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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.
KAO CHIAM SAEPHAN,
Defendant and Appellant.

A132344
(Contra Costa County
Super. Ct. No. 05-110207-8)

Kao Chiam Saephan appeals from convictions of inflicting corporal injury on a child, making criminal threats, dissuading a witness, false imprisonment and misdemeanor battery. He contends his convictions must be reversed because the trial court improperly admitted hearsay evidence and evidence of prior domestic violence, and failed to instruct the jury on lesser included offenses. Alternatively, he argues certain of his sentences should be stayed under Penal Code section 654. We conclude the sentence for the conviction of false imprisonment must be stayed and otherwise affirm the judgment.

STATEMENT OF THE CASE

Appellant was charged by information filed on February 10, 2011, with two counts of inflicting corporal injury on a child (Pen. Code, § 273d, subd. (a)),¹ committed against his two sons (counts 1 and 2); three counts of making criminal threats (§ 422), committed against his two sons and his girlfriend (counts 3, 4 and 5); and one count each of

¹ Further statutory references will be to the Penal Code unless otherwise specified.

dissuading a witness by force or threat (§ 136.1, subd. (c)(1)), false imprisonment (§§ 236, 237, subd. (a)), and misdemeanor battery on a spouse or cohabitant (§§ 242, 243, subd. (e)(1)), committed against his girlfriend (counts 6, 7 and 8). It was alleged that appellant personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)) in the commission of the offenses charged in counts 3, 4, 5, 6 and 7.

On April 21, 2011, after a jury trial, appellant was found guilty of the charged offenses and the enhancement allegations were found true. On May 27, the court sentenced appellant to a prison term of four years, consisting of the four-year middle term for count 1 (inflicting corporal injury on Alvin Doe), concurrent terms on each of the remaining felony counts, and time served for the misdemeanor battery conviction.²

Appellant filed a timely notice of appeal on May 27, 2011.

STATEMENT OF FACTS

On January 1, 2011, Muey Doe lived in Richmond with appellant and their three children, 11-year-old Alvin, 9-year-old Simon and 4-year-old Bridget. Appellant's father and brother, Nai, also lived in the house, as well as the brother's girlfriend and their baby. Muey, appellant and their children shared one bedroom. She and appellant had been together for 14 years. Before the present incident, appellant had shoved her, most recently about a year before, but he had never punched her. They had argued about her going out: Muey testified that she did not go out often, but when she did, he would complain and they would argue. Appellant had threatened to kill Muey if she left him.

On December 31, 2010, Muey went out at about 11:00 p.m., leaving the children with their grandfather. Appellant was not at home.

Alvin testified that his father came home from a friend's house at around 11:00 p.m. Alvin and Simon were playing cards in the living room. Alvin did not remember at what point appellant became upset, but appellant picked up an end table and

² For each of counts 2, 3, 4, 5 and 7, the court imposed the two-year middle term sentence plus an additional one year for the weapon enhancement; for count 6, the court imposed the three-year middle term.

threw it at him from about two feet away. The table hit the side of Alvin's head and broke. Alvin started crying and appellant started yelling. Alvin's head was bleeding and his grandfather took him into the bathroom, locked the door and put a towel on his head to stop the bleeding. Appellant kicked the door open, came into the bathroom and pushed Alvin and Simon into the bathtub. Alvin was scared of appellant. His grandfather took him and Simon into his room and locked the door. Appellant was punching the walls. Alvin heard appellant say, "I'm going to kill you," then appellant kicked in the door and came into the room, swinging a knife. Alvin thought appellant was going to hurt him and Simon with the knife and he was scared. His grandfather and Nai, who had come downstairs, stopped appellant and took the knife away. A relative came and took Alvin and Simon to her house.

At the time of trial, Alvin had a scar or injury above his right ear that still hurt "a little" from where the table hit him. He initially testified that he did not remember having any bruising on his shoulder but, when shown photographs of himself taken on the day of the incident, he saw bruises on his right shoulder and remembered appellant punching him five or six times after he threw the table. He identified photographs of the shirt he was wearing at the time, onto which his head wound had bled. He also identified a photograph of the knife appellant used during the incident. Alvin was still "a little" scared of appellant. Alvin testified that he saw his father drink three to five bottles of beer on the day of the incident. He testified that he was honest when he spoke with the police officers and that it was easier for him to remember the events when he was talking to them than it was at trial.

