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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS A. HERNANDEZ,

Defendant and Appellant.

A136109

(Alameda County
Super. Ct. No. CH48661)

Luis A. Hernandez stalked and brutally killed the woman with whom he had lived for almost 18 years and had two children. A jury convicted him of first-degree murder and stalking. In connection with the murder conviction, the jury found true a special-circumstance allegation of killing by means of lying in wait and an enhancement allegation of using a deadly weapon. In connection with the stalking conviction, the jury found true the enhancement allegations of using a deadly weapon and of inflicting great bodily injury under circumstances involving domestic violence.¹ The trial court sentenced Hernandez to life imprisonment without the possibility of parole for the murder conviction, and imposed a consecutive one-year sentence for the enhancement of using a deadly weapon. It stayed sentencing for the stalking conviction and related enhancements.

¹ The statutes under which Hernandez was convicted were Penal Code section 187, subdivision (a) [first-degree murder]; section 646.9, subdivision (b) [stalking]; section 190.2, subdivision (a)(15) [killing by means of lying in wait]; section 12022, subdivision (b)(1) [using a deadly weapon]; and section 12022.7, subdivision (e) [inflicting great bodily injury under circumstances involving domestic violence].

On appeal, Hernandez argues that his murder conviction must be reversed because (1) he was prevented from introducing a statement he allegedly made after the killing that the victim had “cheated” on him; (2) two prior uncharged acts of domestic violence were allowed into evidence; and (3) the cumulative effect of these errors denied him due process. We reject each claim and affirm.

I. FACTS

Hernandez and Rose Marie Goulart (Rose) were in a relationship for almost 18 years. They had two children together: Luis Hernandez, Jr. (Luisito), who was 16 years old when his mother was killed, and Jeanette Hernandez (Jeanette), who was 15 years old when her mother was killed. For most of the seven to eight years before Rose’s death, the family lived in a house owned by Hernandez and Rose on Lorena Avenue in Castro Valley.

A. *Hernandez and Rose’s Relationship.*

Throughout their relationship, Hernandez controlled Rose. He did not allow her mother or sister to visit even though they lived nearby, and he did not let Rose call them. He also restricted her contact with a child Rose had from a previous relationship, Filipe, whom Rose would only call when Hernandez was not around. Hernandez refused to let Rose go out with her friends or visit them in their homes. She had to ask his permission to leave the house or buy things. If she cooked something he did not like, he would throw it in the garbage or on the ground.

Hernandez also verbally and physically abused Rose. He called her “whore” and “bitch.” He hit her regularly, leaving large bruises on her arms and legs. Rose documented the bruises with photographs, which she showed to her son and her coworkers at Bay Valley Medical Group in Hayward. Rose’s coworker and close friend, Antonia Diaz (Diaz), would help her at work to treat the bruises.

One night in the mid-1990s, Luisito saw Rose in the living room of the family’s previous home, bound to a chair and with duct tape covering her mouth. She appeared to be “tired and worn out.” Luisito tried to free her, but Hernandez discovered him and sent

him to bed. Luisito again saw his mother bound to a chair on another night around this time. She was naked and seemed “out of it,” and the chair was in a bathtub full of ice up to her legs. Hernandez was in bed across the hall, and he had tied a rope between the bathroom door and his wrist so he would detect any attempt to open the door.

In 2003, Hernandez stopped working due to a work-related back injury. He began taking several pain medications and Prozac daily, and drank alcohol almost daily. Two years later, Rose was diagnosed with breast cancer. She had surgery and underwent radiation. After the diagnosis, Hernandez stopped physically abusing Rose, but he continued to abuse her verbally.

B. Rose Leaves for the First Time.

On Valentine’s Day 2007, Rose gave Hernandez candy and a card. Hernandez burned the candy and the card on the stove because she had come home late. The next week, Hernandez became angry with Luisito over his poor grades and ordered him to sleep in the garage. These events convinced Rose to leave, and she took Luisito and Jeanette to a hotel, where they all stayed for a few days. They then moved to Rose’s mother’s house in Union City. Four days after leaving, Rose filed a request for a restraining order, which was granted.

Hernandez promised he would change, and Rose and the children returned home several weeks later. The restraining order was dropped at Rose’s request, but Hernandez soon reverted to being controlling and verbally abusive. He frequently called Rose at work to make sure she was there, to the point that Rose’s supervisor, Michelle Casey, had to caution Rose about her personal telephone use.

