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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.

CORNELIUS MARTENE MCCLENDON,

Defendant and Appellant.

A138039

(Contra Costa County
Super. Ct. No. 51213735)

Cornelius Martene McClendon appeals from convictions of forcible rape, forcible oral copulation, and inflicting corporal injury to a cohabitant. He contends the trial court erred in excluding evidence from the victim's medical records, thereby violating his constitutional right to present a defense; abused its discretion by admitting evidence of prior uncharged incidents of domestic violence and improperly instructing the jury regarding its consideration of this evidence; and miscalculated the sentencing credits to which he is entitled. We conclude that appellant is entitled to one additional day of credit and otherwise affirm the judgment.

STATEMENT OF THE CASE

Appellant was charged by information filed on August 7, 2012, with two counts of forcible rape (Pen. Code, § 261, subd. (a)(2)); one count of forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)(A)); one count of attempted murder (Pen. Code, §§ 187, 664); one count of inflicting corporal injury to a cohabitant (Pen. Code, § 273.5, subd. (a)); and one count of unlawfully attempting to dissuade a witness from testifying (Pen. Code, § 136.1, subd. (a)(2).) It was alleged that in the commission of the sexual offenses

appellant engaged in tying and binding the victim (Pen. Code, § 667.61, subs. (b), (e)) and personally inflicted great bodily injury (Pen. Code, §§ 667.61, subd. (b)(e), 12022.8). It was further alleged that he personally inflicted great bodily injury in the commission of attempted murder and inflicting corporal injury to a cohabitant (Pen. Code, § 12022.7, subd. (a)), and that he had suffered a prior conviction for a serious felony. (Pen. Code, §§ 667, subd. (a)(1), (b)-(i), 1170.12.)

Appellant appeared at trial in propria persona. Trial began with in limine motions on November 2, 2012, and presentation of the case to the jury began on November 7; trial of the prior conviction allegation was bifurcated. On November 27, the jury found appellant guilty of the two counts of forcible rape, the count of forcible oral copulation and the count of inflicting corporal injury to a cohabitant. The jury found the tying and binding allegations true but the infliction of great bodily injury allegations not true. Appellant was found not guilty of attempted murder or dissuading a witness from testifying.

Appellant having waived jury trial on the prior conviction, the court found the allegation true on January 4, 2013. On February 1, 2013, appellant was sentenced to a prison term of 35 years to life. The court granted 240 days of actual credit and 36 days of conduct credit, for a total of 276 days credit for time served.

Appellant filed a timely notice of appeal on February 5, 2013.

STATEMENT OF FACTS

Jane Doe testified that she and appellant started dating in March 2010, and began living together in September 2010. In April 2011, Doe and appellant were arguing about appellant's drinking, Doe sitting at the kitchen table. Appellant pushed Doe's head, causing her to fall to the floor and hit her head, leaving a "knot" on her forehead. She got up and went to the bedroom to get her shoes; he followed, pleading with her not to leave, she argued with him, and he threw her on the bed, got on top of her and restrained her as she "mouth[ed] off at him." She screamed and at some point banged on the wall, hoping the neighbors would hear. Appellant eventually got off of her, or she got out from under him, and she left the apartment with him following her and pleading, "what are you

doing? This is crazy.” She screamed for the neighbors to call the police. Once she got to her car, appellant blocked her from closing the door. Eventually some neighbors came out and got appellant away from the door, and Doe drove around the corner and called the police.¹

Police Officer Tamra Roberts testified that on April 18, 2011, she responded to the report of a domestic dispute and spoke with appellant, who initially gave his name as Cornelius Matthew. He appeared to be under the influence of alcohol and, once at the jail, was found to have a blood alcohol concentration of 0.165. Doe did not appear to be under the influence of alcohol. She had a “goose-egg-size” lump on the right side of her forehead, her lower lip was swollen, she had a cut or abrasion on the inside of her lip and there was a red mark on her arm consistent with the size of a finger. She stated that she did not desire prosecution.

Doe testified that on May 25, 2011, while she and appellant were arguing, he grabbed her and threw her against the kitchen wall, pinning her by her arms. Doe’s six-year-old son, who had been playing, got scared and ran to hide in his room. She struggled to get away from appellant and screamed to her son to get out of the house, get the neighbors, and get the police, but he was too scared. Doe got free, grabbed her son and went out the front door as appellant tried to pull her and prevent her from leaving. A neighbor let her and her son in and called the police. The police took Doe’s statement and when they checked her house, appellant was gone.

Police Officer Scott Johnson testified that Doe was crying when he contacted her at her apartment. He saw a cup of spilled orange juice on the coffee table and, in the

¹ Appellant states that while Doe testified she was not intoxicated, she admitted on cross-examination that she “was bar hopping and was intoxicated as well.” At the page of the reporter’s transcript cited, appellant asked Doe, “Regarding your report on April 18th, 2011, it says in your report—you say that on St. Patrick’s Day 2011 that we went out to Walnut Creek, and I got very intoxicated; is that correct?” Doe answered “yes,” and appellant continued, “Why did you forget to mention that you got off work early and assisted [*sic*] on going to bar hop, and you were very intoxicated as well?” Doe replied, “I don’t know why I failed to mention that.” In 2011, St. Patrick’s Day fell on March 17; the domestic dispute at issue occurred on April 18.

kitchen, a picture that had been knocked off the wall and was on the floor in the area where Doe said appellant had slammed her against the wall. Doe did not want prosecution.

On July 10, 2011, Doe and appellant were arguing as they walked to Safeway through a park behind their apartment. She turned around to walk back home and he followed, still arguing. Doe testified that she was “pretty sure” she was aggravating him; she “might have been screaming at him, calling him a loser, saying leave me alone.” He grabbed her and pushed her down on the gravel at the side of the path and she put her hands out to break her fall, hitting her wrist and scraping her shoulder. He walked away. She got up and was trying to run away when he caught up with her and, as he approached, she swung her hands at him. He laughed and asked what she was doing and she said she was “sick of it” and “going to fight back.” She lay on the ground so appellant could not push her down and screamed for help. A neighbor called the police and came to help her, by which time appellant was gone. Doe spoke with the police and returned to her apartment when they said it was safe to do so. The next day, Doe went to Kaiser and was found to have a fractured elbow. Doe acknowledged on cross-examination that she bit appellant in his face during the argument.

