

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

RUBEN HERRERA,

Defendant and Appellant.

B258324

(Los Angeles County
Super. Ct. No. PA078949)

APPEAL from a judgment of the Superior Court of Los Angeles County.

David W. Stuart, Judge. Affirmed with directions.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

Ruben Herrera was convicted of 19 counts of domestic abuse and sex crimes against his long-time partner and their daughter. On appeal, he complains the trial court committed two evidentiary errors. We affirm the judgment.

FACTS

Herrera and Rosa M. have known one another since they were nine years old and have been in a romantic relationship for 21 years. They have three children together: 20-year-old V.H., 17-year-old R.M., and six-year-old D.M. In 2013, Herrera and Rosa lived with R.M. and D.M. in their home in Pacoima. V.H. moved in with them in September or October of 2013, along with her husband, E.H., and their two young children. When they moved in, D.M. was moved out of her room and began sleeping with Herrera and Rosa in their room. However, Rosa often slept in the living room. On November 21, 2013, Herrera assaulted Rosa and raped her. This was not the first time he had abused Rosa. After Rosa reported the assault to the police, V.H. disclosed that Herrera had sexually and physically abused her when she was a teenager.

In an amended information, Herrera was charged as follows. As related to Rosa: counts 1-3, corporal injury to a cohabitant (Pen. Code § 273.5, subd. (a));¹ count 4, criminal threats (§ 422, subd. (a)); count 5, sexual penetration by a foreign object (§ 289, subd. (a)(1)); count 10, attempted sodomy by force (§§ 664/286, subd. (c)); and count 13, forcible rape (§ 261, subd. (a)(2)). As related to V.H.: counts 18-19, lewd acts upon a child (§ 288, subd. (c)(1)); counts 20-22, sexual penetration by foreign object (§ 289, subd. (a)(1)); counts 23-25, forcible rape (§ 261, subd. (a)(2)); counts 26-28, sodomy by force (§ 286, subd. (c)(2)); and count 29, forcible oral copulation (§ 288a, subd. (c)(2)).

At a jury trial, the defense admitted Herrera physically abused Rosa, but denied all of the sexual assault charges. The prosecution presented testimony from Rosa, V.H., and E.H., among others, who detailed Herrera's abuse of Rosa and V.H. It also presented expert testimony from Susan Hardie, a nurse and developmental psychologist, who testified about child sexual abuse accommodation syndrome, and Gail Pincus, the

¹ All further statutory references are to the Penal Code unless otherwise noted.

director of the Domestic Abuse Center in Van Nuys, who testified about intimate partner battering (previously known as “battered women’s syndrome”).

I. Herrera’s Abuse of Rosa

At trial, Rosa recounted episodes of physical and emotional abuse Herrera committed against her. Herrera often called Rosa names and told her she was “nothing.” Rosa also recounted how Herrera refused to allow her to help D.M. dress, eat, or do her hair if he was upset with Rosa. He also took her blankets in the middle of the night as she slept on the couch or threw her food away while she was eating. Shortly after New Year’s day in 2013, Rosa left for work without waking Herrera or her children. He later called her at work, demanding to know why she left without telling him and she was forced to return home. He beat her over three days and she lost her job. She was given a second chance by her manager, but in March, she was asked to resign because she was embarrassed to go to work after Herrera pushed her, causing her to fall and hit her right cheek on the step. This incident in March 2013 formed the basis for count 1 of corporal injury to a cohabitant.

Rosa described the events underlying the remaining counts related to Herrera’s crimes against her. On November 20, 2013, Rosa and V.H. planned to do laundry at a laundromat when Herrera arrived home from the disability offices. He demanded to know where they were going and told Rosa that she was not V.H.’s slave. He appeared angry and pushed Rosa down onto an armchair. When he raised his arm and attempted to get on top of her, Rosa pushed him with her legs, got up off the armchair, and tried to walk away. Herrera pushed her towards the wall, choking her. Rosa told him to leave her alone. He punched her in the stomach, grabbed her blouse, and pushed her towards the wall again. He scratched her breast. She told him she would go to the police if he continued to treat her this way. He threatened to find her once he was released. He eventually allowed her to leave the house.