C. *Rose Leaves for the Second Time.*

Jeanette's quinceañera party was held in late October 2008. The party required a lot of planning over several months. Hernandez was very angry about the party, particularly its cost. He was drinking a lot during this time, and his abusiveness escalated. On one occasion, Rose brought doughnuts home to share with several visitors, including dancers practicing for the quinceañera. In front of everyone, Hernandez jumped on the doughnuts and crushed them because Rose had not asked his permission to buy them. He also cut up her ATM card. The incident made Rose "really sad and really mad."

On another occasion, Rose was with Diaz in a checkout line at Costco. Hernandez called Rose to tell her to return to the house immediately because the quinceañera photographer had arrived for a meeting. Rose became very scared and insisted on leaving the store instantly, even though it meant abandoning a full shopping cart. When Rose and Diaz got to the house, Hernandez was furious. On another occasion before the quinceañera, Hernandez threw a wrench at Rose in front of the children, Diaz, and Diaz's boyfriend during a fight Hernandez and Rose were having about hiring a limousine.

Around this time, Rose began dating another man and formed a plan to leave Hernandez. Hernandez became suspicious. He told Diaz he knew something was going on, and she responded by being dismissive and raising her middle finger. Hernandez then bit her finger, and she became scared. He told Diaz that if she was in the wrong place at the wrong time, she, like Rose, would "get what was coming."

Rose became more resolved to leave Hernandez, although she was nervous about it. In December 2008, she rented an apartment on Somerset Avenue, about a quarter mile from the Lorena Avenue house, and moved there with the children. This location allowed the children to be near their friends and remain in their high school. Rose did not give Hernandez the apartment's address. Rose also applied for a restraining order (a "no-HAM . . . [¶] . . . [harass, annoy or molest order]") with the help of her attorney, David Hillis, which the superior court granted. On December 23, she and Hernandez appeared in court for a hearing. The court kept the no-HAM order in place and ordered no contact

between Hernandez and Rose except as necessary to facilitate Hernandez's visitation with the children.

As a result of the restraining order, Rose's employer distributed Hernandez's photograph to employees and the security guard. Rose's coworkers were familiar with Hernandez's vehicle, a white Ford truck, and would recognize it. The suite in which Rose worked was kept locked, and peepholes were installed so the employees could see who was at the door. Employees were told to call 911 if they saw Hernandez. The security guard was supposed to walk Rose to and from her car, although Rose became lax about following this precaution.

Rose was afraid that Hernandez would discover the location of the Somerset Avenue apartment. She told Luisito that when he returned from school, he should take different paths home or get a ride with a friend. She also told Luisito's close friend, Daniel Alvarez (Winky), not to tell anyone about the apartment's location. Rose did not linger outside the apartment. She always parked her car in the garage and kept the curtains drawn. Her friends had to check with her before visiting.

A few months after Rose and the children moved out, Luisito ran into Hernandez on the street. Luisito then began to stay part-time at the Lorena Avenue house with Hernandez. Hernandez repeatedly asked Luisito questions about Rose, such as where she lived, whether she had a boyfriend, and what she did after work. Luisito did not answer these questions because he knew his mother did not want Hernandez to have this information.

Rose told Luisito not to give her cellular phone number to Hernandez, but Hernandez discovered it by examining Luisito's phone. Hernandez called Rose often and left messages asking her to come back to him. He also called her at work several times a week. One coworker, Monica Aquino-Feder, heard him "ranting" on the phone. Rose let her supervisor, Casey, listen to a voicemail in which Hernandez said he was looking for Rose and was going to find out where she lived.

Hernandez also called Diaz "constantly" at work and at home, to the point that Diaz changed her cellular phone number. He would ask where Rose lived, what her

cellular phone number was, and what she was doing. Like Rose, Diaz told him that she had gotten in trouble for taking personal calls to get him to stop calling her at work.

About three months after Rose left, Hernandez found the Somerset Avenue apartment when he was riding his bicycle around the neighborhood and recognized some cars parked in front of the apartment as belonging to Rose's friend and aunt. He rang the doorbell, but no one answered. Hernandez showed up a few more times, but Rose refused to let him in.

