-examination. Her difficulty remembering certain facts does not amount to a denial of confrontation rights.⁶ “[A] witness’[s] inability to ‘recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence.’ ” (*U.S. v. Owens* (1988) 484 U.S. 554, 558 (*Owens*)). “ ‘[T]he Confrontation Clause guarantees only “an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” ’ ” (*Id.* at p. 559, italics omitted; see also, *People v. Cowan* (2010) 50 Cal.4th 401, 468 [“Nothing in

⁶ Defendant also claims in his reply brief table of contents that Doe’s testimony violated his due process rights. Any such claim was forfeited by defendant’s failure to raise it in his opening brief, failure to make a reasoned argument on that point, and failure to cite any supporting authority. (*People v. Hardy* (1992) 2 Cal.4th 86, 150; *Dieckmeyer v. Redevelopment Agency of Huntington Beach* (2005) 127 Cal.App.4th 248, 260.) In any case, it has no merit.

Crawford [*v. Washington* (2004) 541 U.S. 36] casts doubt on the continuing vitality of *Owens*.]”)

The *Owens* rule was applied in *People v. Perez* (2000) 82 Cal.App.4th 760, 762-764, where a witness to a gang-related drive-by shooting claimed to have no memory of the underlying events at trial, and her prior statement to police was introduced under section 1235. Though cross-examination in such circumstances may prove unfruitful, it does not violate the confrontation clause to allow the witness to testify. (*Id.* at pp. 765-766.) “ ‘The right of confrontation does not protect against “testimony that is marred by forgetfulness, confusion, or evasion.” ’ ” (*People v. Blacksher* (2011) 52 Cal.4th 769, 805.)

The other cross-examination that defense counsel was thwarted in conducting had to do with Doe’s alleged attack on her ex-husband in 2004. The defense objective was evidently to establish Doe’s character for violence in order to bolster defendant’s claim of self-defense. But that claim was doomed in any case by the clearly excessive beating that defendant inflicted on Doe, even assuming she was the initial aggressor. Defendant had a scratch on his nose, while Doe sustained injuries requiring hospitalization for several days. No viable claim of self-defense existed. Thus, any impairment of the right of confrontation on this particular subject matter was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

II. Ineffective assistance of counsel

Defendant claims he was deprived of effective assistance of counsel under the Sixth Amendment because his attorney did not object to Doe’s testimony about an assault in February or March 2010, which he characterizes as evidence of uncharged misconduct, inadmissible under section 1101. His claim is governed by *Strickland v. Washington* (1984) 466 U.S. 668.

As we have explained, we view the evidence as encompassing only two assaults by defendant. Although Doe testified that the second one occurred “a couple of months” before trial—which would place it in February or March 2010—we firmly reject defendant’s premise that this testimony related to a completely separate attack

objectionable on grounds that it informed the jury of uncharged misconduct. In the context of the whole record, the testimony was clearly about the charged offense. The fact that Doe was confused about the date on which it occurred does not transform it into testimony about an uncharged instance of misconduct. We find no basis for deeming defense counsel's failure to object on this basis a failure to adequately represent her client.

Appellate counsel evidently would have employed a different trial strategy than did trial counsel, but we cannot imagine it would have been successful. Had defense counsel objected to Doe's testimony on grounds that it concerned an uncharged assault in 2010, we are quite confident a section 402 hearing would have established what both counsel already understood—that Doe was, in fact, referring to the same incident as the charged offense. Indeed, an attack could not possibly have occurred in February or March 2010, as defendant was in custody at that time for the offense committed on November 21, 2009. Though the jury was not informed of this fact, surely the trial judge could have taken defendant's custodial status into account in determining whether Doe's testimony was admissible. Knowing full well that Doe's testimony actually related to events on November 21, 2009, defense counsel wisely concluded that an objection would have been futile.

There was no reason for defense counsel to anticipate that Doe would misremember so completely the date of the attack when she testified, and therefore no reason for her to have moved to exclude such testimony in advance of trial. Instead, had trial counsel pursued the course appellate counsel now suggests, she would have had to make her objection midtrial when it would have interrupted the evidence, wasted the jury's time, and resulted in the testimony being admitted anyway once the confusion was resolved.

We are convinced that moving to strike Doe's testimony would not have been a sound tactic. It could have irritated the judge or angered the jurors and turned them against her client. It would not have accomplished what appellate counsel envisions. The testimony was not irrelevant. It was not character evidence. It was not inadmissible.

Defendant's insistence that a futile objection should have been registered falls far short of demonstrating a Sixth Amendment violation.

Moreover, the defense derived some benefit from Doe's confusion about the dates. Her testimony contradicted the district attorney's theory of the timeframe, and defense counsel used it in closing argument to attack Doe's credibility. She used it to argue (unsuccessfully) that a unanimity instruction was necessary. She also used it to argue (unsuccessfully) that medical records from November 21, 2009, should not be admitted.

