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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN DRATTON SORRELLS,

Defendant and Appellant.

B226997

B242513

(Los Angeles County
Super. Ct. No. MA042981)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jared D. Moses, Judge, and from the denial of a post-judgment order. Affirmed.

Roberta Simon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Lawrence M. Daniels and Eric E. Reynolds, Deputy Attorneys General, for Plaintiff and Respondent.

Kevin Dratton Sorrells appeals the judgment entered following his conviction by jury of assault with a firearm, criminal threats, dissuading a witness, false imprisonment by violence, child abuse, assault by means likely to produce great bodily injury and two counts of corporal injury to a spouse or cohabitant. (Pen. Code, §§ 245, subd. (a)(2), 422, 136.1, subd. (b)(3), 236, 273a, subd. (a), 245, subd. (a)(1), 273.5, subd. (a).) With respect to the convictions of assault with a firearm, criminal threats, dissuading a witness and false imprisonment by violence, the jury found Sorrells personally used a firearm within the meaning of Penal Code section 12022.5, subdivision (a). Sorrells admitted a prior conviction within the meaning of the Three Strikes law (Pen. Code, § 667, subds. (b)-(i)) and within the meaning of Penal Code section 667, subdivision (a). The trial court sentenced Sorrells to a term of 41 years in state prison.

The evidence showed Sorrells perpetrated domestic violence against five successive female partners. The last two, Osada and Moore, are the victims in this case. Sorrells contends the trial court committed evidentiary error, inter alia, in admitting evidence of uncharged incidents of domestic violence committed against Sorrells's three other victims. He also claims sentencing error and inappropriate use of peremptory challenges. We reject these claims of error and affirm the judgment. We also reject Sorrells's claim of error in the imposition of a \$10,000 restitution fine pursuant to Penal Code section 1202.4, subdivision (b).¹

FACTS AND PROCEDURAL BACKGROUND

1. *Uncharged acts of domestic violence admitted to show propensity.*

(Evid. Code, § 1109.)

a. *Rocio Sotelo.*

Rocio Sotelo was in a relationship with Sorrells from 1990 to 1996 and had a daughter with him. On November 9, 1996, after Sorrells and Sotelo separated, Sotelo

¹ By order filed January 9, 2013, Sorrells's appeal from the denial of a motion to strike or modify an order imposing restitution, fines and fees is considered concurrently with the appeal from the judgment.

arrived at her apartment and found Sorrells present. Sorrells grabbed Sotelo's throat and choked her with both hands. Sorrells began breaking things in the apartment with a baseball bat, including a glass table and a television. Sotelo's oldest daughter ran from the apartment and had a neighbor call the police. Sorrells hit Sotelo in the head with the bat, rendering her semi-conscious and bleeding. She had several bruises and cuts from broken glass. As a result of this incident, Sorrells was convicted of corporal injury to a spouse or cohabitant in violation of Penal Code section 273.5.

On May 16, 1998, Sorrells telephoned Sotelo and asked to see his daughter. Sotelo refused. Sorrells threatened that if Sotelo did not let him pick up his daughter he would kill Sotelo's family. Later that night, Sotelo's daughter found Sorrells inside the apartment. While Sotelo called 911, Sorrells screamed at Sotelo, grabbed their child from her bed, pushed Sotelo into a dresser and ran from the apartment with the child. As a result of this incident, Sorrells was convicted of criminal threats in violation of Penal Code section 422.

b. *Brenda Macias.*

Brenda Macias dated Sorrells from late 2001 to late 2002. They have a daughter together. After they started dating, Sorrells began to drink heavily and became abusive. He threatened to kill Macias and her family and he violently assaulted Macias numerous times. In one incident that occurred while Macias was pregnant, Sorrells arrived home drunk, choked Macias with both hands and said he would kill her.

At a barbeque at the home of Sorrell's father, Sorrells fought with Macias's brothers and called his father's dogs to attack her brothers. After Macias moved to her mother's house, she saw Sorrells at a bar. He cursed her, pushed her to the ground and dragged her. Macias did not press charges because Sorrells claimed to have friends in the Mexican mafia and he had threatened to have his friend shoot her mother and brothers.

c. *Tandy Hall.*

Tandy Hall dated Sorrells and then lived with him at his father's house. Their relationship began in May of 2004 and lasted approximately five months. In June of 2004, after Hall became pregnant, Sorrells began calling her names, punched her in the face and said he knew people who would kill her. In June 2004, Sorrells yelled at her while she was driving and punched her in the head. Hall left Sorrells for about a week but returned when he agreed to stop drinking.

In late July or early August 2004, Sorrells came home drunk and they argued. Hall tried to leave but Sorrells smashed her driver's side window, opened the car door and kicked her in the face and arms. Her nose was gushing blood. Hall went inside, changed her clothes and gathered her belongings. Sorrells yelled Hall was not going to take his dog, kicked Hall to the ground and had his father's Rottweiler bite Hall while Sorrells kicked Hall in the stomach and legs. Sorrells cleaned Hall's wounds and she fell asleep. She did not call the police because she was afraid of Sorrells. Hall has scars on her buttocks where the dog bit her.

2. *The charged offenses.*

a. *Cheryl Osada (counts 11, 12 and 13).*

Cheryl Osada started dating Sorrells in July of 2005 and married him a year later. Approximately 10 months into the relationship, Sorrells became abusive and there were several violent incidents.

In June of 2005, Osada, Sorrells, and Sorrells's daughter went to the beach. Sorrells got drunk and called Osada names. While Osada drove home, Sorrells slapped her and tried to grab the steering wheel. Osada took Sorrells to his father's house. As she drove home, Sorrells was suddenly behind her, bumped into her car and followed Osada to her apartment where he struck her face with the back of his hand. Osada did not call the police because she thought it was an isolated incident.