After she left, Rosa called a domestic violence shelter for help. She was told to make a police report. Rosa reported the incident to the police that day. The police took pictures of her injuries—a scratch on her chest and redness on her neck. Rosa then attempted to pick D.M. up from school, but Herrera had already left with her.

Rosa returned home, knowing Herrera was not there, to retrieve her phone and the keys to a truck. Rosa stayed with her friend, Maria, that night. The following day, she discovered D.M. was not in school. She went to the courthouse to find a way to get her back. She was told to apply for a restraining order and she did. Rosa then went to work at 2:00 p.m. R.M. and Herrera came to pick her up after work. They convinced her to settle their problems within the family and to stay at home. Once at home, however, Herrera accused her of spending the night with another man and urged V.H. and R.M. to ask their mother where she had spent the night.

The interrogation continued after the children went to bed. Herrera and Rosa stayed in the living room. Rosa told Herrera she had slept in the truck because she did not want him to harass her friend. He accused her of sleeping with someone else, hitting her in the stomach, face, and head. Rosa called for help from R.M. and V.H. They told Herrera to calm down.

Once R.M. and V.H. were back in their rooms, however, Herrera attempted to have sex with Rosa and bathe with her. She rejected his advances. Herrera twisted her arm to get her undressed and hit her. He called her a whore and said that was the way she liked it. Someone called the police. They arrived, but did not enter the home. Rosa was afraid to ask for help because she did not want her children taken away. The officers eventually left. The beatings continued. Rosa again called for help and V.H. came out of her bedroom to calm Herrera down. After V.H. went back to bed, however, Herrera raped and sodomized Rosa. He later dragged her to the bedroom and raped and sodomized her again. She tried to resist, but did not want to wake D.M.

The next day, Rosa left with D.M. before Herrera woke. She reported the physical abuse at the police station, but did not mention the sexual assault. She had bumps on her head, a bite mark on her cheek, a swollen and bruised face, injuries to her nose and the inside of her lip, and bruises on her arms, stomach, and back. The officers took pictures of her injuries. Herrera was arrested when he arrived at the police station to confront Rosa.

The following day, V.H. disclosed to Rosa she had been sexually abused by Herrera when she was a teenager. Rosa stated she would not have let that happen had she known. Rosa urged V.H. to report the abuse to the police. Rosa reported her sexual assault by Herrera to the police as well. She told a nurse from an assault treatment center that Herrera penetrated her digitally “in the front” and with his penis “in the back.” She also reported the sexual assaults that occurred in the bedroom. However, she recanted all of the sexual assault accusations at trial, explaining that she was upset and exaggerated some of her claims to the nurse. She said Herrera put his finger and penis outside her anus, not inside.

V.H. substantiated Rosa’s initial story to the nurse in her testimony at trial. She testified Herrera was angry and harassed Rosa about where she had been and who she had been with the night she left home. She came out of her room at around midnight and saw Herrera punch Rosa in the stomach. She told Herrera to calm down and he appeared to do so. Sometime later, V.H. heard Rosa cry for help and she came out again to observe Herrera pulling up his pants and Rosa on the couch not wearing any pants or underwear. V.H. handed Rosa her clothes. V.H. came out a third time that night to see Herrera hitting Rosa with his cane. V.H. was able to calm Herrera down again and she believed he went to sleep. The next morning, V.H. observed her mother’s face to be very red and swollen. Rosa could not move her mouth very much and had what appeared to be bite marks on the sides of her cheeks and bumps all over her head.

E.H. testified to hearing Rosa yelling and begging Herrera not to hit her that night. V.H. was in and out of their room trying to calm Herrera down and stop him from hitting Rosa all night. But E.H. stayed in the bedroom because V.H. told him to stay out of it.