Nine-year-old Simon described the same general course of events. Simon testified that appellant hurt him by kicking him in the stomach and punching him in the mouth, leaving his mouth swollen but not bleeding, and his stomach bruised. This was after appellant threw the table at Alvin. Simon testified that appellant had never kicked him before but had punched him. Simon did not remember what appellant was saying when he came into the bathroom, and testified that he was scared but did not know why.

Appellant told the boys to call their mother and they tried to call her when they were in their grandfather's room, but she did not answer the phone. From his grandfather's room, Simon could hear appellant yelling but he did not remember what he was saying. When appellant came into the room with a knife, Simon thought he was going to hurt him or kill him; he did not know what appellant was saying. Asked if he was still scared of appellant, Simon replied, "kinda."

The next day, when the boys returned to the house, Muey was there. They told her what had happened and she called the police. Simon told the police the truth about the incident and remembered it then better than he did at the time of trial. He remembered telling the police that appellant had been yelling that he wanted to kill the boys, but at the time of trial he only "[k]inda" remembered appellant yelling this. He testified that appellant was in the living room when he said he wanted to kill the boys, and did not have the knife with him. Simon remembered telling the police that his lip and stomach hurt, but did not remember his legs being hurt.

Muey got home at about 5:00 a.m. on New Year's Day. Appellant and Bridget were asleep, and Muey lay down in the bed. She noticed the boys were not in their bed and asked appellant where they were. Appellant was "really upset" and told her he had hurt the boys, "was going to really hurt them badly last night" and "almost killed them last night." Appellant was not drunk. He told her the boys were at a relative's house. He pushed Muey off the bed by kicking her on her back several times; she was scared that he would do something worse. She picked up her phone to call the police, but he grabbed it and took out the batteries. Muey tried to leave the room but appellant prevented her, picking up a shard of glass from a broken mirror and standing next to the door, yelling that he was going to kill her "too." She believed him, from the look in his eyes.

Appellant finally let Muey out of the room and she went downstairs, asked appellant's father where the children were, and asked him to call the relatives to bring them home. When the children returned, she saw the injuries to Alvin's head and arm and Simon's lip and stomach, and called the police. This was about two and a half hours

after she had come downstairs. After the police arrested him, as he was being taken from the house, appellant said to Muey in their native language, “I’m gonna get you first. He said this is what you’re gonna do me? I’m gonna get you. Really.” During the incident, appellant never told Muey he was kicking her out of the house.

Muey testified that the bruises on Alvin’s arm got “really purple” a couple of days after the incident, the lacerations on his head scabbed, and he still had a scar at the time of trial. Simon’s mouth still burned if he ate spicy food.

At the time of trial, Muey remained afraid of appellant, in fear for her life and her boys’ safety.

Muey acknowledged that she never told any police officer that appellant threatened her with a shard of glass. She did not tell the police she talked to in January that appellant had threatened her in the past because they did not ask her whether there had been previous threats. When Detective Gray asked at an interview in March whether appellant had threatened her in the past, she said he had done so “a lot” and gave specifics about the past threats.

Officer Jonathan Wycinsky testified that when he responded to the call on January 1, Muey told him appellant had assaulted her and her children. She was “nervous” and “scared.” Alvin and Simon started crying when Wycinsky asked them if they were okay. He asked where their father was and the boys pointed and told him appellant was upstairs. Wycinsky observed a small broken table in the kitchen area, which the boys said was the table appellant had thrown at Alvin and Wycinsky described as a “lighter” type end table weighing under 15 pounds. He interviewed the boys separately. Alvin was “oozing” blood from an approximately half-inch laceration on his temple. Simon was bleeding from a small cut on the inside of his lip, had an abrasion or scratch on his stomach, and complained of pains in his legs from appellant kicking him. Simon told him that appellant had been yelling that he wanted to kill the boys. Wycinsky located a knife in the far north bedroom on the first floor, which Alvin and the boys’ grandfather identified as the one appellant had had in his possession. He did not observe

any objective signs of intoxication in appellant or any odor of alcoholic beverage coming from him. Muey told Wycinsky that appellant had broken a glass, held it to her throat and threatened to kill her if she tried to use the phone or leave; that he threatened and yelled at her for “hours”; and that she initially had to act like the incident was not a big deal, then once they were cleaning up the broken glass she was able to go downstairs and call the police. Wycinsky did not see any glass or broken mirrors in the bedroom, but did see a vacuum there. He asked Muey about prior domestic violence incidents and she said there had been some; he did not ask her about prior threats. Muey told him that appellant had told her the kids were being “terrible” and family members had to come and pick them up. She never said appellant had told her he almost killed the kids. When appellant was being taken out of the house, he looked back at Muey and said something in a language Wycinsky did not understand.