After she left Hernandez, Rose started documenting on Post-It notes things he told her. One note said, " 'I've had it with you, bitch. Fuck you, bitch and watch your back.' " Another said, " 'I'm going to make your life miserable and lots of drama. So if you are seeing someone, that person will dump you and will tell you to go hitchhike. I'm going to leave you. You have too many problems.' " Another documented how Hernandez begged Rose to come back to him, saying, " 'You belong to me.' " Rose informed her attorney, Hillis, of some of Hernandez's communications with her. Hillis believed that these communications violated the restraining order. Rose told Hillis she was worried Hernandez would hurt or kill her.

D. The Week Before Rose's Murder.

In the week before Hernandez killed Rose, Luisito noticed that his father seemed angrier. Rose changed her number again, but Hernandez almost immediately discovered the new one. Luisito overheard a conversation between his parents in which Hernandez told Rose, " 'If you take away my life, I'll take away yours.' " Luisito also heard Hernandez begging Rose to come back, saying, " 'You're my girl.' " Rose told Hernandez that she had a boyfriend and was not going to return to Hernandez.

Two nights before the murder, Rose was at a class she was taking to obtain a general equivalency diploma (GED) class. Luisito became concerned when he went to the Lorena Avenue house to meet his father as arranged and found that Hernandez was not there. Luisito texted Rose to tell her that he did not know where Hernandez was and to ask her to have someone walk her to her car.

Hernandez eventually returned to the Lorena Avenue house that night, and Luisito overheard a conversation between his parents in which Rose asked Hernandez for \$150,000 to settle ownership of the house. Hernandez told her she had better accept his offer of \$10,000, which her family could use for her funeral.

The day before she died, Rose received flowers from Hernandez at work. In the accompanying note, Hernandez wrote that he and Rose had been through some rough times, but that he wanted a better future with her. He apologized for the incidents involving the doughnuts and the ATM card, and wished her happy Mother's Day, happy birthday, and happy Valentine's Day. Rose was disgusted by Hernandez's gesture and very scared.

Rose emailed Hillis to tell him that Hernandez had discovered her cellular phone number, which she wanted Hillis to know in case anything happened to her. Hillis responded that Hernandez was "out of control." Hillis suggested that he and Rose meet to discuss their options, such as seeking a more comprehensive restraining order. Rose responded that she did not know what Hernandez was capable of and felt her safety was at stake. She and Hillis arranged to meet the next day during Rose's lunch hour.

Later that afternoon, Rose, Luisito, Jeanette, and Winky drove to Safeway together. They saw Hernandez on a pay telephone outside Safeway, and Rose's cellular phone rang with a call from him. Winky answered. Winky told Hernandez that he was Rose's boyfriend, and said, "[S]top calling or [I'll] kick your ass." The conversation continued, and Hernandez asked, "Is this Winky?" Winky said "no."

About 15 minutes after hanging up the phone, Winky was walking home and was about a half block away from the Somerset Avenue apartment. Hernandez drove by in the white truck and offered Winky a ride. Hernandez twice asked if it had been Winky on the phone, and Winky denied it. Hernandez seemed frustrated.

Around 7:00 p.m. that night, Hernandez drove the white truck to the home of his aunt, Alicia Alvino Diaz (Alvino Diaz). He seemed restless. He asked to borrow her car, a Honda, to go to the store, saying he could not drive the truck because there were other cars parked behind it. He told her he would come back soon, but he never returned.

Alvino Diaz called him several times over the next few hours and then again the next morning. He never picked up the phone or returned her messages.

Hernandez showed up at the Somerset Avenue apartment later that night. He talked to Jeanette and Luisito, and asked Luisito if he wanted to go to the Lorena Avenue house. Hernandez and Luisito then drove to McDonald's in the other family car, a minivan. This was unusual because Hernandez usually drove the white truck, and the minivan did not run well. Luisito asked where the truck was, and Hernandez said it was being repaired. On the way there, Hernandez told Luisito he was very angry at Rose and “ ‘felt like killing her for all of the bad things that she did.’ ” Luisito did not think he was joking.

E. The Day of Rose's Murder.

That morning Hernandez woke up Luisito around 6:00 a.m. and said he was going to the store. It was unusual for Hernandez to wake Luisito up before school to tell him what he was doing or for Hernandez to go to the store so early. Luisito went back to sleep. He was supposed to be at school at 7:15, but he overslept and did not wake up again until 8:00 a.m. Hernandez was not at the house, and Luisito left for school. About 20 minutes after Luisito got there, Jeanette called him and told him that Rose was in the hospital. When he got to the hospital, he learned that his mother was dead.