Police Sergeant Richard McEachin and Officer Richard Enea responded to a report of a woman screaming in Westwood Park and were approached by a man who said the woman was in his apartment. As they followed the man, McEachin saw appellant in the apartment parking lot, looking “a little agitated.” At the apartment, McEachin took a statement from Doe. She had abrasions on her left shoulder and arm and a swollen left wrist, and it appeared she had been drinking alcohol. She did not want prosecution. Both officers testified that appellant appeared to be intoxicated, and had a scratch on his face. Enea arrested appellant, who was very upset, saying he needed to get to work the next day, and thrashing around and yelling when he was put into a patrol car. At the jail, appellant was found to have a blood alcohol level of 0.142.

Doe testified that in April 2012, she went to pick appellant up from a job and found him “completely intoxicated.” He had a bottle of Hennessy that he said one of the

guys had given him for his birthday. Doe yelled at him, upset that he had been drinking at work, and because they had promised not to drink. As she was driving, she grabbed the bottle and threw it out the window. Appellant pushed her head toward the window, which was open. She swerved, then pulled over hard, took the keys from the ignition and got out of the car. He was swearing and calling her names; she “may have been” cussing back at him. She walked away, calling 911, then hung up because a California Highway Patrol officer, who happened to be driving past, stopped and asked if she needed help. She said appellant was drunk and they had a fight, but he was walking it off and she would drive home. Appellant did not have keys to the apartment at that time because she had not returned them after he threw them at her during a previous fight, so she knew he could not get into the apartment. Doe testified that she did not want to be hurt anymore but did not want to see appellant in trouble. As she was driving home, appellant called, continuing to scream at her, and she told him to leave her alone, “it’s over.” She told him not to come to the house and said she would call the police if he came there drunk. She also had his cell phone shut off, which was on a plan she paid for.

Forty-five minutes to an hour later, appellant was back in the house, still “pretty drunk,” and the argument resumed. She was asking him to leave and as she stood at the open front door, he “charged” toward her, grabbed her and threw her against the door, causing the doorknob to make a hole in the wall behind. She ran out of the house, got into her car and called the police. Seeing appellant leaving the apartment with her belongings, including her work laptop, she got out of the car and struggled with him over the laptop; he eventually let go and she returned with it to her car. The police arrived and arrested appellant, who had gone back into the apartment. This time, when the police asked if she wanted a restraining order and a “kick-out” order, she said yes.

Police Officer Tony Killion spoke with Doe outside the residence, then went inside and saw a hole in the wall behind the front door at doorknob height, consistent with Doe’s statement. Doe indicated she did not want prosecution.

Prior to returning to the house that day, appellant left two voicemail messages for Doe, recordings of which were played for the jury. The first said, “You’re going to stay

in this relationship no matter what because I will beat your ass.” In the second message, appellant threatened to break into Doe’s house.

In Doe’s mind, the April 2012 incident was the break-up of her relationship with appellant. Afterward, they still saw each other, were friends, and slept together, but they were not together as a couple and he did not move back into the apartment. Appellant tried to get back together, constantly saying he loved her and would do whatever he had to for them to be together, alternating with being angry.

On June 3, 2012, as far as Doe knew, appellant still did not have a key to the apartment. Doe went to sleep after midnight, alone in the apartment aside from her dog. The power had gone out shortly before she went to sleep. About 3:00 a.m., she woke up and found appellant standing in her bedroom doorway talking to her. Shocked, she asked how he got in and what he was doing there. He said he came to check on her because he was driving by and saw the power was out. She could tell he was drunk and told him to sleep on the couch. He left, then came back and tried to get into bed with her but she insisted he leave and he went to the couch, where she found him sleeping when she got up at 6:00 a.m. She tried to wake him up, telling him he had to leave. He said he would but began searching for something he could not leave without; she could not remember what it was. He wanted to talk about when they could get back together and she refused to have the discussion, saying she was dating other people. He had discovered a couple of weeks before that she was dating online and at some point said the real reason he was at the apartment was because he had heard she was “fucking some Dutch biker from Match.” It turned out Doe had told her cousin about meeting this person and the cousin’s ex-boyfriend had told appellant. She told appellant to leave and he started to cry, then when she did not act sympathetic, he got angry.

Appellant grabbed Doe and pushed her across the living room until she fell back and hit the floor, with him on top of her, strangling her with both hands on her neck. At first, Doe thought it was not that serious, as appellant had choked her before, but she then realized his grip was getting tighter and he was not letting go. She was losing her ability to breathe. Doe told appellant she loved him and they could be together, that he was not

a murderer, “anything I could think of to let him you know—realize what he’s doing so he would stop.” The pressure appellant was applying increased to the point where she could not speak and was losing strength. Doe felt her body shutting down and realized she was going to die. She managed to turn onto her stomach and get two gasps of air, but appellant turned her back over and continued strangling her. She felt herself urinate, could not see, felt her teeth biting down on her tongue, and lost consciousness.

Doe regained consciousness, her vision gradually returning, and saw appellant kissing her forehead “like you would be kissing a dead body.” He was ranting to himself, “oh, my God, what have ever I done, I’m going to jail.” She played dead. She heard him go into the kitchen, heard the sound of a knife coming out of the knife block, thought he was going to “butcher me to pieces,” and wondered if she could get to the door because she felt paralyzed. Then she heard what sounded like appellant trying to stab himself. Appellant returned and touched Doe’s face as though trying to see if she was alive. He realized she was not dead and told her to “quit playing,” got a power cord and tied her wrists in front of her body, got a red tank top and gagged her with it, carried her to the bedroom and put her on the bed.

Appellant started ranting, angry, then “sort of sad,” then angry again. He removed Doe’s pants and underwear, pushed her top up so her breasts were exposed, and removed his clothes. He engaged in oral sex with her for a minute or two, spit on his penis and had vaginal intercourse with her for about 10 minutes, then stopped and continued yelling at Doe. Appellant went to the kitchen, saw beers in the refrigerator and took this to mean she was having other men over, and started drinking them. Telling Doe she had taken everything away from him and was not going to get away with it, appellant started taking pictures of her, still naked, tied and gagged, with his cell phone camera, saying he was going to email them to her work and destroy her reputation. He then had vaginal intercourse with her for another 10 minutes or so. When he stopped, he continued talking and yelling, going through “cycles of sort of anger and sadness.”

Doe was crying, signaling to appellant to take the gag off and let her talk, and at points gasping for air because her neck was in severe pain from the strangling and she

was having moments of not being able to breathe well. Eventually, he let her pull the gag down and untied her hands. Trying to “win him over” and gain his sympathy and trust, Doe told him no one had to know, it was her fault, she should not have broken up with him. At her urging, he lay down with her. She told him she needed to go to the hospital and at first he resisted, then eventually agreed but said he was going with her. Wanting to convince him not to do so, she told him she would have to say she had been strangled and did not want him to get into trouble, but he insisted. Doe thought if she could get somewhere public, she might be able to signal to someone that she was with appellant against her will, so she told appellant they needed to return a “Rug Doctor” she had rented from Safeway. Once there, she was not able to communicate her distress to anyone because appellant was right next to her; also, she was confused, knowing she needed to get away from appellant but not sure she wanted to get him in trouble.