At around 1:00 or 2:00 a.m., E.H. came out with V.H. and saw Herrera pulling his pants up and Rosa laying on the floor naked, trying to cover herself. E.H. testified he and V.H. moved in so V.H. could be closer to her mother and protect her. While he lived there, he often heard Herrera call Rosa names in Spanish. He would also “slap her around, beat her, punch her, throw things at her.” He once called the police, but Herrera threatened him and his family.

II. Herrera Convinces Rosa to Recant

While in jail, Herrera began a campaign to induce Rosa to deny the sexual assaults. Despite a restraining order prohibiting him from contacting her, Herrera called Rosa² and wrote letters to her. He called her from jail on April 7, 2014, the day before his preliminary hearing,³ pleading with Rosa to recant and convince V.H. to do so as well. He also instructed Rosa to follow the instructions he included in a letter to her. Rosa agreed to defend him and stated the family would wait for him.

In another call on April 12, 2014, Herrera continued to urge Rosa to follow the instructions included in three letters he had sent to her. He was particularly concerned about the sexual assault charges, pleading with Rosa to “defend” him. He urged her to retract what she said about “the hand and finger” and to say that he did not take off her pants. He accused E.H. and V.H. of fabricating the sexual assault charges. He asked Rosa to “[h]elp me out so I can get your daughter off my back, okay?” He urged her to remove the domestic violence restraining order and deny V.H.’s testimony.

In a third call on April 13, 2014, Herrera apologized “for everything” and asked for Rosa’s forgiveness. He told Rosa he loved her more than she loved him. He also instructed her to “tell them that everything is a lie. Just like you were saying, but—in the letters I tell you how, okay?”

² Because the Los Angeles County Sheriff’s Department automatically records and logs all calls made from the county jail, the calls from Herrera to Rosa were translated for the jury at trial.

³ The parties stipulated the preliminary hearing occurred on March 27, 2014 and April 8, 2014. Rosa testified on both days.

As a result of Herrera's efforts, Rosa wrote a letter to the judge, which R.M. translated and typed. The letter was given to defense counsel prior to the preliminary hearing. In it, Rosa recanted her sexual abuse claims, stating Herrera physically abused her on November 21, 2013, but he tripped and fell asleep after he dragged her into the bedroom. She stated she believed V.H. made up the sexual abuse because she was angry at what Herrera had done to her mother. She also recanted her statements regarding the sexual assault at trial.

III. Herrera's Abuse of V.H.

After Herrera was arrested, V.H. revealed to Rosa that he sexually abused her from the age of 14 to 16. At trial, V.H. testified the abuse began in 2008, when she had just started 9th grade. Herrera had been drinking one night while he was watching television with V.H., R.M., and D.M. He asked V.H. to go into the bedroom with him. He then locked the door and began to kiss her and grope her over her clothes, touching her on the chest and between her legs. V.H. resisted him and asked him to stop. He eventually left the room. V.H. never told her mother or anyone about the abuse because she was afraid of Herrera and of her family's reaction.

A few weeks after the initial encounter, Herrera again pulled V.H. into his bedroom and locked the door. He kissed her and put his hands underneath her shirt and pants. V.H. resisted and began to cry, but Herrera pushed her on to the bed. She froze because she was afraid he would hit her. He continued to kiss her and grope her underneath her clothes. He eventually stopped after she began to resist again and left the room. Rosa's work hours during this time varied and Herrera was often home alone with the children on the weekends. The abuse typically occurred while Rosa was at work. It escalated to rape and sodomy.

One day, Herrera brought V.H. to the auto body shop, he owned at the time to pick up a battery charger. While there, he forced V.H. to have sex with him. When she refused, he punched her in the ribs and covered her mouth to keep her from screaming. As a result, V.H. quieted and let him continue until "he finished." V.H. also testified about an incident in 2008, when Herrera saw a male friend hugging her after school.