On another occasion, while Osada was bowling with coworkers, Sorrells drunkenly accused one of Osada's coworkers of wanting to date Osada and the police were called. In another incident, Sorrells pushed Osada to the ground, produced a handgun and struck her with it on the head.

A couple of months later, Sorrells told Osada to get out of bed. When she did, Sorrells knocked her to the ground and put a pillow over her face, removing it just before Osada lost consciousness. During another incident, Sorrells knocked Osada down, held a knife to her throat and said he was going to kill her. Osada's hand was cut when she tried to push the knife away.

Count 11: On October 31, 2006, Sorrells asked Osada to bring him a towel and became angry when Osada stopped to give candy to trick or treaters. He accused Osada of speaking with a boyfriend at the door and struck her in the nose, knocking her down.

In early 2007, Sorrells suddenly grabbed Osada in bed, threw her on the ground and stepped on her shoulder, resulting in a torn rotator cuff.

Counts 12 and 13: At a party at Osada's house in July of 2007, Sorrells yelled at Osada and threw a glass of wine at her. Osada tried to enter the house but Sorrells pulled Osada down some stairs and hit her in the back of the head with the back of his hand. When Osada's son attempted to intercede, Sorrells put his forearm to his throat and leaned him over the balcony railing.

In July 2007, Osada left Sorrells and moved to Florida. On cross-examination, Osada admitted she kept in touch with Sorrells for about six months after she moved.

b. *Lori Moore (Counts 2 through 6, and 8).*

Lori Moore started dating Sorrells in August of 2007. Four months later, Moore became pregnant and, a month after that, Moore realized Sorrells had a drinking problem. When he was drunk, Sorrells was violent and said he was a "shot caller" who could order people's deaths. Moore believed Sorrells's claims. Moore owned an exotic bird shop. Sorrells frequently worked at the shop.

Count 8: In January 2008, Sorrells telephoned Moore at 2:00 a.m., and said he was drunk and needed her to give him a ride. Moore refused because it was raining and she was in bed with her daughter. Sorrells called Moore several times and said, "if you know what's good for you, you better fucking come get me." About an hour later, Moore heard Sorrells enter the house. Moore went to the living room where she saw Sorrells taking money from her purse. Sorrells said the money was his. He grabbed Moore's neck and slammed her head into the wall. When Sorrells released Moore, she walked to the table and picked up her cell phone. Sorrells said, "no fucking way," and grabbed Moore's neck with both hands. He took Moore to the ground and squeezed her throat. Moore lost consciousness. She did not call the police because she was scared.

In May 2008, Moore and Sorrells moved into a house in Palmdale. One afternoon, Sorrells came home drunk and asked Moore if she had been cheating on him. They argued and Sorrells grabbed Moore by the neck but released her when Moore said, "real men don't hit women."

Counts 2 through 6: On July 28, 2008, Sorrells came home drunk at around midnight. Moore was in bed with their six-day-old baby. When Moore spoke about Sorrells not seeing the baby, Sorrells became irate and punched Moore in the back of the head. Moore jumped up and yelled he had almost hit the baby. Sorrells demanded the baby and, when Moore refused to give him the child, Sorrells produced a handgun from under the pillow, shoved it at Moore and demanded the baby. After Moore handed the child to Sorrells, he ordered Moore at gunpoint to move from the doorway to the other side of the bedroom and told her to get on the ground. Moore realized she had her cell phone in her hand and asked to go to the bathroom where she intended to call 911. Sorrells refused the request and, when Sorrells saw the phone in Moore's hand, he said, "No fucking way. Give me the phone." Sorrells opened the phone and called people for a few minutes, then forcefully threw the phone over the bed where it broke into pieces. The baby started to cry and Sorrells told Moore to feed her. As Moore breastfed the baby, Sorrells said he would kill Moore, her parents and her sister and he would raise his

daughter the way he wanted. Sorrells was rambling and in a rage, pointing the gun “back and forth.”

When Sorrell eventually went downstairs, Moore tried to find the pieces of her cell phone and checked on her six-year-old daughter. Moore then looked downstairs and saw Sorrells had moved large boxes in front of the door to the house. He returned to the bedroom with the gun and told Moore to go to sleep.

The next morning, Moore packed clothes for her older daughter and told Sorrells she had to take the baby to the hospital. Although Sorrells had returned Moore’s phone, she did not call the police because Sorrells previously had threatened to harm her family if she reported him. However, Moore’s doctor notified the police. When Moore arrived at her store, Sorrells ran to meet her and told her not to worry about what had happened, explaining he had been drunk. A social worker telephoned Moore and told her the police would come to the store if she did not return to the hospital. Moore returned and told the police what had occurred. A few days later, she also told a detective what had happened.

At the preliminary hearing, Moore testified she fabricated the allegations against Sorrells, including his use of a gun, because she was angry at him. Moore also wrote letters to the Department of Children and Family Services and the District Attorney’s Office stating she had made everything up. At trial, Moore testified she wrote the letters because Sorrells telephoned her from jail almost every day begging her to change her story. Sorrells claimed he would stop drinking and said the mafia may come after her for money he owed. Sorrells told Moore what to write in the letters. At the end of November 2008, Moore decided to tell the truth and ended contact with Sorrells.

c. Other evidence.

Ron Garner was an owner of a store near Moore’s store. At the end of July or early August 2008, Sorrells told Garner the police were looking for him and Sorrells needed Garner to hold a gun for him. Garner agreed but Sorrells later telephoned and told Garner the gun already had been taken care of.