Appellant agreed to let Doe go to the hospital without him but demanded that Doe drive him to Pittsburgh, where he was staying at his mother’s house. He continued to alternate between anger, sadness and sympathy, but was angry at the point they arrived at the liquor store where he wanted to be dropped off. He grabbed her wrist and squeezed it in anger, still yelling at her. When he slammed the car door and stormed into the liquor store, she drove away.

Doe drove around, unsure whether to go to the police or the hospital, called her cousin, then went to Kaiser Hospital in Walnut Creek. The police were called and came to the hospital. Doe was then transferred to the county hospital in Martinez, where a SART (Sexual Assault Response Team) exam was performed. Doe testified that when she went to the hospital, a huge bruise the size of a baseball was forming on one of her arms, she had marks on her neck, her neck was sore, and it was hard to breathe.

Doe acknowledged on cross-examination that on May 11, irritated at appellant persisting in trying to have sex with her when she was no longer in the mood, she told him, “the only way you’re going to have sex with me is if you rape me.” He stopped as soon as she used the word “rape.” Doe had used this word once before, early in her

relationship with appellant, when they were very drunk, had sex, and Doe “said it in a joking manner just because I was close to a black-out state like oh, you raped me. . . .”

Police Officer Beth Long spoke with Doe in the emergency room at Kaiser. Doe had red marks about half an inch to an inch long on the left side of her neck, a bruise about the size of a baseball on her right bicep, a bruise on top of her right hand near the pinky and bite marks on her tongue. She was sad and crying, but was able to relate what had happened. Doe’s injuries were documented in photographs taken at the hospital on June 3 and at the police station the next day.

Ana Maree Rea performed the SART examination at the Contra Costa Regional Medical Center (CCRMC) on June 3 and testified that her physical findings were consistent with the history Doe provided. Doe related the events, including that while being choked, she felt her arms and legs getting weaker, her neck and throat were hurting, it was hard to breathe, and she was unable to stop biting her tongue, and she urinated on herself. Rae testified that biting on the tongue and loss of bladder control are consistent with someone being choked. During the examination, Rae noticed petechiae—“little red dots”—on Doe’s face from the top of her hairline, around her jawline, and across her upper cheek area, the result of small capillaries bursting due to pressure. In a case involving strangulation, the presence of petechiae indicate “a lot of pressure” was involved. Doe also had petechiae on her inner eyelids, which is usually the first place they appear. Rae acknowledged that petechiae can result from causes other than strangulation, such as severe vomiting or coughing attacks that prevent getting enough oxygen and cause pressure. They could “probably” result from someone “crying hysterically.”

Doe had an “opened injured area” on the right side of her tongue, bruising on the left side where her teeth would have been biting on it, and a bruise and abrasion on the inside of her lower lip. There was a bruise about two and a half by three and a half inches in diameter on her right upper arm. She had two reddened abraded areas on her neck, an injury not unusual in someone with a history of strangulation, resulting from the

assailant's fingers or the victim trying to claw the hands off the neck. She had bruises on her right hand near the little finger and at the wrist.

Doe was given ice chips to try to swallow because her throat hurt so badly; she did not want to drink water or ice chips because they had tried to have her swallow pudding at Kaiser and she knew it was going to hurt, and she grimaced when she tried to swallow. Her voice was raspy and, when asked, Doe said this was not her normal voice. A raspy voice and difficulty swallowing are consistent with being strangled. A CT scan of Doe's neck did not reveal anything abnormal, which was not inconsistent with a history of strangulation. Rae testified that it is possible for a person to have no damage to their trachea but have trouble swallowing after strangulation.

An external vaginal examination revealed a breakage of skin indicating recent trauma or penetration. No internal vaginal injury was found, which Rae testified did not indicate an absence of forced entry. Rae explained that "[n]ot everybody" sustains a vaginal injury during sex because the vagina is "made to adapt."

On the afternoon of June 3, at Doe's apartment, the police found a knife on the kitchen counter and, in the bedroom, a red and white shirt on the bed, an electrical cord on the floor, and a beer bottle in the trash can.

On June 4, Doe participated in a pretext phone call with appellant at the request of Detective Kevin Choe, a recording of which was played for the jury. Doe confronted appellant about his choking, tying, gagging, and raping her, and he did not deny any of these actions; he talked about his love for her and distress over not being with her and her being with other men, and said he was sorry and was not trying to kill her. When Doe asked why he choked her "until [she] was dead," appellant said he did not know. He said, "when I heard that you was messing with people and sleeping with people and shit like, I couldn't take it and I turned over the rocks and it hurt. And I – it – it drove me crazy, man. . . . [U]ntil you go through it yourself, like when you hear about it, like crimes of – crimes of passion and shit, like I – I w- I – I lived it. I – I never understood it until now, you know what I mean, I been – I done been a part of that shit." Appellant claimed he got a towel and washed her face, saying "you didn't come to on your own,

man,” said he gave Doe CPR and expressed surprise that she did not remember this. Appellant denied thinking that Doe was actually dead but acknowledged knowing it “went too far” and “wasn’t cool.” When she asked why he forced sex on her when she was tied up and gagged, he responded, “how do I answer that” and “what am I supposed to say to that?”

Appellant was interviewed by the police on June 7.² He initially denied hurting Doe or having any physical contact with her on the morning of June 3. After being confronted with the recording of the pretext phone call, appellant eventually stopped these denials and said he “kinda—blacked out” and did not remember all of what happened, “it’s a blur.” He said he and Doe had a heated argument about her cheating, then admitted choking Doe but said he was not going to kill her, just “lost it for a minute.” Appellant said he “blacked out” and did not remember whether he used both hands around her neck, had sex with her, or tied her wrists together, then said he had sex with Doe once and acknowledged tying her wrists because he wanted her to listen to him.

Doe received several letters from appellant while he was in custody. In one from the summer of 2013, appellant described being scared, said he was working with his lawyer and said, “But it looks bad. Only real way would be if you withdrew or decided not to testify. Other than that, it’s going to be fireworks soon. I can say my lawyer is going for the kill. He throwing out names that I don’t even know.”

Defense

Appellant testified that he and Doe had a lot of arguments. He stated that he worked 10- and 12-hour days, then cooked dinner, while she got off work at 4:00 p.m. but would come home at 6:00 or 8:00 p.m. with no explanation. He stressed that he had never punched or hit a woman, and that he was not prosecuted for any of the alleged prior domestic violence incidents—in his view, because Doe knew the fights were “equal or more or less her fault,” as he never started a fight.