Herrera became upset and when they arrived home, he called her a slut in Spanish and hit her in the head with a coffee mug. V.H. did not seek medical care despite blood running down her face from the injury.

Herrera regularly raped and sexually assaulted V.H. either inside the house or inside a trailer parked in the backyard between the time she was 14 years old until she was 16. He told her it was a secret between them, but that it was normal between a father and daughter to do this. He wanted to be the first one with her.

In 2010, Herrera stabbed V.H. in the hand with his keys because she and Rosa had taken too long to bring him beer from the store. Shortly after this, V.H. ran away from home to stay with her friend, whose parents took her to the police. Pictures of the wound were taken by the police and the jury was shown those pictures at trial. The police took a report, but brought her home. V.H. ran away again and stayed with her teacher for a few days. The teacher also took her to the police to report the incident with the keys. This time, the Department of Children and Family Services became involved and she was sent to foster care for a period of time. The sexual abuse stopped when she returned home because Herrera told her he no longer considered her his daughter.

Herrera was upset at V.H.'s teacher for helping her and forced her to report the teacher had kidnapped her and had touched her. Herrera also forced V.H. to file a false sexual assault report against an employee who worked at his auto body shop. V.H. told E.H. about her father's sexual abuse shortly after their first child was born.

IV. Verdict and Sentencing

The jury found Herrera guilty of all 19 counts as pled. As to counts 5, 10, 13, and 20 through 29, the jury found true the allegation that the offenses were committed against more than one victim and qualified for sentencing under section 667.61, subdivisions (b) and (e). Herrera was sentenced to an indeterminate term of 75 years to life in state prison plus a determinate term of five years eight months. This total sentence was comprised of five consecutive terms of 15 years to life (counts 5, 20, 21, 22, & 25), seven concurrent terms of 15 years to life (counts 13, 23, 24, 26, 27, 28, & 29), one consecutive three-year term (count 1), two consecutive one-year terms (counts 2 & 3), a consecutive eight-

month term (count 4), a concurrent three-year term (count 10), and two concurrent two-year terms (counts 18 & 19). The trial court struck the section 667.61 allegations as to count 10. Herrera was also ordered to pay a multitude of fees and fines, including \$3,800 to the Department of Justice Sexual Offender Program Fund under section 290.3, \$3,849 in direct restitution under section 1204, subdivision (f), and a \$9,500 restitution fine under section 1202.4, subdivision (b). Herrera timely appealed.

DISCUSSION

Although he plead not guilty to all the charges, Herrera conceded at trial he physically abused Rosa. On appeal, Herrera primarily argues his concessions regarding the physical abuse meant that evidence regarding his physical abuse of Rosa and V.H. should not have been admitted. First, he argues the trial court improperly admitted evidence of uncharged prior acts of physical abuse against V.H. to establish disposition to commit sexual crimes against her, especially since he was not charged with physical abuse of V.H. Second, he challenges the admission of expert testimony regarding intimate partner abuse syndrome on the grounds it was irrelevant and unduly prejudicial due to his concessions regarding the physical abuse. Neither argument supports reversal.

I. Admission of Prior Acts of Domestic Violence

Prior to trial, the prosecution sought to admit V.H.'s testimony regarding Herrera hitting her over the head with a coffee cup and stabbing her hand with his keys. The prosecution relied on Evidence Code sections 1109 and 1101, subdivision (b) to argue the evidence was admissible. The defense objected on the ground it was propensity evidence that failed to fit within any exception. The defense claimed the victims were different—one was a romantic partner while the other was his daughter. Relying on Evidence Code section 1109, the court noted there was no requirement the victims had to be similarly situated. The trial court then conducted a balancing analysis under Evidence Code section 352 and found the evidence to be admissible, reasoning, “[t]he prior incidents compared to the instant case are not more serious or traumatic or potentially inflammatory or unfairly prejudicial to the jury in this case, and . . . everything is relatively recent.”