Rose was due at work at 8:30 a.m. that morning. Shortly before 7:30 a.m., a coworker, Julia Allen, drove into their building's parking lot. Allen saw a Honda parked against the building. She noticed the car because it was strange for a vehicle to be there that early in the morning, and a trash bag was hanging out of the trunk and partially blocking the license plate.

Surveillance footage showed that the Honda's driver continued to move the car and park it in different spots over the next several minutes. At about 8:15 a.m., Dorrie Reyes, who worked in the same building as Rose, was walking in the parking lot when the Honda passed by her. Reyes noticed the car because it approached her from a direction different from the one people normally drove in the lot. Reyes did not see the driver's face, but she noticed that the driver was wearing gloves and a hat. She later

identified the gloves as those that the police found at the scene of Rose's murder. She saw the Honda pull into a parking stall next to a dumpster. Before she entered the building, she saw Rose drive by, park, and open her car door. Reyes waved at Rose, and Reyes then went into the building.

Many offices at Bay Valley Medical Group, including the office of Rose's supervisor, Casey, had large windows and looked directly onto the parking lot. Casey saw the Honda pull up quickly behind Rose's car and saw Hernandez get out of it. Hernandez wore a jacket, camouflage pants, a hat, and gloves. As soon as she recognized him, Casey called 911.

As Rose got out of her car, Hernandez walked quickly toward her and then lunged at her. He grabbed Rose around the neck, and started stabbing her with a sharpened screwdriver. Rose tried to get away, but Hernandez held on to her. Several employees inside the building began to scream.

Allen, Diaz, and Aquino-Feder ran outside. The security guard was also outside. Rose called Diaz's name and begged for help. Diaz had not seen the weapon and thought Hernandez was punching Rose. Diaz approached Hernandez, yelling at him to stop. He did not respond to her, and he looked like he was foaming at the mouth. Aquino-Feder grabbed Hernandez's shirt and begged him to stop, but he did not react. Allen picked up Rose's heavy purse and began hitting Hernandez with it. Hernandez did not flinch.

Rose fell down, and Hernandez continued stabbing her. He twisted the screwdriver in her chest and abdomen in a circle, like he was digging inside her or trying to gut her. He then kicked her in the head three times and moved away from her. Allen put her fingers to Rose's neck and felt a pulse. A few seconds later, Rose's eyes flew open, and the pulse disappeared. Allen overheard Hernandez say, " 'I told you I would do it.' " Diaz took off her shoes, ready to chase him in case he tried to run away, and she began hitting him with one of them and telling him to wait. Aquino-Feder went back into the building and called 911 with Reyes.

Casey's 911 call came in at 8:18 a.m., and two police units arrived within a few minutes. The police got Hernandez down on the ground and handcuffed him. Diaz

continued screaming at him, but he never responded or showed any emotion. An officer led Hernandez to the patrol car, and he was able to walk unaided and without any problems. He was quiet and cooperative throughout his arrest. The officers observed no signs of intoxication or drug use, and he did not appear to be in shock. After Hernandez got into the patrol car, the women and security guard began hitting it, crying and screaming.

An officer transported Hernandez to the police station. Again, Hernandez was cooperative. He did not smell like alcohol and did not have any symptoms of intoxication. He did not appear to be in shock. During his jail intake, Hernandez disclosed that he had taken his normal dosage of pills that morning, but did not mention taking any other drugs or drinking alcohol. He had no problems communicating and did not appear to be impaired.

At the scene, the police found a screwdriver sharpened to a point embedded in Rose's chest. Hernandez's initials were engraved on the screwdriver's handle. The Honda contained another sharpened screwdriver, a large trash bag, sunglasses, a beanie hat, and a pair of gloves. Alvino Diaz testified that these things did not belong to her. Luisito testified that the screwdrivers belonged to Hernandez, although they were not sharpened the last time Luisito saw them.