² A recording of part of the interview was played for the jury; the recording of the balance of the interview was admitted into evidence and made available to the jury.

With respect to the incident on July 10, the day he and Doe were walking to Safeway, appellant said Doe started “attacking him” about the amount of money he was making and calling him “half a man” and “a piece of shit.” He “grabbed her like I always do to restrain her while she’s yelling in the park,” and she bit his cheek. He pushed her off, tried to grab her immediately but missed, and she fell. He protected her by telling the police the bite mark on his face was a scratch.

Appellant testified that after April 7, 2012, “it just got worse and worse, and I tried everything that I could to make this work. And it was no sign that the relationship wouldn’t work out.” On April 13, the day the emergency protective order was lifted, he came to Doe’s apartment and spent the night. Although he was “technically” living at his mother’s house, he spent many nights a week at Doe’s, continued to cook, clean and tutor Doe’s son, and “[e]verything was normal except I came over with a backpack.” But Doe would kick him out whenever she wanted to and he felt she was trying “to see exactly what I would put up with.” She told him she would be dating other people but not to worry about it, if he went back to school “and all these sort of things,” everything would be fine.

On June 3, appellant testified, he went to check on Doe because of the power going out in the area. She told him to sleep on the couch and he did; he never went back into her bedroom. In the morning, Doe told him to leave and they looked for his phone, which they eventually found in the bedroom. Appellant testified, “sex was initiated, was started barely,” then the power came on and he stopped. He went into the kitchen and instantly knew Doe had entertained someone because he saw wine and beer of a type neither he nor Doe drank, as well as burgers on the stove. He took a beer back to the bedroom and said, “oh, you had company,” she said no, and a heated argument ensued. He called her “everything under the sun,” saying “verbal things out of hurt and pain” that were “pretty harsh.” Appellant denied raping or attempting to murder Doe. He said he picked Doe’s panties up from the floor and, finding them damp, said, “you pissed yourself you were so drunk last night,” and this started another argument. Doe told him to get the Rug Doctor to return to Safeway, he put it in the car and they drove to Safeway

in silence. Appellant walked into the store with Doe, then left to smoke. According to appellant, Doe's story about wanting to get help at Safeway was fabricated: If she had wanted to get away from him, she could have run or cried for help when he went outside.

As Doe drove him to Pittsburg, appellant was angry and hurt, believing he had been doing everything he was supposed to do to "get her back all the way." He was again "laying into her" and Doe was crying. As he was about to get out of the car at the market, she suddenly started "bouncing her knee" and "clacking her teeth," saying her throat hurt and she was going to the hospital. He asked if she wanted him to go with her and she told him to "[j]ust get out." He slammed the door, then opened it and said he hated her. Appellant testified, "I knew she was up to something, but I didn't know what." Half an hour later, Doe's cousin's ex-boyfriend called appellant and told him Doe said he had broken into her house and raped her. Appellant texted Doe but got no response. The next day, he got a text saying "I'm okay." He took this to mean she had calmed down.

Discussing the recorded phone call, appellant testified, "When I called her, I knew I shouldn't of had that conversation, but I wanted to find out what—exactly what was she saying." He said that in the phone conversation he tried to "steer away from her pulling me into things that I shouldn't and weren't true while I tried to figure out what was going on, but I stepped in a couple of bear traps trying to progress." Appellant testified that "as hard as she tried to, I never said anything about raping her or trying to kill her. I tried to steer away from it, but I still said a little too much." The conversation was "fishy" and it was obvious "something was going on." When appellant went to talk to the police on June 7, he told them "exactly what was going on," but as soon as the officer said he had a recorded conversation, appellant knew he was in deep trouble.

Appellant testified on cross-examination that he felt pressured by the police during his interview. When he realized he had been caught in the phone call, he told the police he did not remember what happened because he was trying not to incriminate himself; he was lying when he said he blacked out. He denied ever tying Doe up, although he told the police he did. Appellant testified that in the phone conversation he went along with some of Doe's accusations in an attempt to get information from her, but he

acknowledged that he never offered this explanation to the police. Appellant also denied having ever pushed, kicked, or choked a woman. He acknowledged that on April 7, 2012, he “elbowed” Doe when they were going out the door at the same time, causing her to bump into the door and the doorknob to make a hole in the wall. He denied knocking Doe off the bar stool on April 18, 2011; he elbowed her after she lunged at him, and he did not cause her to hit her head. On July 10, he pushed Doe to the ground after she bit his face, but he did not intentionally injure her.

DISCUSSION

I.

Appellant contends the trial court erred in excluding evidence of Doe’s medical records that he maintains were admissible as business records under Evidence Code section 1271.³ He urges that the exclusion of this evidence violated his constitutional right to present a defense.

During his cross-examination of Doe, after confirming her testimony that when she went to Kaiser she reported having a “very sore throat from being strangled,” appellant sought to read and question her about portions of her medical records indicating that she “tested negative for a sore throat in all of her reports, showed no signs of pain to her throat.” The prosecutor raised a hearsay objection, stating that appellant would be “more or less testifying on the part of the doctor. We don’t know in what phrase those questions were asked or answers were given, and because of that, she can’t possibly testify to what the doctors wrote down in the notes.” When the prosecutor indicated there were no plans to put the medical records into evidence, the court ruled that the statements appellant wished to read were hearsay and told appellant he could not refer to the records.

Later, appellant asked whether he would be able to present medical records in his defense. Appellant wanted to point out a reference in the Kaiser records to “no

³ Further statutory references will be to the Evidence Code unless otherwise specified.

hoarseness.”⁴ He also wanted to use pages from the CCRMC records that “say negative with everything. . . . I wanted to read the results, negative for the CT scans and everything. They came back with nothing.”⁵ The court asked if there was any reason the records could not be admitted and the prosecutor replied, “Other than the fact that they’re kind of unintelligible evidence without someone explaining their significance; just allow the jury to speculate. [¶] I don’t know if anybody knows the significance of a negative CT scan.” Appellant argued, “A negative—it’s not rocket science. CT scan is for the neck and the neck which has to deal with strangulation and everything was fine.” The prosecutor agreed that the results of the CT scan were admissible over a hearsay objection because the medical records were produced pursuant to a subpoena, but argued that the jury would not be able to understand the significance of the results without medical testimony and would “leap to conclusions” about their meaning, and that appellant was not entitled to argue that the negative CT scan was inconsistent with Doe’s testimony about strangulation because this would be a medical opinion. When appellant reiterated that “people understand what negative means,” the court stated that it understood the prosecutor’s concern because “I do know what that means, but in terms of having any kind of medical background, it doesn’t have any significance to me one way or the other.”