Defense

Appellant testified that he had been drinking a lot on New Year’s Eve—three or four beers at home and then almost a fifth of Hennessy at a party—and had “too much alcohol” in him when he got home around 11:00 p.m. He had driven himself home, swerving because of his intoxication. Appellant became angry when he saw that Muey was not at home, because Muey was supposed to have taken the kids to her mother’s house that day, and because she “always” stole his money and gambled. In a rage, he threw a table at Alvin and punched the walls in the living room and in the hallway next to the bathroom. He kicked Simon in the stomach and backhanded him in the face. Appellant testified that he was taking his anger at Muey out on the boys, and stated at trial that “it wasn’t me really. It was, like, the alcohol took over me already.” Appellant testified that he took Alvin to the bathroom and used a tissue to stop the bleeding, then on cross-examination, acknowledged that his father helped Alvin in the bathroom and he (appellant) went in and out helping them. He yelled at the boys and pushed them “on the side” to the tub, but did not shove them into the bathtub. He denied kicking in the bathroom door. He and the boys went into his father’s room, then he went into the

kitchen and grabbed a butcher's knife. He pushed open the door to his father's room, which was already a little bit open, and yelled at the kids, saying several times that he was going to kill them. He did not mean this, but the alcohol "took over." He denied waving or swinging the knife and testified, "I was so mad. It wasn't me. The alcohol took over and controlled me." On cross-examination, he acknowledged that he deliberately went to the kitchen and got the knife, but said he just wanted to scare the boys, which he did by telling them, "see, I got a knife." After his brother took the knife away, appellant went upstairs to his room and punched a small mirror, breaking it. He denied that his brother had to restrain him to get the knife away. His father called his cousin, who took the boys to their house, and appellant went to sleep with Bridget.

When Muey came home, she could not open the door to the room because appellant had locked it. He opened the door for her and went back to sleep. He was "coming down," "hung over." When the sun came up, he started to yell at Muey and told her if she wanted to leave, just get out of the house. She was next to the edge of the bed and he "tapped" her with his feet, "not hard," and she fell down. He never threatened to kill her, never did anything with the glass to threaten her, never touched her cell phone, and never blocked her from leaving the room. He told her he had hit the kids, but never said he almost killed them. She went downstairs and smoked a cigarette, as did he, then he took the vacuum cleaner upstairs and cleaned up the broken glass.

Appellant acknowledged having shoved Muey in the past, once, and denied ever hitting or threatening her. He testified that what he said to Muey when the police were escorting him out of the house was "you gonna call the police? Like, hey, then, nobody going to help you pay rent." As he was being put into the police car, appellant asked the officer to wait and let him "try to yack it out" because he did not want to "yack" in the police car. When he was booked, appellant told Officer Wycinsky he had been drinking the night before and was drunk.

DISCUSSION

I.

Appellant contends that the trial court violated his constitutional rights to confront witnesses and to a fair trial by admitting hearsay statements by Muey, Alvin, Simon and the boys' grandfather through Officer Wycinsky's testimony. Prior to trial, the People moved to admit Muey, Alvin and Simon's complaints about the physical abuse to the police on the day of the offense under the "fresh complaint doctrine," offered only as evidence that a complaint was made and not for the truth of the statements. The defense objected, arguing that the statements were hearsay and would bolster the witnesses' testimony, and that the fresh complaint doctrine was inapplicable. The trial court indicated a preliminary view that this exception to the hearsay rule would not apply, but reserved the issue to "see how things unfold."