After V.H.'s testimony regarding those uncharged crimes, the trial court instructed the jury with CALCRIM No. 852 about evidence of uncharged domestic violence. It cautioned the jury to only consider the uncharged evidence if the prosecution proved it by a preponderance of the evidence. Moreover, it instructed the jury that if it found the incidents so proved, it was only one factor to consider amongst all the other evidence in determining his guilt of the charged domestic violence crimes and that "[i]t is not sufficient by itself to prove that the defendant is guilty of the charged domestic violence crimes." The instruction read by the court continued, "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, the charged domestic violence counts alleged against—with Rosa as the victim in this case." CALCRIM No. 852 was read again to the jury just before deliberations.

Herrera contends his convictions must be reversed because the trial court erred when it admitted evidence of these prior acts of domestic violence against V.H. According to Herrera, he admitted hitting Rosa, and thus the evidence of other domestic violence incidents was irrelevant. In addition, he contends the admission of evidence relating to his physical abuse of V.H. was irrelevant and inadmissible to determine whether he sexually abused her.⁴

⁴ It is unclear whether Herrera also contests the admission of evidence of domestic abuse against Rosa. He fails to do so in his opening brief, but alludes to that evidence in the reply brief without expressly stating its admission was in error. In any event, evidence of physical abuse against Rosa was properly admitted. Herrera was charged and plead not guilty to three counts of corporal injury to a cohabitant under section 273.5, subdivision (a). The evidence was admissible to prove the elements of those crimes, despite Herrera's failure to contest the physical abuse charges. "[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." (*Estelle v. McGuire* (1991) 502 U.S. 62, 69.)

The Attorney General argues Herrera forfeited this argument because it was not raised below. While defense counsel did object to the admission of this evidence, it is unclear whether she did so on these specific grounds. Regardless, we conclude evidence of physical abuse against V.H. was properly admitted under Evidence Code section 1109. Herrera's failure to contest the physical abuse charges involving Rosa does not change our conclusion.

Evidence Code section 1101, subdivision (a) generally prohibits the admission of character evidence, that is, evidence of a propensity or disposition to engage in a certain type of conduct to prove a defendant's conduct on a particular occasion. (*People v. Carter* (2005) 36 Cal.4th 1114, 1147.) However, in cases of 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 [Evidence Code] Section 352." (Evid. Code, § 1109, subd. (a)(1).) Whether evidence of prior acts of domestic violence is admissible is left to the sound discretion of the trial court. (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138 (*Poplar*).)

The contention that the prior domestic violence against V.H. was inadmissible because Herrera admitted to committing domestic violence against Rosa is simply wrong. The Supreme Court has made it clear that the burden of the prosecution "to prove every element of a crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." (*Estelle v. McGuire, supra*, 502 U.S. at p. 69.)

Second, according to the plain language of the jury instruction, the evidence of uncharged domestic violence was only admitted to prove the charged domestic violence counts. Even so, case law provides that evidence of uncharged domestic violence is admissible to prove certain sexual assaults. The court's analysis in *Poplar* is instructive. There, the prosecution sought to admit evidence of prior acts of domestic violence committed by the defendant against his ex-girlfriends in a case involving a charge of forcible rape of a current girlfriend. (*Poplar, supra*, 70 Cal.App.4th at p. 1136.) In one incident, the defendant slammed an ex-girlfriend into a wall, putting a hole in it. He then began kicking her as she lay on the floor. He called her to threaten her after he was

placed in custody. The following year, the defendant dragged a different girlfriend into her apartment by the hair, beat her with his fists, and put his foot on her baby. When she fled to another apartment, he pursued her and pushed her over a glass table, shattering the glass. (*Poplar, supra*, at p. 1136, fn. 5.)