After the prosecutor ascertained that the sexual assault nurse would be able to testify as to whether a normal CT scan was consistent or inconsistent with the history Doe provided, the court indicated that the two-page CT report included in the medical

⁴ The Kaiser report includes the statement, “Pt c/o mild Rt shoulder pain, some mild olynophagia [painful swallowing], but no hoarseness.” A list of the symptoms Doe reported when she was evaluated at Kaiser indicates, “[n]egative for headaches, nosebleeds, congestion and sore throat.”

⁵ The CCRMC records include, “At this point in time, patient reports neck discomfort from the choking . . . [d]enies any respiratory difficulty, phonation difficulty but reports pain with swallowing. Denies any headaches, photophobia or neck stiffness. . . . She has no cervical, thoracic, or lumbosacral spine tenderness but she does have some soft tissue swelling with an abrasion/bruise noted in the left lower neck anteriorly. ”

records could be admitted. The report concludes with the statement, “No acute osseous or soft tissue pathology identified.” The nurse testified on direct examination that a normal neck CT was not inconsistent with the report of strangulation and that it was standard practice to do a CT when strangulation was reported because, depending on the type of strangulation and amount of pressure used, there could be broken bones in the neck or swelling that might impair the airway. Appellant chose not to put the CT report into evidence after an exchange in which the court told him that “the reports themselves” were hearsay.⁶

Section 1271 provides: “Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.”

⁶ By appellant’s description, he withdrew the evidence in frustration after the court told him the reports were still hearsay and he “could not argue contradictions from the evidence to the jury.” It is less than clear exactly what was being discussed when appellant made his decision. Immediately after appellant completed cross-examining Officer Choe about his interrogation, the court and parties discussed exhibits to be admitted in evidence. The court indicated that the two-page CT report could be marked as defense exhibit M. Appellant asked, “Am I allowed to use the comparisons between testimony and what was said on the actual reports from the officers that contradict things?” The court told him the reports were hearsay but could have been used to cross-examine the officers. Appellant said, “[n]ot the officer. I’m talking about the statements of the accuser, things she said that don’t match up with[.]” The court reiterated that “the reports are hearsay unless it came out in the testimony somehow. You could certainly comment on whatever evidence that was received in the trial that may be contradictory to other evidence received in the trial. But the reports themselves are hearsay.” When appellant asked, “[h]ow do I receive testimony from the officers?” the court said it could not give him legal advice, but his closing argument had to be based on evidence or logical inferences drawn from evidence. Exhibit M was then marked for identification and appellant stated he would not be using it.

“Hospital records are often admissible under the business records exception to the hearsay rule, assuming a custodian of records or other duly qualified witness satisfies the requirement of the exception. (§ 1271.) Compliance with a subpoena duces tecum often dispenses with the need for a live witness to establish the business records exception. (§ 1560 et seq.)” (*In re R.R.* (2010) 187 Cal.App.4th 1264, 1280.) But when these records are based on hearsay, an independent exception to the hearsay rule is required for each level of hearsay. (*People v. Ayers* (2005) 125 Cal.App.4th 988, 995.) Here, appellant sought admission of portions of the hospital records documenting the symptoms Doe reported when she went to Kaiser. Respondent asserts that even if the hospital records themselves were admissible because they were produced pursuant to a subpoena, Doe’s statements regarding her symptoms were hearsay not subject to any exception.

We need not determine whether the trial court erred in finding the Kaiser records inadmissible because any error in excluding this evidence was harmless under any standard of review. As a result of the ruling, the jury did not see the Kaiser records indicating that Doe did not report having a sore throat; appellant was not able to confront Doe with any inconsistency between her trial testimony that her throat hurt when she went to Kaiser and indications in the records that she did not report this symptom; and appellant was unable to use the records to argue to the jury that such inconsistency undermined Doe’s credibility or that her failure to report throat pain demonstrated she had not been strangled. But the medical records in fact documented that Doe *did* report throat pain both at Kaiser and later at CCRMC, and, in any event, the evidence she had been strangled was overwhelming.

First, while the pages of the Kaiser records to which appellant draws our attention indicated Doe did not report a “sore throat” or “hoarseness,” they did document her report of “mild odynophagia,” or painful swallowing, and other pages of the same records reflect that Doe did report throat pain. Under the section heading “Medical,” the Kaiser records state “pt reports pain to throat and tongue,” with a patient-reported pain rating of three on a scale of one to ten. “Flowsheet Data” documenting the Kaiser assessment, under “Pain Assessment,” reflects “aching” throat pain with a pain score of five at 11:09

a.m., 1:00 p.m. and 3:00 p.m., then a score of four for aching throat pain at 3:15 p.m. The flowsheet data, for “eyes, ears, nose, and throat assessment,” documents “denies symptoms” at 1:00 p.m. and 3:15 p.m. The CCRMC records state that Doe reported “reports neck discomfort from the choking” and “pain with swallowing.” Rae, the nurse who performed the SART examination, testified that Doe reported her neck and throat were hurting while she was being choked, and that during the examination Doe was “given a trial of ice chips to try to swallow them because her throat hurt so bad.”⁷

In addition to the fact that the medical records clearly documented Doe complaining of neck and throat pain, there was abundant other evidence that Doe was choked. The petechiae Rae saw on Doe’s face and inner eyelids were consistent with strangulation and indicated “a lot of pressure” was used. Rae found injuries to Doe’s tongue and lip that were consistent with Doe’s report of biting down on her tongue, and testified that biting the tongue was consistent with someone being choked. The loss of bladder control Doe reported was also consistent with being choked, the result of the brain being deprived of oxygen. Rae also found two reddened abraded areas on Doe’s neck, an injury Rae testified was not unusual in a strangulation case and could result from the assailant’s fingers or the victim trying to claw the hands off the neck.⁸ Doe was reluctant to drink because it had hurt when she tried to swallow pudding at Kaiser, Rae saw Doe grimace when she tried to swallow, and Doe’s voice was raspy; Rae testified that both difficulty swallowing and a raspy voice are consistent with being strangled.

⁷ The medical records’ simultaneous indication that Doe reported throat “pain” but denied a “sore” throat illustrates the basis for the prosecutor’s objection that to allow appellant to argue the significance of the notations in the records that Doe was “negative” for sore throat would be to allow appellant to testify “on the part of the doctor.” One possible explanation is that Doe was distinguishing between the “aching” throat pain she attributed to being choked from the “sore throat” one might have with a cold or other illness. In the absence of testimony to explain the context and import of the medical notes, there would have been no basis for appellant to argue any particular conclusion from these records.

⁸ Under “Physical Examination,” the CCRMC records state that Doe had “some soft tissue swelling with an abrasion/bruise noted in the left lower neck anteriorly.”