During Officer Wycinsky's testimony, defense counsel objected to a question about whether Muey told him why she had called the police. The objection was overruled on the ground that the statement was being offered for its effect on the listener, and Wycinsky testified that Muey told him she had called the police because appellant had "come home and assaulted her as well as her children." No objection was made to the next statement appellant challenges, that Alvin and Simon identified the broken table to him as the one appellant threw at Alvin. Wycinsky's testimony that Simon complained of pains in his legs from appellant kicking him was admitted over objection as a prior inconsistent statement. Wycinsky's statements that Alvin and his grandfather identified the knife to him as the one appellant used during the incident, and that Simon told him appellant had been yelling that he wanted to kill the boys, were admitted over objection without explanation of grounds. Finally, Wycinsky testified without objection that Muey told him there had been prior domestic violence incidents with appellant. Recognizing that defense counsel did not object to every statement he now challenges, appellant urges that because every hearsay objection defense counsel did make was overruled, further objections would have been futile and no forfeiture resulted from

counsel's failure to object every single time the prosecutor elicited hearsay. (See *People v. Hill* (1998) 17 Cal.4th 800, 820-821 [claim of prosecutorial misconduct not forfeited where continued objections would have been futile].)

We need not determine whether the statements described above were in fact admissible or whether defense counsel's objections were sufficient. As appellant recognizes, with the exception of the testimony relating the grandfather's pointing out of the knife, which implicates the confrontation clause because the grandfather did not testify, erroneous admission of the hearsay statements would require reversal only if there is a reasonable probability that exclusion of the statements would have resulted in a more favorable outcome for appellant. (*People v. Harris* (2005) 37 Cal.4th 310, 336, *People v. Watson* (1956) 46 Cal.2d 818, 836.) Wycinsky's testimony that Muey told him appellant had come home and assaulted her and the children was consistent with and provided no further information than what Muey and the children directly described to the jury. His testimony that the children identified the broken table as the one appellant threw at Alvin also added little to the evidentiary picture: The boys both testified that appellant threw a table at Alvin, Alvin testified that the table broke when it hit him, and both boys identified the broken table in a photograph. Wycinsky's testimony that Simon complained of pains in his legs did supply evidence not otherwise before the jury, as Simon himself did not describe any injury to his legs. But there was no focus on this point at trial and the prosecutor told the jury that the charge of corporal injury to Simon was based on the injuries to his mouth and stomach. Wycinsky's statement that Alvin identified the knife appellant had used did not add significantly to the evidence against appellant, as the boys' and appellant's own testimony left no question appellant took a knife into the bedroom and Wycinsky testified that he found the knife in the bedroom. Wycinsky's testimony that Simon told him appellant had been yelling that he wanted to kill the boys was consistent with Simon's testimony that he remembered telling the police this. While the officer's testimony bolstered Simon's, it is not likely this would have had a strong effect on jurors' view of the case since the strongest evidence of the threats was

supplied by Alvin's testimony. Wycinsky's testimony that Muey told him there had been prior domestic violence incidents with appellant was consistent with Muey's own testimony and would not have greatly added to it.

Appellant argues that he was prejudiced by the erroneous admission of the hearsay statements above, particularly concerning the counts of corporal injury and criminal threats to the children, because his convictions on these counts rested almost entirely on the children's testimony, that testimony was "somewhat disjointed" and "sparing" in details, and Wycinsky's testimony was used unfairly to corroborate it. Putting aside Wycinsky's testimony, however, the evidence was far stronger than appellant suggests. As to the counts of corporal injury, the children's testimony was clear and consistent on the critical details—that appellant threw the table at Alvin, hitting his head, and punched him, hit Simon in the mouth and stomach, and pushed both boys into the bathtub—and corroborated by the photographs of, and their testimony about, the injuries they sustained as well as Muey's testimony about their injuries. And appellant himself admitted inflicting these injuries. As for the threats, Alvin's testimony was unequivocal. While Simon acknowledged that at the time of trial he had little memory of what words appellant was using when he was yelling at the boys, he clearly conveyed the fear engendered in him by appellant's words and conduct, and he remembered telling the police that appellant threatened to kill the boys. In sum, there is no reasonable probability the outcome of the trial court have been more favorable for appellant if Wycinsky's above-described statements had not been admitted.