At Rose's autopsy, the screwdriver with Hernandez's initials on it was still sticking out of her chest. She had been stabbed 24 times in her neck, back, hands, and chest. The outside of one of the wounds was scraped by the handle of the screwdriver because Hernandez had driven the screwdriver in so deeply. At least five of the wounds were potentially fatal, including injuries to her jugular vein, kidney, lung, and heart. She also had two bruises on her scalp, which were consistent with her having been kicked in the head.

F. The Defense Case.

Hernandez was the only defense witness. He admitted that he had occasionally been verbally abusive to Rose, but he denied that he hit her. He claimed that the chair and bathtub incidents never happened and that he never threw a wrench at her. He also claimed that he had never tried to prevent Rose from maintaining contact with her other family members.

Hernandez testified that he “went crazy” when Rose left the second time. He was angry she had lied to him by not telling him she planned to leave. He felt “diminished” because she had a boyfriend and because she changed her cellular phone number in the days leading up to the murder. But he denied threatening her, and said he was unaware of the no-HAM order, despite acknowledging that he was in court for the hearing about it.

Hernandez admitted sending flowers to Rose the day before she died but denied writing the note accompanying them. He testified that he had called Rose from Safeway that afternoon to find out what food to buy for Luisito and to see if she had received the flowers. He denied that he knew it was Winky on the phone or that he gave Winky a ride later that day. Hernandez contended that he borrowed Alvin Diaz’s car so that he could follow Rose without her recognizing him, discover who her boyfriend was, and figure out whether the boyfriend wanted to kill him. Hernandez testified that he forgot about his plan when Luisito came to the Lorena Avenue house later that night.

Luisito went to sleep around midnight. Hernandez claimed to have then ingested 20 beers, 10 morphine tablets, 60 Prozac pills, and seven Xanax pills in an attempt to kill himself. He went to bed at about 1:00 a.m. but could not sleep. He denied making a phone call that Rose had received from Luisito’s phone at 4:44 a.m. The morning of the murder, he got up, told his son he was going to pick up a day laborer to help him work on the house, and left in the Honda. Hernandez remembered bringing the gloves and screwdrivers, which he claimed he needed to work on the brakes of his aunt’s car. He testified that the screwdrivers were already sharpened when he bought them at a garage sale.

Hernandez claimed that he drove to Hayward to pick up a day laborer from a 7-Eleven store near Rose's workplace. He testified that he did not have any problems driving from Castro Valley to Hayward, despite all of the beer and pills he had ingested. After waiting for the day laborer for half an hour, Hernandez left. He claimed that as he was about to turn into a gas station in Hayward, he saw Rose's car behind him. Instead of stopping to get gas, he drove to Rose's workplace while Rose was behind him. He testified that he wanted to talk with her about their relationship.

Hernandez remembered parking in front of Rose's car, but he testified that he could not remember Rose getting out of her car or anything else over the next few minutes. He did not remember stabbing her, and "didn't know what [he] was doing" because of the beer and pills he had had the previous night. He remembered the police arriving.

II. DISCUSSION

A. *Exclusion of Hernandez's Statement, "Well, She Cheated on Me."*

Hernandez contends that the trial court erred by excluding the testimony of two officers who heard Hernandez say at the scene, "Well, she cheated on me." The prosecution had argued in a motion in limine that the statement was hearsay and inadmissible as a spontaneous statement under Evidence Code section 1240.² Hernandez opposed the motion on the basis that the spontaneous-statement exception applied. The court ruled that the statement was inadmissible as a spontaneous statement through the officers' testimony, but that the statement probably would be admissible through Hernandez's own testimony.

The People argue that Hernandez has waived his argument about the admissibility of the statement because he never sought to introduce it through his own testimony. We disagree. Hernandez could not testify about the statement because any such testimony would have been inconsistent with his defense that he was too intoxicated during the

² All further statutory references are to the Evidence Code.

murder and its immediate aftermath to remember anything. His inability to testify about the statement was not a waiver of his argument that the statement should have been allowed through the officers' testimony.

Even though we conclude that Hernandez did not waive his ability to argue that the statement was admissible through the officers' testimony, we find that he did waive the specific arguments he now makes for the first time about the statement's admissibility. Hernandez abandons the argument he made below that the statement was admissible as a spontaneous statement under section 1240. Instead, he now argues that the statement was admissible for two reasons. First, he contends it was nonhearsay because it was not offered for the truth of the matter asserted. (§ 1200, subd. (a).) Second, he argues that it was admissible under section 356, which permits the admission of evidence "necessary" to understand "part of an act, declaration, conversation, or writing" that has already been introduced (in this case, his statement at the scene overheard by Allen, "I told you I would do this"). But Hernandez never argued these points below,³ and we thus conclude that he has waived them. (*People v. Kaurish* (1990) 52 Cal.3d 648, 704; *People v. Rogers* (1978) 21 Cal.3d 542, 547-548.)

