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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

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THE PEOPLE,

Plaintiff and Respondent,

v.

COLIN WILLIAM BIRSE,

Defendant and Appellant.

C073296

(Super. Ct. No. 12F6663)

Defendant Colin William Birse appeals from a judgment of conviction following a jury trial. Defendant was charged with multiple counts related to a violent altercation with his girlfriend, H.L. He was charged with making criminal threats (Pen. Code, § 422<sup>1</sup>), assault with force likely to cause great bodily injury (GBI) (§ 245, subd. (a)(4)), false imprisonment by violence (§§ 236, 237), misdemeanor infliction of corporal injury on a cohabitant (§273.5), violation of a domestic violence protective order (§ 273.6), and

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<sup>1</sup> Undesignated statutory references are to the Penal Code in effect at the time of defendant's crimes.

two prior prison term allegations (§ 667.5, subd. (b)). A jury found defendant guilty on all counts and in a bifurcated proceeding, the trial court found true both prior prison term allegations. The trial court then sentenced defendant to state prison for a term of six years eight months.

On appeal, defendant contends that: (1) the trial court erred in excluding proposed testimony of H.L.'s allegedly false prior report of abuse; (2) the trial court erred in admitting the expert testimony of an investigator on strangulation and intimate partner battering; and (3) the trial court abused its discretion in refusing to allow defendant to accept a plea offer on the first day of trial.

We have discovered a sentencing error on count three, false imprisonment by force or violence, that requires remand for resentencing and otherwise affirm the judgment.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **The Charged Offenses and Enhancements**

On September 28, 2012, the Shasta County District Attorney filed an information charging defendant in count one with making criminal threats in violation of section 422, in count two with assault with force likely to cause GBI in violation of section 245, subdivision (a)(4), in count three with false imprisonment by violence in violation of sections 236 and 237, in count four with infliction of corporal injury on a cohabitant, a misdemeanor, in violation of 273.5, subdivision (a), and in count five with violation of a domestic violence protective order, a misdemeanor, in violation of section 273.6, subdivision (a). The information also alleged that defendant has two prior felony convictions for which he served prison terms within the meaning of section 667.5, subdivision (b). Defendant pleaded not guilty to all counts and denied the prison prior allegations.

### **Motion in Limine Regarding Expert Testimony**

Prior to trial, the People moved to admit testimony from a district attorney's office investigator, Mike Wallace, as an expert on strangulation and intimate partner battering (formerly known as battered woman syndrome) under Evidence Code sections 801 and 1107. Noting that Wallace had previously testified as an expert on these subjects, the People argued that because the distinction between choking and strangulation and "the reality of battering and its effects is beyond common experience, expert testimony would assist the trier of fact and is admissible under Evidence Code section 801." The People contended that because H.L. would likely recant her "initial statement made to police and testify she was just angry at the time she spoke with the officer and exaggerated her initial statement as well as the statement she made to . . . Wallace," the proposed expert testimony "regarding domestic violence victims recanting and the reasons they do so [is] extremely relevant."

The court held a hearing on the motion pursuant to Evidence Code section 402. Wallace testified about his background and described his two-year assignment in the district attorney's office to the Domestic Violence Enhance Response Team. In his capacity as an investigator for that team, Wallace would "take an advocate in the field and actually go to victims' homes and conduct follow-up interviews, check for additional evidence, photograph crime scenes," and document the victims' injuries and any additional bruising that was "not as present or as prevalent on the night or day of the offense." Prior to working for the district attorney's office, Wallace worked for the Eureka Police Department as a patrol officer for over two years and for the Shasta County Sheriff's Office as a deputy sheriff for 14 years, frequently responding to domestic-violence calls.

In Wallace's estimate, he encountered thousands of domestic-violence situations and personally interviewed over 100 alleged domestic-violence victims between July 1, 2008 and July 1, 2010. He dealt with many more over the course of his 25-year career as

a police officer and investigator. Additionally, Wallace attended multiple local, state, and national training conferences on domestic violence, including approximately 56 hours of training specifically on strangulation in domestic-violence cases. He also received extensive training on patterns of behavior of domestic abusers and their victims as well as common misperceptions on victims' behavior as a result of these dynamics. Finally, Wallace was involved in the development and opening of the Shasta Family Justice Center, an organization that provides assistance to victims of domestic violence, sexual assault, and elder abuse. He stated that he testified as an expert in the area of domestic violence, including the tendency of victims to recant and their reasons for doing so, five times in Shasta County Superior Court. Similarly, he testified that he had previously qualified as an expert to testify about strangulation and its effects three times.

Wallace testified that in approximately 25 percent of the cases he has investigated, the alleged domestic-violence victims recant, state that they are not willing to testify, or change and minimize their story. Based on his experience, Wallace explained that victims often recant either because of fear of retribution, fear of public shame, a shared business or children, or because they are still romantically attached to their abusers. He described the typical cycle of domestic violence from tension-building problems in the relationship, to an acute episode of violence, to reconciliation and a "honeymoon" period where the abuser promises to change. Wallace testified that as a result of this dynamic, victims often try to protect their abusers by recanting and/or minimizing the events or the batterer's conduct.