Wycinsky's testimony that the grandfather identified the knife as the one appellant had used requires us to employ a different standard of prejudice because, since the grandfather did not testify at trial, appellant had no opportunity to cross-examine him. Assuming the statement was testimonial hearsay admitted in violation of appellant's federal constitutional rights, it would be subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24, requiring us to determine whether the error was harmless beyond a reasonable doubt. (*People v. Mitchell* (2005))

131 Cal.App.4th 1210, 1225; *Delaware v. Van Arsdell* (1986) 475 U.S. 673. 684.) We are convinced that it was. Both Alvin and Simon described appellant coming into their grandfather's room with a knife, Officer Wycinski found a knife in the bedroom, and Alvin identified a photograph of the knife at trial. Appellant admitted getting a butcher's knife from the kitchen and taking it to the bedroom. His suggestion that we should not view his testimony as ameliorating the prejudicial effect of Officer Wycinski's testimony is unpersuasive. Appellant urges that he had no choice but to testify once the hearsay evidence had been improperly admitted. But he does not explain why Officer Wycinski's testimony that the grandfather identified the knife would have forced him to testify when the other evidence regarding the knife did not. The boys were credible witnesses, as demonstrated by the consistency of their accounts and the corroboration provided by their injuries and the broken end table. In closing argument, the prosecutor placed no emphasis on the identification of the knife; rather, she told the jury that Officer Wycinski's testimony was important to contradict appellant's intoxication defense. Any error in permitting Officer Wycinski to testify that the grandfather identified the knife Wycinski found in the bedroom as the one appellant used during the incident was harmless beyond a reasonable doubt.

II.

Appellant next contends the trial court erred in admitting evidence of prior domestic violence. At issue is Muey's testimony that appellant had previously shoved her and threatened to kill her if she left him, and Simon's testimony that appellant had punched him once before the present incident. Appellant maintains that the court had insufficient information about the prior incidents to permit a determination of admissibility.

Evidence Code section 1109 permits the use of evidence of prior domestic violence by the defendant to prove propensity in a prosecution for domestic violence, as

long as the evidence is admissible under Evidence Code section 352.³ (*People v. Johnson* (2010) 185 Cal.App.4th 520, 528.) “Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. (*People v. Dyer* (1988) 45 Cal.3d 26, 73.) Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion ‘must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]’ (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) “ ‘ “The ‘prejudice’ referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, ‘prejudicial’ is not synonymous with ‘damaging.’ ” ’ (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) Relevant factors in determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s). (See *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1315.)” (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.)

Among its in limine motions, the prosecution asked the court to admit evidence of prior domestic violence incidents between appellant and Muey under Evidence Code

³ Evidence Code 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.” “ ‘Domestic violence’ means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship.” (Pen. Code, § 13700; Evid. Code, § 1109, subd. (d)(3).)

section 1109, and to admit two 1994 burglary convictions and a 1996 petty theft with prior conviction. At the hearing, defense counsel asked for clarification of what the testimony would be, to enable the court to determine its probative value and prejudicial effect. The prosecutor related the police detective's report that when asked about prior incidents of domestic violence between her and appellant, Muey stated there had been such violence on "numerous occasions," but it had "never escalated beyond the suspect shoving her" and she had previously never called the police about it. The last incident of shoving was one year before. The detective asked if appellant had ever threatened to kill Muey and she said "yes, a lot. The defendant would tell her that he would drop her off in the ocean." While defense counsel urged that there were too few details for the shoving incident to be helpful to the jury, the court agreed with the prosecutor that the facts of the current case were so much more egregious that evidence of a year-old shoving incident would not be prejudicial. Asked about appellant's prior threats, the prosecutor argued that in addition to their relevance to appellant's intent, the evidence was necessary to allow the jury to properly evaluate whether Muey's fear was reasonable and sustained based on what she knew about appellant. On this point, the prosecutor urged admission of appellant's prior threats to Muey, prior convictions and recently uncovered evidence that appellant was a gang member, which the prosecutor maintained was a primary reason Muey believed appellant when he said he was going to kill her. The detective's report did not indicate the timing of past threats, but related Muey's statements that appellant was capable of hurting her and the children and that he would keep her locked in the house and tell her he was going to kill her. The trial court excluded evidence of gang membership and of the prior convictions, which it found too remote. The court then stated, "I think the only thing I find compelling would be prior threats to her." Defense counsel responded, "I don't have any argument on that."