Rae also testified that the fact the CT scan did not find any abnormalities was not inconsistent with a history of strangulation, as a person can have trouble swallowing after strangulation if there is no damage to the trachea.

Aside from all this evidence, in the recorded phone call appellant did not deny strangling Doe, and in his police interview he admitted doing so.

At most, the medical records appellant sought to place in evidence would have supported—though certainly not compelled—an inference that Doe was inconsistent in reporting her symptoms at Kaiser. And despite the court’s ruling, appellant argued in his closing that Doe’s first complaint at the hospital was that she was raped, not that her throat hurt; that Rae confirmed the CT scan of Doe’s neck was negative, there was no damage to Doe’s trachea and there was “nothing wrong with her neck at all”; and that the doctor at Kaiser said there was “no hoarseness.”

Given the many references to throat pain in the medical records and the other evidence of Doe’s physical condition supporting her report of being strangled, it is clear that any error in failing to admit the requested records into evidence did not affect the verdict.⁹

⁹ Appellant describes this as a close case based on weak evidence, urging that it is clear the jury did not find Doe’s testimony “completely credible” because its deliberations lasted as long as the presentation of evidence, the jury requested transcripts of Doe’s and appellant’s testimony regarding June 3 and readback of Rae’s testimony about Doe’s report of the “sequence of events of events regarding sex and oral sex” and the jury acquitted appellant of “most of the charges.” The factors appellant describes, however, do not necessarily indicate a rejection of Doe’s credibility. The jury accepted Doe’s claim that appellant forcibly raped and orally copulated her after tying and binding her, and inflicted corporal injury upon her. With respect to these offenses, the jury found in appellant’s favor only in rejecting the allegations that he inflicted great bodily injury. This conclusion depended not on Doe’s testimony but on the legal significance of her injuries. The acquittal on the charge of attempted murder does not necessarily mean the jury disbelieved Doe’s account; it might simply mean the jury did not believe the prosecution had proved beyond a reasonable doubt that appellant intended to kill Doe. The acquittal on the charge of threatening a witness says nothing about the jury’s evaluation of Doe’s credibility in describing the charged offenses; it was based on a letter appellant wrote.

II.

Appellant also contends the trial court abused its discretion in permitting the prosecution to present evidence of several uncharged incidents of domestic violence by him against Doe. When appellant sought exclusion of this evidence before trial, the court found under section 352 that it had significant probative value that was not outweighed by prejudice and that it would not be unduly time consuming.

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.” Section 352 gives the trial court discretion to exclude evidence “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

Noting that evidence is admissible only if it is relevant to a disputed material issue in the case (§ 350), appellant argues that the evidence of past incidents of domestic abuse were relevant to only one of the six counts with which he was charged. As to the other five counts—rape, oral copulation, attempted murder and intimidating a witness—appellant urges the prior domestic abuse evidence was not probative and was unduly prejudicial. Although the prosecutor argued that all the counts involved domestic violence, the trial court ruled the evidence of uncharged domestic violence would be limited to the single “specific charged act of domestic violence.”

Section 1109 creates an exception to the rule that evidence of prior criminal acts is generally inadmissible to show a defendant’s propensity to commit such acts. (*People v. Brown* (2011) 192 Cal.App.4th 1222.) Analogous exceptions have been established for evidence of prior sexual offenses committed by the defendant in a sexual offense case (§ 1108), prior abuse of an elder or dependent person by a defendant charged with abuse of an elder or dependent person (§ 1109, subd. (a)(2)) and prior child abuse by a person charged with an offense involving child abuse (§ 1109, subd. (a)(3)). The California

Supreme Court, in *People v. Falsetta* (1999) 21 Cal.4th 903, 907, held that section 1108 does not violate the constitutional guarantee of due process largely because the retention of the trial court’s discretion to exclude evidence under section 352 provides a “safeguard” against use of the other crimes evidence in cases where admission could result in a fundamentally unfair trial. (*Falsetta*, at pp. 916-917.) As we observed in *People v. Johnson* (2010) 185 Cal.App.4th 520, 529, the courts of appeal have uniformly followed the reasoning of *Falsetta* in upholding the constitutionality of section 1109.¹⁰

The legislative history of section 1109 explains the rationale for applying special evidentiary rules in domestic violence cases. We have previously noted the explanation in one bill analysis that “ ‘evidence of other acts is important in domestic violence cases because of the typically repetitive nature of domestic violence crimes, and because of the acute difficulties of proof associated with frequently uncooperative victims and third-party witnesses who are often children or neighbors who may fear retaliation from the abuser and do not wish to become involved.’ ” (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333, quoting Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1876 (1995–1996 Reg. Sess.) June 25, 1996, p. 4.) This legislative analysis further explained: “[T]he legislative history of the statute recognizes the special nature of domestic violence crime, as follows: ‘The propensity inference is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases. Not only is there a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity. Without the propensity inference, the escalating nature of domestic violence is likewise masked. If we fail to address the very essence of domestic violence, we will continue to see cases where perpetrators of this violence will beat their intimate partners, even kill them, and go on to beat or kill the next intimate partner. Since criminal prosecution is one of the few factors which may interrupt the escalating pattern of

¹⁰ Recognizing this point, appellant challenges the constitutionality of section 1109 only to preserve the argument for federal review.

domestic violence, we must be willing to look at that pattern during the criminal prosecution, or we will miss the opportunity to address this problem at all.” (Assem. Com. [] on Public Safety[, Analysis of Sen. Bill No. 1876 (1995-1996 Reg. Sess.) June 25, 1996,] pp. 3-4.)” (*People v. Johnson* (2000) 77 Cal.App.4th 410, 419; *People v. Brown, supra*, 192 Cal.App.4th at pp. 1235-1236.)

“ ‘[T]he California Legislature has determined the policy considerations favoring the exclusion of evidence of uncharged domestic violence offenses are outweighed in criminal domestic violence cases by the policy considerations favoring the admission of such evidence.’ (*People v. Johnson*[, *supra*,] 77 Cal.App.4th [at p. 420].) Section 1109, in effect, ‘permits the admission of defendant’s other acts of domestic violence for the purpose of showing a propensity to commit such crimes. [Citation.]’ (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1024; see also *People v. Soto* (1998) 64 Cal.App.4th 966, 979–981 [history of section 1108].) ‘[I]t is apparent that the Legislature considered the difficulties of proof unique to the prosecution of these crimes when compared with other crimes where propensity evidence may be probative but has been historically prohibited.’ (*People v. Brown*[, *supra*,] 77 Cal.App.4th [at pp.] 1333–1334.)” (*People v. Brown, supra*, 192 Cal.App.4th at pp. 1232-1233.)