Neither of these incidents involved sexual assault. Nevertheless, the appellate court determined they were admissible in the prosecution's case-in-chief under Evidence Code section 1109. (*Poplar, supra*, at p. 1138.) The *Poplar* court held, "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')." (*Id.* at p. 1139.) Thus, the defendant was charged with a domestic violence offense. The court found rape was merely a higher level of domestic violence, involving a similar act of control. Because evidence of the prior acts of domestic violence was more probative than prejudicial under Evidence Code section 352, the trial court did not abuse its discretion in admitting the evidence of the defendant's prior acts of domestic violence. (*Ibid.*)

We see no difference between the facts found in *Poplar* and those found in this case. Like in *Poplar*, Herrera was charged with forcible sex crimes as well as other acts of domestic violence. The jury was properly instructed on the definition of domestic violence, and was free to consider the uncharged domestic violence evidence to prove the current offenses as long as they found the charged crimes fell within the definition of a domestic violence crime. As in *Poplar*, the trial court properly admitted evidence of his prior acts of domestic violence against V.H. to show a propensity to commit violence against women and exert control over women.

Moreover, the trial court properly conducted a balancing analysis under Evidence Code section 352, finding the evidence of Herrera's acts of prior domestic violence against V.H. were more probative than prejudicial. The trial court's conclusion is supported by the evidence. The acts of violence were not more inflammatory than the sexual assault charges. They occurred within the same time frame as the sexual assault

charges. The trial court did not abuse its discretion in admitting evidence of prior uncharged acts of physical violence against V.H.

II. Admission of Expert Testimony

At trial, the prosecution presented expert testimony regarding child sexual abuse accommodation syndrome and intimate partner abuse syndrome. Defense counsel objected to the inclusion of both experts' testimony. On appeal, however, Herrera has limited his challenge to the admissibility of expert testimony regarding intimate partner abuse syndrome by Gail Pincus.

Pincus testified that intimate partner battering concerns "the coercive nature of a domestic violence relationship and how the abuser changes how the victim thinks, feels and behaves about the abuse that is being perpetrated against them." She explained that, contrary to popular expectation, domestic violence victims often return to an abusive relationship, recant reports of abuse, fail to report abuse, minimize injuries, and continue to love and want to protect the abuser. She related how a study of 7,000 women drawn from a diverse population found that the core aspect of the abuser's personality is a need to exercise power and control over the victim and children. The abuser will often intimidate or threaten the victim as well. If the abuser feels disrespected or embarrassed by the victim, he gives himself permission to escalate his behavior to physical violence in order to regain a sense of control.

Pincus further testified the severity of the physical violence and the frequency of its use tends to increase over time, beginning with pushing and shoving, and escalating to rape and murder. This is because the abuser has to resort to more violence over time to maintain the same level of control over the victim. When the violence reaches a level beyond what the victim can handle, a "trauma window" opens which allows the victim to reveal the abuse. Pincus explained that once an abuser's adrenaline is exhausted and he has calmed down, he typically begins to fear the consequences of his actions. This fear leads to what Pincus called the "honeymoon phase" where the abuser pleads, cries, begs, and makes promises to the victim. The honeymoon phase may be intensified if the police are called and the abuser is detained or incarcerated. According to Pincus, incarceration

represents complete loss of power and control to the abuser; he becomes desperate and believes he is in jail because the victim betrayed him, not because of what he did. As a result, the abuser may begin an intense campaign to convince the victim to recant and rescue him. The abuser reasons that incarceration is far worse than any injuries suffered by the victim as a result of the abuse. He may do this through phone calls from detention. These calls are a way for the abuser to maintain contact with the victim and allows him to use the long-term grooming tools he has acquired to persuade the victim to help him. Pincus was also aware of circumstances when the abuser constructed a script for the victim to follow, which forced the victim to admit that anger and jealousy motivated the initial accusation.

The trial court issued a limiting instruction immediately after Pincus' testimony and again just before deliberations. It cautioned the jury the testimony was not evidence that Herrera committed the crimes charged, but that it could be used to help the jury "only in deciding whether or not Rosa's conduct was not inconsistent with the conduct of someone who has been abused and in evaluating the believability of her testimony."