The court did not abuse its discretion. While it did not have much information about the prior shoving incident, the court had enough to make the determination it was called upon to make. Muey's statement to the detective indicated there had been

domestic violence incidents in the past that did not involve anything more than appellant shoving her, and that the last shoving incident was a year before trial. This evidence was not prejudicial in comparison to the far more egregious facts of the present case, and was highly relevant for the jury's understanding of the context of Muey and appellant's relationship. The evidence that appellant had previously threatened to kill Muey was relevant for the same reason and—especially as offered at trial with no elaboration of details—no more egregious than the threats described in the present case. While this evidence was damaging to appellant and undermined his intoxication defense, it was not the kind of evidence “uniquely tend[ing] to evoke an emotional bias against defendant as an individual and which has very little effect on the issues” (*People v. Bolin, supra*, 18 Cal.4th at p. 320.) The record reflects a considered weighing by the trial court, resulting in the exclusion of evidence deemed insufficiently probative or too prejudicial and the admission of evidence necessary for the jury's evaluation of the case.

The in limine motions and rulings did not address Simon's testimony that appellant had punched him on a previous occasion. No objection was made to this testimony at trial, forfeiting the issue. (*People v. Harrison* (2005) 35 Cal.4th 208, 230-231.) In any event, considering all the evidence in the case, there is no reasonable probability appellant would have achieved a more favorable result if this testimony had not been admitted.

III.

Appellant additionally argues that the admission of propensity evidence under Evidence Code section 1109 violated his constitutional rights to due process and equal protection of the law. As appellant acknowledges, California courts have rejected challenges on these grounds to Evidence Code section 1109 (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1233); *People v. Cabrera* (2007) 152 Cal.App.4th 695, 703-704; *People v. Escobar* (2000) 82 Cal. 4th 1085, 1095; *People v. Price* (2004) 120 Cal.App.4th 224, 240; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1309-1313; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1332-1334) and analogous statutes (*People*

v. Falsetta (1999) 21 Cal.4th 903, 917 [Evid. Code, § 1108, subd (a), evidence of prior sex offenses in prosecution for sexual offense]). Appellant raises this argument here to preserve his right to federal review. We need not consider the issue further.

Appellant further challenges the jury instructions regarding propensity evidence, which directed the jury that it had to determine whether appellant committed the prior offenses by a preponderance of the evidence and thereby lessened the prosecution's burden of proving guilt beyond a reasonable doubt. The jury was instructed in accordance with CALCRIM No. 852 that it could consider evidence of uncharged domestic violence only if the People proved by a preponderance of the evidence that appellant committed it, and that if the jury decided appellant committed the uncharged domestic violence, it was permitted to conclude that appellant was "disposed or inclined to commit domestic violence and, based on that decision, also conclude that [appellant] was likely to commit and did commit" the charged battery against a cohabitant. The instructions continued: "If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Penal Code section 242/243(e)(1). The People must still prove the charge beyond a reasonable doubt."

In *People v. Reliford* (2003) 29 Cal.4th 1007, the Supreme Court rejected a challenge to jury instructions regarding propensity evidence admitted under section 1108. The instructions in that case told the jury, "[i]f you find by a preponderance of the evidence that the defendant committed [the prior sexual offense], that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime. The weight and significance of the evidence, if any, are for you to decide." (*Id.* at p. 1012.) *Reliford* rejected an argument that the jury could have interpreted the instructions to authorize conviction of the charged offenses based on a lower standard of proof than beyond a reasonable doubt: "Nothing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary

determination whether defendant committed [the prior offense]. The instructions instead explained that, in all other respects, the People had the burden of proving defendant guilty ‘beyond a reasonable doubt.’ ” (*Id.* at p. 1016.)

The instruction in the present case was even more explicit: The jury was expressly told that finding by a preponderance of the evidence that appellant committed the uncharged conduct was not sufficient to prove guilt of the charged offense and that the prosecution was required to prove the charge beyond a reasonable doubt. There was no error.

IV.

Appellant urges that the trial court erred in refusing his request to instruct the jury on simple assault and simple battery as lesser included offenses of the crime of infliction of corporal injury (§ 273d, subd. (a)) charged in counts 1 and 2. The trial court declined this request on the ground that the evidence did not support finding an offense less than the one charged.

A trial court is required to instruct on lesser included offenses “if the evidence ‘raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense. [Citation.]’ [Citation.]” (*People v. Lopez* (1998) 19 Cal.4th 282, 287-288.) But “[s]uch instructions are required only where there is ‘substantial evidence’ from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense.” (*People v. DePriest* (2007) 42 Cal.4th 1, 50.)