Furthermore, even if there were an error in disallowing the officers' testimony about the statement, the error was manifestly harmless. Hernandez argues that the statement would have helped establish that he killed Rose because he knew she had a boyfriend and became enraged by his calls with her and Winky the night before the murder.⁴ As a result, he argues that the jury could have convicted him of second-degree murder or voluntary manslaughter. But there was no question that Hernandez knew about Rose's boyfriend and was angry about the calls. Other witnesses confirmed

³ While his opposition to the motion in limine mentioned that the statement would be used to show his state of mind, not the truth of the matter, his counsel characterized that distinction as "[t]he exact purpose of Evidence Code section 1240" (which allows the introduction of spontaneous statements as an exception to the hearsay rule).

⁴ Hernandez testified that he and Rose discussed settling ownership of the house the night before the murder, not two nights before.

Hernandez's belief that Rose was seeing someone else. Hernandez himself testified that he was upset and felt "diminished" by the fact that Rose had a boyfriend. He also testified that he was very upset by the call with Winky, whom he believed was Rose's boyfriend, and by the subsequent call with Rose in which she repeatedly referred to her boyfriend. There was ample evidence to permit the jury to conclude that Hernandez's rage about Rose's boyfriend was part of his motive for killing her. The officers' statements would have added little to the evidence already introduced on this point.

Nor did the exclusion of the statement harm Hernandez's defense by precluding evidence that he said something else at the scene besides "I told you I would do it." The excluded statement would not have undermined the prosecution's evidence and theory that Hernandez was calm at the scene and felt no remorse. The other crime-scene witnesses testified that Hernandez was impassive during and after the murder, even when they were hitting him and screaming at him. The statement would have neither undermined the impression that Hernandez was composed nor bolstered the defense's contention that he was in shock.

The case against Hernandez was exceptionally strong. There was no dispute that he killed Rose by stabbing her repeatedly and viciously, and extensive evidence was presented that the murder was premeditated. This evidence included Hernandez's telling Luisito he wanted to kill Rose; threatening Rose repeatedly and with witnesses present; borrowing Alvino Diaz's car to drive to Rose's workplace instead of using his recognizable white truck; sharpening screwdrivers into weapons and carrying them with him; wearing clothing to disguise himself on the morning of the murder; waiting in the parking lot for Rose to arrive; blocking Rose's car after she parked to prevent her escape; and killing Rose quickly, calmly, and brutally. In contrast, Hernandez's defense was exceedingly weak and much of his testimony was unbelievable. Accordingly, we have no difficulty concluding that any purported constitutional error was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24) and that it was not reasonably probable that Hernandez would have received a more favorable verdict if the

court had admitted the statement through the officers' testimony. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

B. Admission of Evidence of Prior Acts of Domestic Violence.

Hernandez argues that the trial court erred by admitting evidence of the bathtub and chair incidents. While he does not contest the admissibility of the incidents under sections 1101 and 1109, he argues that the court should have nonetheless excluded them under section 352 because their prejudicial effect substantially outweighed their probative value.⁵

We review the trial court's determination under section 352 for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) Section 352 provides that evidence may be excluded "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The "prejudice" section 352 refers to "is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Rather, it " 'applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.' " (*Ibid.*)

In this case, the trial court weighed the evidence's prejudicial effect against its probative value as required. (See *People v. Karis, supra*, 46 Cal.3d at p. 637.) While the court found that the incidents were not similar to the charged crimes, it concluded that the evidence was "extremely probative" to establish Hernandez's disposition for abusing Rose, as well as his motive, intent, and mental state. Luisito's testimony at the

⁵ Section 1109, subdivision (e) makes evidence of acts occurring more than ten years before the charged offense inadmissible unless admission "is in the interest of justice," which requires "some greater justification for admissibility" than section 352 does. (*People v. Johnson* (2010) 185 Cal.App.4th 520, 539.) Hernandez does not argue for application of the "interest of justice" standard, and we therefore do not address its effect in this case.

preliminary hearing about the incidents was sufficiently reliable and specific, and there was no danger of undue consumption of time or confusion of the issues.