Carol Crabson, Chief Executive Officer of the Antelope Valley Domestic Violence Council, testified as an expert on domestic violence.

3. *Defense case.*

a. *Sorrell's testimony.*

Sorrells testified in his own defense. Regarding the incident involving Moore on July 28, 2008, Sorrells indicated he returned to Palmdale at 11:30 p.m. after having worked at Moore's shop and having gone to his father's house. He was not drunk, they did not argue and Sorrells did not strike Moore, point a gun at her, threaten to kill her or barricade the front door. Sorrells denied any violence or threats against Moore or that he ever almost hit their baby. He does not own a gun. Sorrells claimed Moore was controlling and accused him of cheating. Sorrells denied attempting to get Moore to change her story or write letters. Sorrells testified Moore visited him in jail twice a week and told him she was sorry that she lied to the police.

Sorrells similarly denied every other instance of domestic violence related by Moore, Osada, Hall, Macias and Sotelo and claimed he was not abusive to any of the women who testified. Sorrells testified he entered a plea in Sotelo's case because his attorney at the time advised him to do so.

b. *Sorrell's father.*

Felix Sorrells, Sorrells's father, testified Sotelo, Macias, and Hall lived with Sorrells in Felix's home at various times. At a barbeque in 2007, Felix did not see Sorrells strike Osada, throw wine on her or pull her down stairs. Felix recalled Osada was drunk and she tripped and fell. After Sorrells went to jail, Moore told Felix she lied to the police because she was mad at Sorrells. Felix was not aware that Sorrells had ever abused any woman. He never saw Sorrells drunk at the house and never saw Sorrells with a gun.

CONTENTIONS

Sorrells contends the trial court erroneously admitted evidence of uncharged incidents of domestic violence against Sotelo, Macias and Hall. He claims some of the acts were more than 10 years old and should have been excluded under Evidence Code section 1109, subdivision (e). Also, the trial court abused its discretion in admitting evidence of too many uncharged acts and in not excluding the evidence under Evidence Code section 352 as more prejudicial than probative, especially the dog-biting incident involving Hall which was more inflammatory than the charged offenses.

Sorrells also claims the trial court erroneously excluded evidence of the acquittal of Moore's ex-husband on charges similar to those she had made against Sorrells. He further asserts the trial court committed sentencing error and the prosecutor made inappropriate use of peremptory challenges within the meaning of *Batson v. Kentucky* (1986) 476 U.S. 79, 85 [90 L.Ed.2d 69] and *People v. Wheeler* (1978) 22 Cal.3d 258, 276, overruled in part by *Johnson v. California* (2005) 545 U.S. 162, 168 [162 L.Ed.2d 129].

In a separate appeal from the denial of a post judgment order, which we previously ordered to be considered concurrently with this appeal, appointed appellate counsel filed a *Wende* brief. (*People v. Wende* (1979) 25 Cal.3d 436, 443.) In a supplemental opening brief filed in propria persona, Sorrells contends the trial court's order directing payment of a \$10,000 restitution fine was excessive and was not supported by substantial evidence.

DISCUSSION

1. *The trial court committed no reversible error in the admission of evidence of uncharged acts of domestic violence to show propensity.*

a. *Evidence Code section 1109.*

Evidence Code section 1109 creates an exception to the general prohibition against evidence of a defendant's propensity to commit crime found in Evidence Code section 1101. Section 1109, subdivision (a)(1) provides: "[I]n 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.”

The exception of Evidence Code section 1109 was created “ ‘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 may fear retaliation from the abuser and do not wish to become involved.’ [Citation.]” (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333.)

If evidence is admitted under Evidence Code section 1109, a jury may infer from the evidence that the defendant had a disposition or propensity to commit other offenses involving domestic violence and may infer he was likely to commit and did commit the current domestic violence offense. (*People v. Johnson* (2010) 185 Cal.App.4th 520, 528.)

We apply an abuse of discretion standard to a trial court's admission of prior acts of domestic violence under Evidence Code section 1109 and its refusal to exclude the evidence under section 352. (*People v. Johnson, supra*, 185 Cal.App.4th at p. 531; *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.)

b. *Additional background.*

Prior to trial, the defense moved to exclude the testimony of Hall and Macias regarding Sorrells's prior acts of domestic violence. At the hearing on the motion, the trial court summarized Sorrells's relationships with the witnesses and found an ongoing, consistent course of domestic violence commencing in 1996 and ending with the arrest in this case. The trial court indicated Sorrells's conduct fell “squarely within the purview of Evidence Code section 1109.” Thus, the trial court was inclined to allow evidence related to Sorrells's treatment of Hall and Macias.

In attempting to dissuade the trial court from its indicated ruling, defense counsel addressed the dog attack on Hall, referencing the inflammatory pictures of her injuries and noting Hall previously had testified the dog's eyes rolled back and Hall thought she was going to die. The trial court ruled the dog attack was highly probative and Evidence Code section 352 did not require its exclusion. The trial court also indicated the

prosecutor could corroborate Hall's testimony with photographs of the injuries, subject to the trial court's approval.

The trial court then inquired whether defense counsel wished to be heard with respect to Sotelo. After defense counsel and Sorrells conferred sotto voce, defense counsel stated, "Your Honor, we have no issue with Ms. Sotelo's testimony, whatever that may be." The trial court responded: "All right. So I will permit that"

As to Macias, defense counsel argued lack of corroboration. Defense counsel also asserted Macias had been in contact with other victims and her allegations were contrived. The trial court ruled Sorrells's conduct with Macias was similar to his conduct with the other victims, noted Macias filed police reports and ruled Macias could testify with respect to acts of prior domestic violence. Also, evidence of Sorrell's prior convictions of criminal threats and corporal injury to a spouse or cohabitant could be introduced. (Pen. Code, §§ 422, 273.5.)

c. Sorrells invited any error in the admission of Sotelo's testimony.