Section 273d, subdivision (a), defines as a felony the willful infliction upon a child of “any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition.” “Causing a ‘traumatic condition,’ means the infliction of ‘a wound or other abnormal bodily condition resulting from the application of some external force. [Citation.]’ ” (*People v. Moussabeck* (2007) 157 Cal.App.4th 975, 980.) Simple assault and battery are lesser included offenses of section 273d, subdivision (a). (*People v. Moussabeck*, at pp. 980-981; see *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952

[simple assault and battery lesser included offenses of infliction of corporal injury resulting in traumatic condition on spouse or cohabitant].) Neither of these lesser offenses requires that the victim suffer actual injury. (§§ 240, 242; *People v. Longoria* (1995) 34 Cal.App.4th 12, 16.) “It is *injury* resulting in a traumatic condition that differentiates [the charged] crime from lesser offenses.” (*People v. Gutierrez*, at p. 952.)

Appellant contends the jury should have been given the option of considering simple assault and battery because there was no medical evidence concerning the children’s injuries, only lay testimony regarding Alvin’s head wound and testimony that Simon suffered pain and bruising. But the evidence left no question that appellant caused each of the children to suffer “ ‘a wound or other abnormal bodily condition resulting from the application of some external force. [Citation.]’ ” (*People v. Moussabeck, supra*, 157 Cal.App.4th at p. 980.) Appellant admitted that he threw a table at Alvin, causing Alvin’s head to bleed, and that he kicked Simon in the stomach and hit Simon in the face. Alvin testified that appellant punched him, and photographs taken at the time showed bruises on Alvin’s shoulder. Simon testified that appellant kicked him in the stomach and punched him in the mouth, leaving his mouth swollen and his stomach bruised. Muey testified that she called the police after seeing the injuries to Alvin’s head and arm and Simon’s lip and stomach. No particular degree of injury is necessary to establish a violation of section 273d, subdivision (a); the required “traumatic condition” may consist of a serious or a minor injury. (*People v. Gutierrez, supra*, 171 Cal.App.3d at p. 952; see § 273.5, subd. (c) [“ ‘traumatic condition’ means a condition of the body, such as a wound or external or internal injury, [including, but not limited to, injury as a result of strangulation or suffocation,] whether of a minor or serious nature, caused by a physical force”].) There was no evidence to support a conclusion that appellant assaulted the children but did not succeed in injuring them, or that he committed a battery that did not amount to infliction of a traumatic condition. Thus, there was no evidence that he committed the lesser offenses but not the one charged.

V.

Appellant's final argument is that the sentences for his convictions of making criminal threats to Alvin and Simon (counts 3 and 4) should have been stayed under section 654 because these convictions arose from the same transaction as his convictions of inflicting corporal injury upon the boys (counts 1 and 2), and that the sentences for his convictions of dissuading a witness (count 6) and false imprisonment (count 7) should have been stayed because these convictions were based on the same continuous course of conduct as his conviction of making criminal threats to Muey (count 5).

“Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct.” (*People v. Deloza* (1998) 18 Cal.4th 585, 591-592.)

“ ‘Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’ ” (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208, quoting *Neal v. State of California* (1960) 55 Cal.2d 11, 19.)

“ ‘It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] . . . [I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.]’ ” (*People v. Hicks* (1993) 6 Cal.4th 784, 789, quoting *People v. Harrison* (1989) 48 Cal.3d 321, 335.) “On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.” (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) And “ ‘a course of conduct divisible in time, although directed to one objective, may give

rise to multiple violations and punishment. [Citations.]” [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken. [Citation.]’ (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)” (*People v. Andra* (2007) 156 Cal.App.4th 638, 640.)

“The defendant’s intent and objective present factual questions for the trial court, and its findings will be upheld if supported by substantial evidence.” (*People v. Andra, supra*, 156 Cal.App.4th at p. 640; *People v. Liu, supra*, 46 Cal.App.4th at pp. 1135-1136.) “ ‘We review the court’s determination of [a defendant’s] “separate intents” for sufficient evidence in a light most favorable to the judgment, and presume in support of the court’s conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence. [Citation.]’ (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 271.)” (*People v. Andra*, at pp. 640-641.)

In the present case, as relevant to appellant’s claim, the trial court stated that it found section 654 inapplicable because “the offenses were independent of and not merely incidental to each other,” “[t]he defendant entertains several criminal objectives” and the victims “were the subject of physical abuse and then threats as well as intimidation to dissuade a witness from testifying.”⁴ The evidence supports this finding.