Here, the evidence of prior domestic violence was clearly relevant to the charged infliction of corporal injury to a cohabitant. All the incidents involved the same victim and occurred within 14 months of the charged offenses. The prior incidents were thus highly probative of appellant’s propensity to commit violent acts against Doe, allowing the jury to evaluate the present charge in the context of appellant and Doe’s overall relationship. The prior incidents, all of which involved appellant restraining, pushing and shoving Doe, were not unduly prejudicial; rather, they were far less inflammatory than the charged offenses. The evidence was not unduly time consuming: Each of the four incidents was described by Doe and corroborated by brief testimony from the police officers who responded on each occasion.

Appellant maintains that the evidence should have been excluded because it had no probative value, and was unduly prejudicial, with respect to the majority of the

charges against him. “ “ “The “prejudice” referred to in Evidence Code section 352 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.’ ” ’ ” (People v. Branch (2001) 91 Cal.App.4th 274, 286.) In appellant’s view, his trial was rendered fundamentally unfair because the evidence of past domestic violence allowed the jury to convict him of the sexual offenses based on the “extraneous factor” of his propensity to commit domestic violence.

The jury was instructed pursuant to CALCRIM No. 852 that if it found the prosecution proved the uncharged domestic violence by a preponderance of the evidence, it could, but was not required to, conclude 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 offense] in Inflicting Corporal Injury to Cohabitant, as charged here, or the lesser-included offense of Battery of a Cohabitant. If you conclude that [appellant] 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 Inflicting Corporal Injury to Cohabitant, or of the lesser-included offense of Battery on the Cohabitant. The People must still prove the charge beyond a reasonable doubt.”¹¹ The prosecutor, in closing argument, reiterated this point,

¹¹ CALCRIM No. 852, as given in this case, provides in full:

“The People have presented evidence that the defendant committed domestic violence that was not charged in this case, specifically: incidents that allegedly occurred on the following dates:

“April 18, 2011, May 25, 2011, July 10, 2011, and April 7, 2012.

“Domestic violence means abuse committed against an adult who is the cohabitant or former cohabitant of the defendant.

“Abuse means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else.

“The term cohabitant means two unrelated persons living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people [are] cohabiting include, but are not limited to, (1) sexual

telling the jurors that if they decided appellant committed the uncharged domestic violence, “you may but are not required to conclude . . . from that evidence that the defendant was disposed or inclined to commit domestic violence” and “also to conclude that the defendant was likely to commit and did commit count 5 as charged here. That’s the corporal injury to cohabitant.”

The jury instructions, emphasized by the prosecutor’s argument, directed the jurors that they were permitted to consider evidence of appellant’s propensity to commit domestic violence as evidence that he committed only one of the charged offenses, the corporal injury to cohabitant charged in count 5. The instruction singled out this offense

relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties’ holding themselves out as husband and wife, (5) the parties’ registering as domestic partners, (6) the continuity of the relationship, and (7) the length of the relationship.

“You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

“If the People have not met this burden of proof, you must disregard this evidence entirely.

“If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit Inflicting Corporal Injury to Cohabitant, as charged here, or the lesser-included offense of Battery of a Cohabitant. 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 Inflicting Corporal Injury to Cohabitant or of the lesser-included offense of Battery on the Cohabitant. The People must still prove the charge beyond a reasonable doubt.”

The form instruction includes an optional last sentence: “[Do not consider this evidence for any other purpose [except for the limited purpose of <insert other permitted purpose, e.g., determining the defendant’s credibility>].]” The Bench Notes to CALCRIM No. 852 state, “Give the final sentence that begins with ‘Do not consider’ on request.”

and nothing in this or any other instruction suggested the uncharged domestic violence evidence could be used as a basis for finding appellant guilty of the other charged counts. “Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court’s instructions.” (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

Appellant urges that the jury instruction did not adequately restrict the jury’s consideration of the domestic violence evidence to the domestic violence count because the court failed to include the optional last line of CALCRIM No. 852, which reads: “[Do not consider this evidence for any other purpose [except for the limited purpose of <insert other permitted purpose, e.g., determining the defendant’s credibility>].]”¹² We disagree. Since there was no “other purpose” the jury needed to be told about, the last line of the instruction would simply have stated, “Do not consider this evidence for any other purpose.” This point was implicit in the instruction as a whole: As we have said, the instruction explicitly directed the jury that it could consider the evidence with respect to a single charged offense, necessarily indicating the evidence could not be so considered with respect to the other charged offenses. No other reasonable interpretation of the instruction is possible.

Although what we have said thus far resolves appellant’s challenges to the evidence and instructions on use of the evidence of uncharged domestic violence, we observe that the trial court was mistaken in its belief that this evidence had to be limited to the charge of infliction of corporal injury to cohabitant. The court’s ruling on this point was not an exercise of its discretion; its comments make clear that it believed the

¹² Appellant also argues the instruction improperly permitted the jury to infer guilt based on propensity rather than proof of the elements of the charged offenses, effectively lowering the prosecution’s burden of proof in violation of his due process rights. Recognizing that the California courts have resolved such challenges to CALCRIM No. 852 and the analogous form instructions concerning evidence of sex offenses under section 1108 against him (*People v. Johnson* (2008) 164 Cal.App.4th 731, 739 [CALCRIM No. 852]; *People v. Reilford* (2003) 29 Cal.4th 1007, 1012-1016 [CALJIC No. 2.50.01]; *People v. Schnabel* (2007) 150 Cal.App.4th 83, 87 [CALCRIM No. 1191]), he raises these issues only to preserve them for federal review.

limitation was required. When the prosecutor urged that the jury should be able to consider the evidence as to the other counts because all “involve[d] domestic violence,” the court paused to look at the bench notes and then stated, “Seems to be limited though to charged—a specific charged act of domestic violence as defined by Penal Code Section 13700.” The prosecutor argued that the definition in Penal Code section 13700 is “intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself or another,” and that appellant caused Doe to be placed in fear for the other counts, as well as for count 5 (corporal injury to cohabitant). The court responded, “Well, I’m going to leave it as it is.”

Section 1109 permits evidence of other incidents of domestic violence in a prosecution for “an offense involving domestic violence.” The statute operates not only in a prosecution for a charge of domestic violence specifically but also where the defendant is charged with a violent offense committed in circumstances that show it was “abuse” committed against a present or former spouse, cohabitant or person with whom the suspect has had a child or a dating or engagement relationship. (§ 1109, subd. (d)(3); Pen. Code, § 13700, subd. (b); *People v. Brown, supra*, 192 Cal.App.4th at p. 1237.)¹³

¹³ Section 1109, subdivision (d)(3), provides: “ ‘Domestic violence’ has the meaning set forth in Section 13700 of the Penal Code. Subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, ‘domestic violence’ has the further meaning as set forth in Section 6211 of the Family Code, if the act occurred no more than five years before the charged offense.”