Sorrells contends the trial court erroneously admitted evidence of prior acts of domestic violence more than 10 years old in violation of Evidence Code section 1109, subdivision (e) which states: "Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice."

Specifically, Sorrells asserts the first offense against Sotelo occurred on November 9, 1996, more than 10 years before the latest charged offenses against Moore, which occurred in July of 2008. Further, the trial court did not consider whether evidence of these remote offenses would serve the interest of justice as required by Evidence Code section 1109, subdivision (e).

However, at the hearing on the admissibility of the evidence, defense counsel conferred with Sotelo, then advised the trial court the defense had "no issue with Ms. Sotelo's testimony, whatever that may be." Thus, Sorrells not only failed to object but affirmatively indicated it had no concern with respect to Sotelo's testimony. He cannot now complain the testimony erroneously was admitted. Indeed, Sorrells

essentially invited any error. (See, e.g., *People v. Seaton* (2001) 26 Cal.4th 598, 638-639 [defendant's stipulation to excuse juror rendered any error in excusing juror invited and not subject to appellate review]; *Mt. Holyoke Homes, LP v. California Costal Com.* (2008) 167 Cal.App.4th 830, 842 [a party who induces an error is estopped under the doctrine of invited error from asserting the alleged error as grounds for reversal].)

Alternatively, Sorrells claims defense counsel's failure to object to Sotelo's testimony on the ground it was too remote constituted ineffective assistance of counsel as there is a reasonable probability of a more favorable result absent counsel's omission. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674].) However, the first uncharged offense against Sotelo on November 9, 1996, occurred within 10 years of the first charged offense against Osada on October 31, 2006. Because Evidence Code section 1109, subdivision (e) did not apply, any objection under Evidence Code section 1109, subdivision (e) would have been futile. (See *People v. Anderson* (2001) 25 Cal.4th 543, 587 [counsel is not required to proffer futile objections]; *People v. Constancio* (1974) 42 Cal.App.3d 533, 546 [counsel need not undertake useless procedural challenges].)

Additionally, even had defense counsel objected, it is apparent, based on the trial court's remarks at the hearing, evidence of Sorrells mistreatment of Sotelo would have been admitted in the interest of justice to establish the complete picture of Sorrells's propensity to commit domestic violence. Thus, Sorrells is unable to demonstrate prejudice attributable to counsel's asserted omission.

d. *The trial court committed no error in weighing prejudice against probative value.*

Sorrells contends the trial court erred in finding the uncharged offenses more probative than prejudicial and in admitting evidence of too many uncharged acts. He claims the sheer number of prior offenses required numerous minitrials which consumed a great deal of time and the evidence confused the jury. Also, the dog-biting incident involving Hall was more inflammatory than the charged offenses. (See *People v. Harris* (1998) 60 Cal.App.4th 727, 738-741.)

Sorrells assert the trial court should have, at minimum, excluded some of the uncharged acts. He claims that, absent the uncharged offenses, or with fewer of them, it is reasonably likely the jury would have believed Sorrells rather than Osada and Moore. Sorrells notes no gun was ever found, his father testified Osada tripped and Moore recanted her allegations. Further, at Sorrells's first trial, Sotelo and Macias did not testify and the jury hung. Sorrells concludes a more favorable result is reasonably likely absent the uncharged acts of domestic violence.

Sorrells's claims are not persuasive.

In enacting Evidence Code section 1109, the Legislature intended to allow evidence of prior acts of domestic violence to prove current crimes of domestic violence because such crimes are frequently credibility contests between the victim and the perpetrator. (See *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1313.) Recognizing the likelihood a defendant who has previously committed these acts will repeat this type of offense, the Legislature intended to allow propensity evidence to promote the victim's version of the incident, unless the evidence is unduly inflammatory or would create confusion or mislead the jurors. (See *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027-1028.) Thus, the fact the trial was a credibility contest between Sorrells and the victims is not a reason to exclude the evidence but is precisely why the Legislature enacted the provision.

Moreover, the trial court found this case fell "squarely within" Evidence Code section 1109. The trial court engaged in the required balancing of probative value, which the trial court found was extremely high, against the prejudicial effect of the evidence, and found the evidence admissible. The trial court's ruling was reasonable and sufficient to indicate it carefully had applied Evidence Code section 352, and properly found good cause to admit the domestic violence evidence.

Regarding Sorrells's claim the trial court admitted too many prior incidents, although the testimony of Sotelo, Macias and Hall increased the length of the trial, Sorrells cannot show he was unduly prejudiced by an undue consumption of time required to elicit their testimony. Further, because the charged and uncharged acts were

upon different women, it is unlikely the jury confused the uncharged acts with the charged acts. Also, even the most inflammatory of the uncharged acts, the dog biting incident, was less inflammatory than the charged conduct, which included the use of a handgun by Sorrells. Additionally, evidence of the prior assaults came from independent sources, which reduced the danger of fabrication. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 404-405.) Finally, Sorrells was convicted of offenses committed against Sotelo, thereby reducing the likelihood the jury might convict Sorrells in this case in order to punish him for prior offenses. (*Id.* at p. 405.)

In sum, the probative value of the evidence was great and the uncharged acts bore strong similarities to the charged acts. The uncharged acts also demonstrated Sorrells's unrelenting pattern of domestic violence. "Painting a person faithfully is not, of itself, unfair." (*People v. Harris, supra*, 60 Cal.App.4th at p. 737.) We therefore conclude the trial court properly admitted evidence of uncharged acts of domestic violence perpetrated against Hall, Macias, and Sotelo.