Regarding the offenses against the children, the different nature of the offenses appellant committed—first inflicting actual physical injury and later obtaining a weapon for use in making verbal threats—supports the trial court’s conclusion that the offenses

⁴ The trial court also noted that there were three different victims. ~(RT 380)~ This fact triggered the “multiple victim” exception to section 654, under which a defendant who entertains a single objective during an indivisible course of conduct may be convicted and punished for each crime of violence against a different victim. (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1781.) This exception is not relevant to appellant’s argument, as he challenges only the sentences imposed on multiple counts involving a given victim.

were not incidental to each other and that appellant entertained different criminal intents. Moreover, both the children’s accounts and appellant’s own testimony describe at least two discrete phases within the course of appellant’s conduct: First, appellant physically abused the boys, then—after the grandfather took them into the bathroom to attend to Alvin’s injury and then into the bedroom—appellant made a decision to get the butcher’s knife from the kitchen, took it into the bedroom and made sure the boys saw it when he threatened their lives. This temporal separation, albeit short, and change in physical location clearly gave appellant an “opportunity to reflect and to renew his or her intent” before committing the later offenses, “thereby aggravating the violation of public security or policy already undertaken.” (*People v. Andra, supra*, 156 Cal.App.4th at p. 640; *People v. Clair* (2011) 197 Cal.App.4th 949, 960.)⁵

With respect to the offenses against Muey, appellant argues that the convictions of making criminal threats, false imprisonment and dissuading a witness all arose from the single objective of frightening Muey and punishing her for going out. The trial court was not required to accept this broadly defined objective. The evidence amply supports the conclusion that appellant entertained different intents and objectives in making the criminal threats and in attempting to dissuade Muey from reporting the offenses against her. Appellant’s argument that the dissuading-a-witness count arose from his objective of scaring and punishing Muey ignores the intent necessarily required for conviction of this offense—the intent to prevent Muey from making a report to the police. Appellant made his intent to dissuade Muey from reporting his offenses clear when he prevented her from using her cell phone; his threats to kill her with the shard of glass supported the

⁵ Appellant emphasizes the prosecutor’s statement, in argument to the jury, that appellant’s offenses against the children were “all one continuous course of conduct.” But those same remarks described the discrete episodes within the sequence, focusing on appellant’s infliction of physical injuries upon the children separately from the threats he made in the bedroom while holding the knife. The prosecutor pointed out that appellant deliberately went to get the knife with the intention of scaring the children after the children had been “taken to a place of safety” following the physical abuse.

jury's determination that he tried to prevent her from reporting his offenses by means of force or an express or implied threat of force or violence (§ 136.1, subd. (c)(1)). The trial court was entitled to view appellant's course of conduct—battering Muey, preventing her from using her phone, and threatening to kill her while preventing her from leaving the room—as reflecting separate, albeit simultaneous, intents: The intent to prevent a report of his offenses underlying the dissuading a witness conviction and the independent intent to hurt, punish or scare her underlying the criminal threat conviction. Appellant's anger at Muey was overwhelmingly established by the evidence relating to his offenses against the children, and his conduct toward her in their bedroom was clearly motivated by that anger independent of any concern with police reports.

We agree with appellant, however, that he could not be separately punished for the false imprisonment conviction. The basis of this conviction was appellant's standing in front of the door and threatening to kill Muey while holding a glass shard in his hand. This conduct could plausibly be viewed as based on an intent to prevent her from contacting the police, the same objective underlying the dissuading a witness count, or as further expression of this anger and intent to scare or punish her, the objective underlying the criminal threat count. Although the false imprisonment conviction required evidence of conduct not necessary for the other two convictions (that appellant intentionally restrained or confined Muey), the conduct that supported this conviction was the same act as that supporting the criminal threat conviction—appellant's threatening to kill Muey while holding a glass shard in his hand. Section 654 precludes separate punishment for convictions arising out of a single act, even when the act is committed with multiple intents or objectives. (*People v. Mesa* (2012) 54 Cal.4th 191, 198-200.) Accordingly, the trial court should have stayed sentence on the false imprisonment conviction.

DISPOSITION

The abstract of judgment shall be modified to reflect a stay of sentence on count 7, false imprisonment. In all other respects, the judgment is affirmed.

Kline, P.J.

We concur:

Haerle, J.

Lambden, J.