Penal Code section 13700, subdivision (b), defines “domestic violence” as “*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.” “Abuse” is defined as “ ‘intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.’ ” (Pen. Code, § 13700, subd. (a).)

Family Code section 6211 defines “domestic violence” as “abuse” perpetrated against a present or former spouse or cohabitant (Fam. Code, § 6211, subs. (a) & (b)), a “person with whom the respondent is having or has had a dating or engagement

For example, a defendant charged with murdering his former girlfriend after a long period of attempting to intimidate her after she broke up with him “was clearly ‘accused of an offense involving domestic violence’ within the meaning of section 1109.” (*Brown*, at p. 1237.) The *Brown* court agreed with the trial court’s observation that “ ‘murder is the ultimate form of domestic violence.’ ” (*Id.* at p. 1225.) *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138-1139, in which the defendant was charged with forcibly raping his girlfriend during an argument after she said she wanted to end the relationship, rejected the argument that section 1109 applies “ ‘to the classic kind of pushing, shoving, hitting, slapping, punching’ and not to ‘a specific sexual offense such as rape.’ ” (*Poplar*, at p. 1138.) The court explained, “The definition of domestic violence/abuse (‘reasonable apprehension of imminent serious bodily injury to . . . herself’) encompasses the definition of rape (‘fear of immediate and unlawful bodily injury on the person’). Defendant was charged with an offense involving domestic violence, that is, rape. As the prosecutor argued, rape is a higher level of domestic violence, a similar act of control.” (*Id.* at p. 1139.)

Here, all the offenses appellant was charged with committing against Doe on June 3 “involv[ed] domestic violence.” Doe described the offenses, sexual and otherwise, as part of a continuous physical assault that occurred when appellant became upset and angry because he thought Doe was seeing other men. The forcible sex offenses and attempted murder charges, like the charge of infliction of corporal injury on a cohabitant, clearly involved “abuse” committed against a cohabitant. (§§ 1109, subd. (d)(3), Pen. Code, § 13700, subds. (a), (b).) Contrary to appellant’s claim that the evidence of uncharged domestic violence had no relevance to the majority of the charges against him,

relationship” (*id.*, subd. (c)), a “person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12)” (*id.*, subd. (d)), a “child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected” (*id.*, subd. (e)), or “[a]ny other person related by consanguinity or affinity within the second degree” (*id.*, subd. (f)).

it would have been entirely proper for the court to have instructed the jury that it could consider that evidence with respect to the charges of forcible rape, forcible oral copulation and attempted murder, as well as with respect to the charge of infliction of corporal injury to a cohabitant.

III.

Appellant's final contention¹⁴ is that the trial court miscalculated the presentence custody credits to which he was entitled. Respondent agrees there was a miscalculation but disagrees as to the correct number.

The trial court granted a total of 276 days credit, 240 actual days credit and 36 days conduct credit. Appellant maintains that he was in continuous custody from the date of his arrest, June 3, 2012, until he was sentenced on February 1, 2013, a total of 244 days. Accordingly, he seeks correction of the credit calculation to reflect four additional days of actual credit for a total of 280 days credit.

Respondent points out that the probation report states appellant was arrested on June 3, 2012, spent one day in custody on that date, and then was in continuous custody from June 7, 2012, until sentencing. Based on this information, respondent maintains appellant is entitled to only one additional day of credit because it appears he was not in custody on June 4, 5, and 6. Respondent is correct.

Contrary to appellant's assertions that "[t]here is nothing in the record to show that appellant did not remain in custody in some jail facility from the date of his arrest" and it is "likely that he was continuously in the Concord Police Department Jail Facility until he was booked into the Contra Costa County jail in Martinez," the record affirmatively demonstrates that appellant was not in custody on June 4, 5, and 6. First, the conversation recorded in the pretext phone on June 4 was inconsistent with appellant

¹⁴ Appellant additionally argues that the cumulative effect of the trial court's errors in excluding Doe's medical records, allowing evidence of uncharged domestic violence and instructing the jury on the evidence of uncharged domestic violence requires reversal. As we have rejected the individual claims of error, there is no need for us to address the cumulative error argument.

being in jail at the time. Appellant answered the phone when Doe called; during the conversation he mentioned being “ready to just . . . skip town” and asked, “can I please come see you man?” When Doe said even if she was willing to see him they would have to meet somewhere public and it was not going to be that day, appellant replied, “[a]nd that’s not gonna be today?” and asked her, “don’t make it where I gotta meet you at . . . a pizza place or some funny shit man.”

Appellant’s police interview on June 7 indicates that he was not in custody over the preceding days. After being told that the police had a recording of his phone call with Doe and that his denials were making him look like a liar, appellant said, “What’s going on today like – like I’m – I’m – am I – nothing – nothing I could do like I’m going to jail today regardless?” Officer Nakayama responded, “Well you’re here for the interview, that’s why we – that’s why, ah, Choe called you.” Appellant said he felt like he “got bamboozled” and wondered if he needed to talk to a lawyer, saying, “you call me like I’m fitting to come in . . . I’m coming in for an interview now” Officer Choe told him, “we’re not even to the point of charging you . . . I’m here still investigating” Appellant asked, “am I going to jail today?” Shortly thereafter, Choe told him, “You know you’re going to jail, right?” Appellant asked if he was going to have bail, and the officers told him he would.

Appellant’s own testimony confirms that he was not in custody on June 4, 5, or 6. Appellant testified that after the phone call on June 4, “I spent these next couple of days, because of everything we’ve been through, calling the police, seeing if I had warrants, calling the hospitals to see if somebody by her name had checked in. . . . I was checking to see if I had any warrants because she said she was going to . . . call the police, and I didn’t know if she actually went through with it even though she said she did. [¶] And then on, I believe, Wednesday the 6th, I got a call from Concord P.D. They tell me to come in the following day, and I do.”

It is disturbing that appellant’s attorney pursued this claim despite the record directly refuting the point, and that the Attorney General also failed to bring these parts of the record to our attention. In any event, appellant is entitled to one additional day of

presentence custody credit, not four. The abstract of judgment shall be modified to reflect actual custody credit of 241 days and a total of 277 days credit.

DISPOSITION

The judgment shall be modified to reflect 241 days of actual presentence custody credit and total credit of 277 days. As so modified, the judgment is affirmed.

Kline, P.J.

We concur:

Richman, J.

Miller, J.

People v. McClendon (A138039)