2. *The trial court properly excluded evidence indicating Moore's ex-husband had been acquitted of charges he committed domestic violence against Moore.*

During cross-examination of Moore, Sorrells sought to inquire whether Moore had prosecuted a criminal action against Siavashrastegar Aria, Moore's ex-husband, in which Aria had been acquitted of domestic violence against Moore based on the same type of allegations Moore currently was making against Sorrells. The trial court indicated that, under Evidence Code section 352, the evidence was "very far afield" from whether Moore had experienced prior domestic violence and was not relevant, would consume an undue amount of time and may tend to confuse or mislead the jury. The trial court noted the defense nonetheless could call Aria as a witness and question him regarding Moore's allegations of domestic violence. The trial court also indicated it would permit the defense to ask Moore, "Did you falsely accuse your ex-husband?" The trial court reiterated its view the trial and its result were irrelevant but indicated the defense could inquire if Moore made accusations against a former husband and whether they were true, and then call Aria and ask if Moore made false accusations.

Sorrell's contends Aria's acquittal on charges of domestic violence against Moore was probative on the issue of Moore's credibility, would have helped to offset the risk of prejudice from the propensity evidence and its exclusion was prejudicial error.

We disagree. As the trial court noted, the result of Aria's prosecution for domestic violence against Moore, at best, was tangential to the truth of the allegations against Sorrells. Also, the trial court was concerned the evidence would lead to an undue consumption of time litigating the facts of Aria's criminal case and would confuse the jury. On the record presented, these were appropriate concerns.

Further, the trial court allowed Sorrells to question Moore about her allegations against Aria and indicated Sorrells could ask Aria whether Moore's allegations were false. However, Sorrells did not call Aria as a witness. The trial court's rulings struck an appropriate balance between Sorrells's right to present evidence and the trial court's obligation to control the proceedings.

People v. Griffin (1967) 66 Cal.2d 459, cited by Sorrells, is distinguishable. In *Griffin*, the prosecutor presented evidence indicating the *defendant* committed offenses similar to the offense for which he was on trial. *Griffin* held the defendant was entitled to present evidence of the defendant's acquittal, if any, of such crimes. (*Id.* at p. 466.) Here, Moore's ex-husband, not Sorrells, was charged with crimes. Accordingly, *Griffin* is inapplicable.

In sum, Sorrells's claim of error fails.

3. *No cumulative evidentiary error.*

Sorrells contends that, even if none of the foregoing errors warrants reversal, the cumulative impact of all of the errors caused substantial prejudice and rendered the trial fundamentally unfair. However, there was no error, and, to the extent there was error, Sorrells has failed to demonstrate prejudice. Moreover, the evidence overwhelmingly established Sorrells's guilt. Therefore, whether considered individually or collectively, any claimed evidentiary error was harmless.

4. *Sentencing contentions.*

a. *The terms at issue.*

The trial court commenced imposition of sentence by stating the evidence had shown Sorrells to be a serial abuser of women with a long, violent history. The trial court noted five separate women had testified about his abuse, “telling stories that were remarkably similar” The trial court found this evidence credible and indicated, in imposing sentence, it would consider that Sorrells “took the stand and said that essentially nothing ever happened, it never happened, and that each and every one of these women lied about each and every event. And the jury rejected that testimony out of hand, and I reject it, as well. I find the defendant perjured himself.”

The trial court selected count 5, assault with a firearm on Moore during the bedroom incident of July 28, 2008, as the principal term. The trial court imposed the high base term because Sorrells engaged in violent conduct that indicated a serious danger to society (Cal. Rules of Court, rule 4.421, subd. (b)(1)), his prior convictions as an adult were numerous and of increasing seriousness (Cal. Rules of Court, rule 4.421, subd. (b)(2)), he had served a prior prison term (Cal. Rules of Court, rule 4.421, subd. (b)(3)), and his prior performance on probation or parole was unsatisfactory. Also, the victim was particularly vulnerable in that a baby was present during the incident (Cal. Rules of Court, rule 4.421, subd. (a)(3)), Sorrells was intoxicated and “waving a gun around,” and there were no factors in mitigation. For the same reasons, the trial court imposed the high base term on the firearm enhancement. The trial court imposed a consecutive term for child abuse, noting the offense had a separate victim and Sorrell’s conduct placed the child at very high risk.

The trial court indicated it was not convinced by defense counsel’s argument Penal Code section 654 applied to count 3, criminal threats. The trial court reviewed the facts of the incident which indicated Moore was in bed with her baby when Sorrells arrived home angry and intoxicated. Sorrells punched Moore in the back of the head, almost striking the baby. Sorrells cursed Moore, produced a gun from under a pillow and demanded the baby. After Moore handed Sorrells the baby, he pointed the gun at Moore

and ordered her to the floor. During this time, Moore had a phone in her hand, which Sorrells took from her, saying, “No fucking way.” Sorrells went through the phone’s call log, telephoned people and threw the phone across the room, breaking it. During this time, the baby was crying and Sorrells told Moore to feed the child. When Sorrells threatened to kill Moore and her parents, he was holding the gun and pacing, rambling.

The trial court found the criminal threats constituted a separate offense. Although any term imposed for false imprisonment had to be stayed, the criminal threats occurred “after the assault with a firearm, and came after the false imprisonment, [and] was a separate, criminal act” with the objective of terrorizing Moore by threatening her and her family.

The trial court imposed a consecutive term on count 3. The trial court noted that, although counts 3, 4 and 5 were committed in the same general time frame, count 3 constituted a separate crime of violence against the same victim. (Cal. Rules of Court, rule 4.425 (a)(1).)