And even if there had been an error on counsel's part, we would deem it harmless under the second prong of *Strickland, supra*, 466 U.S. at p. 694. There is no reasonable probability the outcome would have been different even if defendant's trial attorney had followed the course now suggested by his appellate counsel.⁷

III. Evidence of prior incident of domestic violence

As stated at the outset of this opinion, the charged offense was only one of some 50 to 60 incidents of domestic violence by defendant against Doe in the three or four years they had resided together. The prosecutor sought, however, to introduce only one prior incident, namely the December 2008 attack, when Doe was thrown off the porch and ended up at Russian River Clinic.

The court further ruled that if the defense attacked Doe's own character as being violent (§ 1103, subd. (a)(1)), the prosecutor could also introduce in rebuttal the assault on or about November 17, 2009 (§ 1103, subd. (a)(2)), when Doe was attacked by defendant and offered no resistance.

This eventuality never occurred. Defense counsel did attempt to attack Doe's character through cross-examination, asking her about prior acts of alleged domestic violence against her ex-husband in 2004, which she denied. The defense put on no

⁷ For the same reasons we deny by separate order the petition for writ of habeas corpus filed by defendant in A133496.

witnesses, however, and prosecutor never offered testimony at trial about the separate November 17 assault.⁸

Defendant claims evidence of even the one 2008 incident should not have been admitted and the error was prejudicial. Under section 1109, however, the court properly allowed evidence of the 2008 incident of domestic violence and it was not more prejudicial than probative.

Section 1109, subdivision (a)(1) provides: “Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant’s commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.” Defendant’s jury was instructed that if it found by a preponderance of the evidence that defendant committed a prior offense involving domestic violence, it could conclude “that the defendant was disposed or inclined to commit domestic violence” and further infer “that he was likely to commit and did commit” the crime of which he was accused. (See CALCRIM No. 852; CALJIC No. 2.50.02.)

We review the court’s ruling for abuse of discretion. (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531 (*Johnson*); *People v. Branch* (2001) 91 Cal.App.4th 274, 281-282; see also *People v. Brown* (2000) 77 Cal.App.4th 1324, 1337.) The reference in section 1109 to section 352 is intended to operate as an overriding safety valve to prevent admission of prior misconduct evidence whenever its prejudicial impact substantially outweighs its probative value. This sufficiently protects the defendant’s constitutional rights. (*Johnson, supra*, 185 Cal.App.4th at p. 531; *People v. Brown, supra*, 77 Cal.App.4th at p. 1334; see also, *People v. Falsetta* (1999) 21 Cal.4th 903, 918-919 [§ 1108].)

⁸ The prosecutor believed the ribs were fractured on November 21, 2009, but Doe was kicked in the same place in a separate attack some two to four days earlier. Testifying about the prior attack in a section 402 hearing, Doe did not mention that defendant kicked her, but only that he shoved her to the floor and hit her on the head.

“ “The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense.” ’ (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274.) Section 1109 was intended to make admissible a prior incident ‘similar in character to the charged domestic violence crime, and which was committed against the victim of the charged crime or another similarly situated person.’ (Assembly Com. on Public Safety, Analysis of Sen. Bill No. 1876 (1995-1996 Reg. Sess.) June 25, 1996, p. 5.) Thus, the statute reflects the legislative judgment that in domestic violence cases . . . similar prior offenses are ‘uniquely probative’ of guilt in a later accusation. (See *People v. Britt* (2002) 104 Cal.App.4th 500, 505-506 [§ 1108].)” (*Johnson, supra*, 185 Cal.App.4th at pp. 531-532.)

Here the similarities in the offenses are overwhelming. The 2008 offense involved violence against the same victim, occurring in the same trailer home, involving similar techniques (hitting her about the head, shoving, and throwing her), within a year prior to the charged offense. Though not established in evidence, the court was aware defendant was convicted of disturbing the peace (Pen. Code, § 415) as a result of the 2008 misconduct, so the risk of fabrication by Doe was nil.

The evidence here was more probative than prejudicial. Indeed, any “prejudice” defendant suffered as a result of the admission of testimony about this incident was the ordinary prejudice that ensues from being confronted with damning evidence. This is not the kind of “prejudice” about which section 352 is concerned. (*Johnson, supra*, 185 Cal.App.4th at p. 534; *People v. Harris* (1998) 60 Cal.App.4th 727, 737.) The word “prejudicial” is not synonymous with “damaging.” (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.) Rather, evidence is unduly prejudicial under section 352 only if it “ “uniquely tends to evoke an emotional bias against defendant as an individual and . . . has very little effect on the issues” ’ ” (*ibid.*), or if it invites the jury to prejudge a person or cause on the basis of extraneous factors (*People v. Harris, supra*, 60 Cal.App.4th at p. 737). “Painting a person faithfully is not, of itself, unfair.” (*Ibid.*)

Because of the many similarities between the attack on December 14, 2008, and that on November 21, 2009, there was no abuse of discretion in admitting the evidence.

The fact that there were a total of 50 to 60 prior incidents of physical abuse against this same victim also makes the admission of one prior incident eminently reasonable under the statute. The jury was properly allowed to consider such evidence in reaching its verdict.

DISPOSITION

The judgment is affirmed.

Richman, J.

We concur:

Haerle, Acting P.J.

Lambden, J.