We agree with the trial court that the evidence was probative. Section 1109 “reflects the legislative judgment that in domestic violence cases . . . similar prior offenses are ‘uniquely probative’ of guilt in a later accusation. [Citations.] Indeed, proponents of the bill that became section 1109 argued for admissibility of such evidence because of the ‘typically repetitive nature’ of domestic violence.” (*People v. Johnson, supra*, 185 Cal.App.4th at p. 532.) Hernandez’s history of extreme violence toward Rose was strong evidence of his propensity for domestic violence against her. It was also probative of his intent and mind state in stalking and killing her.

Contrary to Hernandez’s argument, the fact the incidents happened over 10 years before the murder did not extinguish their probative value. The concern about admitting remote acts is that “[i]n theory, a substantial gap between the prior offenses and the charged offenses means that it is less likely that the defendant had the propensity to commit the charged offenses.” (*People v. Branch* (2001) 91 Cal.App.4th 274, 285. “This is especially true if the defendant has led a substantially blameless life in the interim.” (*People v. Johnson, supra*, 185 Cal.App.4th at p. 534.) But here there was ample evidence that the two incidents were part of a long pattern of domestic violence Hernandez inflicted on Rose. Hernandez does not even argue that the incidents’ remoteness means they were not probative of his propensity to commit domestic violence, but only that they were not probative of his intent and mental state at the time of the crime.

We also reject Hernandez’s argument that the two incidents and the charged crimes were not sufficiently similar. Again, Hernandez argues only that the two incidents are not probative of his motive or intent to kill Rose, but he is silent about their value in reinforcing his propensity to engage in domestic violence. The prior incidents and the charged crimes show Hernandez’s need to control and abuse through fear, pain, and humiliation. This similarity is sufficient to make the prior acts probative of his intent. (See *People v. Abilez* (2007) 41 Cal.4th 472, 500 [lesser level of similarity between prior

acts and charged crimes required for prior acts to be probative of intent, as opposed to probative of other issues like identity].)

The evidence of the two prior acts was also not cumulative. We agree with Hernandez that there was “evidence of other numerous acts of physical and mental abuse inflicted upon [Rose] by [him].” Still, these two acts were especially probative because they showed the depth of Hernandez’s desire to control and hurt Rose. In addition, intent was the main contested issue at trial, and the prosecution’s evidence of intent was circumstantial. While that circumstantial evidence was strong, we cannot say that it “so conclusively” established intent that the evidence of the prior acts was overly cumulative. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1150.)

We disagree with Hernandez that there was a risk the jury would have been tempted to convict him in order to punish him for the prior acts. It was uncontested that Hernandez killed Rose by stabbing her repeatedly and viciously. There was no reasonable likelihood that the jury would convict him because it believed he deserved to be punished for tying her up years before, but not for stalking her and stabbing her to death. This is especially true given the trial court’s instruction that a finding by the jury that Hernandez committed the prior acts by a preponderance of the evidence would be insufficient for the jury to convict him. We presume the jury followed this instruction. (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1277.)

Finally, we reject Hernandez’s contention that the evidence of the prior acts should have been excluded because of its “inflammatory nature.” (See *People v. Johnson, supra*, 185 Cal.App.4th at p. 534, fn. 11 [courts’ focus when evaluating prejudice is whether past act is “ ‘more inflammatory’ ” than charged offense].) We are at a loss to understand how the prior incidents, as sadistic as they were, could possibly be considered more inflammatory than the horrific manner by which Hernandez murdered Rose. Hernandez offers no other reason why the evidence of his prior acts was unduly prejudicial, and we see none. The trial court did not abuse its discretion by admitting this evidence.

Finally, as discussed above, the case against Hernandez was extremely strong, and his defense was extremely weak. Any purported constitutional error in the admission of the prior acts was harmless. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

C. *Cumulative Error.*

Hernandez contends that the cumulative effect of the two errors he identifies requires reversal of his conviction, even if neither of the errors individually requires reversal. For the reasons discussed above, we find no error and no cumulative prejudice.

III.
DISPOSITION

The judgment is affirmed.

Humes, J.

We concur:

Reardon, Acting P.J.

Rivera, J.