The trial court found count 4, dissuading a witness, also constituted a separate act of violence or threat of violence in which Sorrells took Moore’s telephone to prevent her from calling the police. The trial court found this was “a completely separate objective” and imposed a consecutive term and firearm use enhancement.

b. *Penal Code Section 654 does not apply to counts 3 and 4.*

Sorrells contends the sentences imposed for criminal threats and dissuading a witness, counts 3 and 4, should have been stayed pursuant to Penal Code section 654. Sorrells claims he engaged in an indivisible course of conduct on July 28, 2008, and counts 3 and 4, as well as count 5, assault with a firearm which the trial court selected as the principle term, had but one objective, to control Moore. Sorrells claims the criminal threats were incident to forcing Moore to the ground and confining her. Also, Sorrells needed to take Moore’s phone in order to continue to confine her. Therefore, the sentences imposed for criminal threats and dissuading a witness must be stayed. (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1346.)

Sorrells's claims are unavailing. "The purpose of section 654 is to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although the distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose sentence for only one offense" (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*People v. Correa* (2012) 54 Cal.4th 331, 336.) "Our case law has found multiple criminal objectives to be a predicate for multiple punishment . . . in circumstances that involve, or arguably involve, multiple acts." (*People v. Mesa* (2012) 54 Cal.4th 191, 199.)

"A trial court's express or implied determination that two crimes were separate, involving separate objectives, must be upheld on appeal if supported by substantial evidence." (*People v. Brents* (2012) 53 Cal.4th 599, 618.)

Here, the trial court reasonably could find Sorrells assaulted Moore with the firearm in order to force her to give him the baby. When he later took her telephone and broke it against the wall, his intent was to prevent her from calling the police. After Sorrells smashed Moore's phone, the baby began to cry and Sorrells told Moore to feed the child. While Moore breastfed the baby, Sorrells threatened to kill Moore, her parents and her sister. Because the fear instilled by this threat was not the same fear engendered by the assault with a firearm, the trial court properly could conclude Sorrells entertained multiple criminal objectives.

We find no abuse of discretion or lack of substantial evidence to support these findings.

c. *Consecutive terms on counts 3 and 4 properly imposed.*

Sorrells contends the trial court erred in imposing consecutive rather than concurrent terms on counts 3 and 4, criminal threats and dissuading a witness. He claims there was not substantial evidence to support the trial court's finding the crimes and their objectives were predominantly independent of each other and the acts did not constitute separate acts of violence or threats of violence but were a single violent action.

Rule 4.425 of the California Rules of Court sets out “[c]riteria affecting the decision to impose consecutive rather than concurrent sentences,” which include that the “crimes and their objectives were predominantly independent of each other,” the crimes “involved separate acts of violence or threats of violence” and the “crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.” (Cal. Rules of Court, rule 4.425(a)(1)-(3).)

Here, the trial court determined counts 3, 4, and 5 were independent of each other, involved separate acts of violence, and were committed at separate times. Accordingly, the court did not abuse its discretion in imposing consecutive sentences.

d. *Perjury properly considered as an aggravating factor.*

Sorrells contends the trial court erred in considering perjury as an aggravating factor in sentencing. He claims the trial court failed to make necessary on-the-record findings as to each element of perjury. (*People v. Howard* (1993) 17 Cal.App.4th 999, 1001, 1004 [a willful statement, under oath, of any material matter the witness knows to be false].) Sorrells asserts he may raise the issue for the first time on appeal because imposition of a greater punishment without a finding Sorrells committed perjury amounts to constitutional error. He also asserts defense counsel rendered ineffective assistance in failing to object to the trial court's consideration of an improper aggravating factor that might have unfairly tipped the sentencing balance. (See *Strickland v. Washington, supra*, 466 U.S. at pp. 687-688.)

Even if Sorrells's claim is not forfeited for failure to object to the trial court's use of perjury as an aggravating factor (but see *People v. Scott* (1994) 9 Cal.4th 331, 353), the trial court properly could consider Sorrell's perjury in this case. *People v. Howard* stated "an aggravated sentence should not be imposed routinely simply because the jury, by convicting the defendant, obviously did not accept his or her testimony. We are particularly concerned because in so many cases, as is true here, the only evidence before the jury is the conflicting testimony of the victim and the defendant. The routine use of perjury as an aggravating factor in such cases would violate due process by chilling the defendant's constitutional right to testify." (*People v. Howard, supra*, 17 Cal.App.4th at p. 1005.)

The trial court in this case did not rely on the fact the defendant was convicted to support a finding he committed perjury, as was the fear in *Howard*. Rather, the trial court found Sorrells testified each of the five women who testified against him "lied about each and every event." The trial court indicated it rejected Sorrells's testimony as unworthy of belief. Thus, the trial court found Sorrells made willful statements under oath regarding material matters Sorrells knew to be false. These findings fulfilled the elements of perjury, thereby permitting the trial court to consider Sorrells's perjury as an aggravating factor.

Moreover, even if the trial court did not make the necessary findings, any error was harmless. The trial court cited numerous aggravating factors to support its sentencing choices. Even removing perjury from the equation, a plethora of aggravating factors remains. Thus, a different outcome is not reasonably probable. (*People v. Osband* (1996) 13 Cal.4th 622, 728.)

In sum, the trial court's consideration of Sorrells's perjury was not inappropriate and, even if error is assumed, it was harmless on the facts presented.

5. *No reversible error in the denial of Sorrells's Batson/Wheeler motion.*

a. *Applicable law.*

“ “[A] prosecutor’s use of peremptory challenges to strike prospective jurors on the basis of group bias - that is, bias against ‘members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds’ - violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution. [Citations.]” [Citation.] “Such a practice also violates the defendant’s right to equal protection under the 4teenth Amendment. [Citations.]” ’ ’ (*People v. Taylor* (2010) 48 Cal.4th 574, 611.)