On appeal, Herrera contends Pincus' testimony was irrelevant and unduly prejudicial. Because he did not contest the physical abuse charges at trial, he claims Pincus' testimony was irrelevant. This is a similar argument to his previous one seeking to exclude V.M's testimony about Herrera's physical abuse of her. It fails for similar reasons. In any event, Pincus' testimony is relevant under Evidence Code section 1107, which provides: "In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding intimate partner battering and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge." (Evid. Code, § 1107, subd. (a).)

Here, the jury was faced with conflicting stories from Rosa. At trial, she recanted her story to the sexual assault nurse that Herrera raped her on the night of November 21, 2013. She testified she made up the sexual assault allegations because she was angry with Herrera and exaggerated her story. Pincus' testimony was therefore relevant to explain or offer a motive for Rosa's recantation. It also helped the jury to fully evaluate Rosa's credibility.

Herrera also argues the prosecution used Pincus' testimony to "springboard into an expert essentially profiling appellant as a sexual abuser, and otherwise vouching for the credibility of the witnesses alleging sexual abuse. In short, as pointed out by trial counsel, the [intimate partner abuse syndrome] testimony here was about appellant the batterer-rapist, not Rosa the battery victim." He relies on *People v. Robbie* (2001) 92 Cal.App.4th 1075, 1082-1083 (*Robbie*), to support this argument.

Herrera's reliance is misplaced because *Robbie* is distinguishable. In *Robbie*, the prosecution presented expert testimony that the defendant's "conduct was consistent with being a rapist." (*Robbie, supra*, at p. 1081, italics omitted.) In response to hypothetical questions which tracked the defendant's purported conduct, the expert opined the described behavior was typical of a sex offender. Although the expert was never asked to opine whether the defendant was a rapist, the Court of Appeal found the expert's testimony constituted improper profile evidence and should not have been admitted. (*Id.* at p. 1084.)

Unlike the expert in *Robbie*, however, Pincus' testimony did not profile Herrera as a rapist. She did not respond to hypothetical questions which tracked Herrera's purported behavior. Although Pincus testified about a typical abuser's behavior, this testimony was presented in the context of how the behavior impacts a victim. Moreover, the trial court instructed the jury not to consider Pincus' testimony as evidence that Herrera committed the crimes of which he was charged. We assume the jury followed that instruction. (*People v. Holt* (1997) 15 Cal.4th 619, 662.) As a result, Pincus' testimony was not impermissible profile evidence and was admissible.

III. Sentencing Credits

In the respondent's brief, the Attorney General notes that Herrera was improperly granted an extra day of presentence credit because the trial court rounded up when calculating the credit. There is no dispute Herrera served 261 actual days presentence. Given that his crimes were serious felonies, Herrera was entitled to presentence credit of 15 percent of the actual days served. (§ 2933.1, subd. (a).) Subdivision (c) of section 2933.1 explicitly provides the credit "shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a)." The calculation of 15 percent of 261 days equals 39.15 days. Granting Herrera 40 days of credit would run afoul of subdivision (c)'s proscription. Accordingly, the award of presentence credit is ordered reduced by one day and the total credit granted to Herrera should be 300 days (261 actual days plus 39 days).

DISPOSITION

The trial court is ordered to prepare an amended abstract of judgment reflecting a total credit of 300 days of presentence credit. The judgment is otherwise affirmed.⁵

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.

⁵ Since his appeal, Herrera has submitted several handwritten "reports" exhaustively detailing crimes which he claims V.H. and E.H. have committed. They include murder, fraud, and child abuse, which he claims his public defender failed to investigate during his trial. These reports were not presented at trial, and are irrelevant to our resolution of the appeal. Herrera requests that the two not be allowed to "get away with" their crimes; we are neither a police nor a prosecution agency and therefore we are not the appropriate agency to determine the veracity of his claims or take any action on them.