In ruling on a motion challenging the exercise of peremptory strikes, the trial court follows a three-step procedure. “First, the defendant must make out a prima facie case ‘by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.’ [Citations.] Second, once the defendant has made out a prima facie case, the ‘burden shifts to the State to explain adequately the racial exclusion’ by offering permissible race-neutral justifications for the strikes. [Citations.] Third, ‘[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.’ [Citation.]” (*Johnson v. California, supra*, 545 U.S. at p. 168, fn. omitted.)

Under *Johnson*, a defendant establishes a prima facie case “by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.” (*Johnson v. California, supra*, 545 U.S. at p. 170; see also *People v. Taylor, supra*, 48 Cal.4th at p. 614.) When the defendant makes a prima facie case, the burden shifts to the prosecutor to offer permissible race-neutral justifications for the peremptory challenge. (*People v. Lenix* (2008) 44 Cal.4th 602, 612.)

The proffered explanation need not rise to a challenge for cause. Even trivial reasons, if genuine and neutral, will suffice to justify a peremptory challenge. (*People v. Arias* (1996) 13 Cal.4th 92, 136.) The trial court must determine whether the proffered explanation is a pretext to conceal what is, in fact, group bias. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122.) Determining the genuineness of the stated reason for a

peremptory challenge often depends upon viewing demeanor and assessing the credibility of the attorney who offers the reason, and a determination of an attorney's state of mind based on such factors is best left to the direct observer, i.e., the trial judge. (*People v. Stevens* (2007) 41 Cal.4th 182, 198.) Thus, a trial court's conclusion a race-neutral reason is genuine will be upheld on appeal when it is supported by substantial evidence in the record. (*People v. Ward* (2005) 36 Cal.4th 186, 200.)

b. *Factual background.*

During voir dire, Sorrells asserted the prosecution had exercised peremptory challenges as to each of the three African-American prospective jurors on the panel, Number 5, Number 9 and Number 16. The trial court agreed, noting it appeared no African-Americans remained and asked the prosecutor to justify the challenges.

As to Number 5, the prosecutor explained the prospective juror was an engineer and the prosecutor never allowed engineers on a jury, stating they are "hypercritical" and expect perfection. The prosecutor noted the People also had exercised a peremptory challenge to excuse a Caucasian who was an engineer.

Regarding Number 9, an African-American female, the prosecutor was concerned because she had spoken of people "getting the short end of the stick." Also, Number 9 and Number 18 had been sitting in the back of the courtroom joking and laughing. The trial court indicated it had observed the same conduct and had been on the verge of admonishing them. The prosecutor also noted Number 9 had spoken about racial profiling in the system and had noted that Sorrells is African-American and the prosecutor is Caucasian. Even though Number 9 said she could be fair, the prosecutor thought Number 9 had "some issues." Based on Number 9's belief there is "pervasive racial bias in the system and her behavior during jury selection . . . I think she's going to be biased against me or the State."

With respect to juror Number 16, an African-American male, the prosecutor noted the prospective juror was eager to talk about friends and family members who had been mistreated by law enforcement and the system, and Number 16 believed racial profiling

occurred. Although Number 16 dressed nicely and seemed to answer questions well, “when we started on that stuff, I just realized he’s got some issues, too.”

Defense counsel responded Numbers 9 and 16 had been candid and indicated on their questionnaires they had been racially profiled. If that were a valid basis for a peremptory challenge, every person of color who had ever resided in a neighborhood of lower socioeconomic status could be excluded from jury service. Also, none of the prospective jurors said they could not be fair.

The trial court indicated it had evaluated the prosecutor’s reasons for exercising the challenges to determine whether they were pretextual and had compared the prosecutor’s treatment of the challenged jurors with the prosecutor’s treatment of other similarly situated jurors and had found the prosecutor had provided race neutral reasons for the peremptory challenges. As to Number 5, the trial court accepted the prosecutor’s claimed dislike of engineers and noted the prosecutor also excused a Caucasian engineer.

As to Number 9, the trial court noted the prospective juror expressed much concern with law enforcement. Also, Number 9 indicated her father had spent five years in state prison, he was beaten by guards and the prospective juror had a problem with the state prison system. She “said some people get the short end of the stick, that there’s racial profiling.” She also once had a gun held on her by police officers, and her fiancé had been arrested and jailed for drugs before she knew him.

The trial court indicated Number 16 believed he was the subject of racial profiling, had problems with law enforcement and had been arrested at 13 years of age for shoplifting. The trial court concluded these were legitimate race-neutral reasons and denied Sorrells’s motion.

c. Sorrells’s claims lack merit.

Sorrells contends the prosecutor’s reasons were pretextual and were not case-specific. (*People v. Alvarez* (1996) 14 Cal.4th 155, 197.) Also, the reasons offered by the prosecutor were inherently implausible or were not supported by the record. (*People v. Ward, supra*, 36 Cal.4th at p. 205.)

As to Number 5, a retired engineer, Sorrells claims the prosecutor's stated reason, he always excused engineers because they are hypercritical and expect perfection, seems ridiculous. He asserts the prosecutor failed to identify how an engineer's precision would prevent impartiality. Sorrells notes the prosecutor asked Number 5 no questions before the peremptory challenge, demonstrating the prosecutor's intent to excuse the juror.

However, neither the reasonableness of the proffered explanation nor the number of questions the prosecutor might ask a prospective juror is determinative. "All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory. '[A] "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection. [Citations.]' [Citation.]" (*People v. Reynoso* (2003) 31 Cal.4th 903, 924; *People v. Williams* (1997) 16 Cal.4th 635, 664.) Further, given that the prosecutor also excused a Caucasian engineer, the record supports the trial court's finding the prosecutor's peremptory challenge to Number 5 because he was an engineer was a valid race-neutral reason.

Sorrells asserts the prosecutor excused Number 9 without asking the prospective juror any questions, then noted number 9 had been concerned about people getting the short end of the stick and that she had been joking and laughing in the back of the courtroom.

The fact Number 9 acted disrespectfully during voir dire while seated in the back of the courtroom, standing alone, would appear to have been an appropriate basis upon which to excuse the prospective juror without asking her a question. The prosecutor remarked on the prospective juror's conduct and the trial court confirmed the prosecutor's observations. Also, Number 9's personal experience with racial profiling and her negative view of law enforcement were sufficient race-neutral reasons for the prosecutor to excuse her. (See *People v. Clark* (2011) 52 Cal.4th 856, 907 [distrust of the criminal justice system is a race-neutral reason for excusal]; *People v. Fields* (1983) 35 Cal.3d 329, 348 ["[P]ersons previously arrested, crime victims, believers in law and

order, etc. are not identifiable groups whose representation is essential to a constitutional venire.”])

Sorrells complains the trial court inappropriately added its own views in evaluating the prosecutor’s reasons for excusing Number 9, noting her father had been beaten by prison guards while incarcerated, she had been held at gunpoint by police officers, and her fiancé had been arrested and jailed for drugs before she knew him. Sorrells claims the trial court improperly included these additional considerations among the race-neutral reasons for excusing Number 9, even though the prosecutor did not state them. (*Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090.)

Paulino, the case cited by Sorrells, involved a case in which the trial court offered, sua sponte, its speculation as to why the prosecutor may have struck five potential jurors without ever hearing from the prosecutor. *Paulino* remanded the matter for a hearing at which the prosecution could present evidence as to the prosecutor’s reasons for the peremptory challenges. Here, the trial court did not shortcut the three step *Batson/Wheeler* process and permitted the prosecutor to state reasons for the challenges. The trial court was entitled to corroborate the prosecutor’s stated reasons with its own observations about the voir dire process in order to support its finding the prosecutor’s reason were race-neutral. Thus, *Paulino* is inapplicable.

With respect to Number 16, Sorrells notes the prospective juror and Number 9 answered questions about racial profiling honestly but were excused. Sorrells asserts all African-Americans are concerned about racial profiling. Sorrells concludes the prosecutor’s concern about racial profiling was a proxy for group membership, citing *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, 821, 825-826, overruled on other grounds by *United States v. Nevils* (9th Cir. 2010) 598 F.3d 1158, 1167.

As noted in *People v. Williams* (1997) 16 Cal.4th 153, 190, *Bishop*, a decision of a lower federal court interpreting federal law, is not binding on state courts. Further, *Bishop* is distinguishable.

In *Bishop*, the prosecutor exercised a peremptory challenge to exclude an African-American prospective juror because the prosecutor believed people from Compton are likely to be hostile to the police because they have witnessed police activity and are inured to violence. *Bishop* found the proffered reasons were “generic reasons, group-based presuppositions applicable in all criminal trials to residents of poor, predominantly black neighborhoods. They amounted to little more than the assumption that one who lives in an area heavily populated by poor black people could not fairly try a black defendant.” (*United States v. Bishop, supra*, 959 F.2d at p. 825.)

Here, the prosecutor did not seek to excuse Number 9 or Number 16 because they lived in a predominately African-American area or based on any presumptions about their beliefs but because they stated on the jury questionnaire they believed racial profiling occurred. Thus, the peremptory challenges were not impermissibly based on the prosecutor’s assumptions about the prospective jurors, but on the prospective jurors’ belief they had been victims of racial profiling by law enforcement, a valid race-neutral reason for excusing the prospective jurors.

To the extent Sorrells contends a prosecutor cannot rely on the negative attitudes of an African-American prospective juror toward the criminal justice system in exercising peremptory challenges because such attitudes are so widespread among African-Americans as to constitute a surrogate for race, this claim expressly was rejected in *People v. Calvin* (2008) 159 Cal.App.4th 1377, 1383, citing *People v. Avila* (2006) 38 Cal.4th 491. We agree with *Calvin*’s analysis of the issue. As *Calvin* concluded, a prosecutor properly may justify peremptory challenges based on the information found in a prospective juror’s questionnaire and the fact many other African-Americans share similar attitudes “does not convert the prosecutor’s challenge into intentional race-based discrimination. [Citations.]” (*People v. Calvin, supra*, at p. 1388.)

In sum, we conclude the prosecutor stated race-neutral reasons for exercising the peremptory challenges and, because the trial court made “a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.” (*People v. Burgener* (2003) 29 Cal.4th 833, 864.)

6. *Independent review of the record in B242513 reveals no error.*

On May 10, 2012, Sorrells filed an ex parte motion to strike or modify an order for restitution, fees and fines. The trial court denied Sorrells's motion on June 11, 2012, and Sorrells filed a separate notice of appeal from that denial.

Appointed appellate counsel filed a *Wende* brief (*People v. Wende, supra*, 25 Cal.3d at p. 443), and asked this Court independently to review the entire record for arguable issues. Sorrells filed a supplemental opening brief in which he contends the order imposing a restitution fine of \$10,000 was excessive and was not supported by substantial evidence. We have reviewed the record in the appeal from imposition of the restitution fine and find no error.

DISPOSITION

The judgment and the denial of Sorrells's post-judgment motion to strike or modify the order for restitution, fees and fines are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.