With respect to his expertise on strangulation, Wallace testified that, among other training programs on the topic, he attended a 16-hour training program at the National Strangulation Training Institute, sponsored by the U.S. Department of Justice. He described the difference between choking, which he described as a physical obstruction in the throat, and strangulation: "Strangulation is pressure applied to the neck that restricts normal blood flow, either to or from the brain, resulting in the brain becoming

depleted of oxygen which is asphyxiation.” Based on his training and experience, Wallace testified that approximately 50 percent of all strangulation-victims in non-fatal cases do not have a visible injury and another 35 percent have a visible injury, but not one significant enough to photograph. He stated that the most significant internal injury in those non-fatal cases is asphyxiation, where brain cells die because the strangulation prevents oxygenated blood from getting to the brain.

After a thorough examination of Wallace on his qualifications and areas of expertise, the trial court indicated its inclination to find that he was qualified to testify on the subject matters that the prosecutor proposed. However, the court did not make a final ruling that day but instead deferred the ruling several days to allow counsel to develop their arguments, and the court heard additional argument on the motion on two subsequent days. During argument, the court noted that an expert in these areas need not be a psychologist or doctor to testify about patterns of victim and abuser behavior. However, the court ruled that it would limit Wallace’s testimony in scope to the issues raised by the evidence at trial. Finally, the court ruled that Wallace could testify as an expert on the mechanics and effects of strangulation based on his own experience but could not reference the studies on visible injuries because he did not participate in those studies.

### **The Prosecution Trial Evidence**

H.L. testified that she and defendant had been together for approximately four years, and at the time of the charged incident, they were living together on and off along with defendant’s brother and H.L.’s eight-year-old daughter.<sup>2</sup> The People played a recording for the jury of H.L.’s 911 call at 1:41 a.m. on September 13, 2012, and the transcript was admitted into evidence. During the call, H.L. told the 911 operator that her

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<sup>2</sup> At the time of the charged incident, a restraining order was in effect against defendant, relating to his no contest plea in 2010 to assaulting H.L.

boyfriend was “goin’ crazy, breaking things and slamming me around . . . slamming a mattress on me.” She also stated, “he slapped me into the wall a bunch of times . . . threw me down, choked me.” The operator asked her about the mattress, and H.L. replied, “Uh, he picked the mattress up and then I was behind it and he kept punchin’ it and slamming me against the wall behind the mattress.” H.L. stated that she was not injured but wanted defendant to leave, and she told the operator that she had a restraining order against him. She also stated, “he was threatening to kill me and burn the house down and he dumped hair spray all over me and he said he was going to light me on fire.” She told the operator that she had fled the house.

Shasta County Sheriff’s Deputy Michael Orner testified that he was dispatched in response to H.L.’s call. When he arrived and found H.L. around the corner from her home, he observed that she appeared happy to see him and her demeanor was alternately upset and frightened. Orner testified that H.L. told him that defendant assaulted her but she did not need medical attention. H.L. also told Orner that before the assault, she had driven to Redding to pick up defendant from another woman’s home and the two argued most of the evening. She stated that later that night, her argument with defendant became physical, and defendant held her up against a wall with a mattress and punched and kicked the mattress so she was repeatedly slammed against the wall. She told Orner that she fled to the bathroom but defendant followed her and dumped a bottle of hairspray on her, threatening to light her on fire and burn the house down. Orner observed that H.L.’s shirt-sleeve was wet and she had residue on her arm. Orner further testified that H.L. told him that after dumping hairspray on her, defendant forced her down to the floor, held her down, and “choked her with both hands around her neck.” H.L. told Orner that the pressure on her neck caused her pain and that defendant threatened to kill her while squeezing her neck.

Orner further testified that while he was speaking with H.L. and waiting for a backup unit, defendant approached them on the street. Defendant appeared to Orner to be

agitated and, directing his statements toward H.L. rather than Orner, he said that she caused the fight and that he held her against the wall with the mattress to protect himself because she was hitting him. Defendant admitted that he and H.L. had been arguing but denied assaulting her. Orner arrested defendant after the backup unit arrived. He then looked around the home and observed from the hallway that the mattress in the master bedroom did not appear to be out of place. He also viewed the master bathroom from the hallway and did not notice any hairspray bottles. However, he did not take any photographs of either room.

In her testimony during the trial, H.L. told a very different story. She testified that on the evening of September 12, 2012, she and defendant began arguing over a photograph of defendant with another woman, Sarah. Defendant left the home with a backpack and H.L. followed after him. The two continued to argue, and H.L. looked through defendant's phone and found Sarah's phone number. H.L. returned home and checked their shared cell phone statement, and she discovered that there were numerous text messages between defendant and Sarah. She testified that she then attempted to contact defendant on his cell phone but could not reach him, so she drove to Sarah's home in Redding and found him there. She began arguing with defendant and Sarah, and defendant then agreed to leave with H.L.

H.L. testified that when they returned to their home, they continued arguing. She testified that the fight became physical when she grabbed a bottle of hairspray and threw it at defendant, spilling some hairspray on her arm. She stated that after that, defendant went to the couch to try to sleep, and H.L. followed and sat on him. She said defendant then told her that he was leaving to find somewhere else to sleep, and he headed toward the door. H.L. testified that she begged him to stay and threatened to call the police if he left her. She stated that defendant told her to go ahead and call the police because he had done nothing wrong. H.L. further testified that while they were standing by the door, after she blocked defendant from leaving, he grabbed a picture frame containing photos

of the couple together and threw it out the door. She stated that during the fight, defendant's brother, Keith Birse, was in his room but may have come out for a moment to see what was going on. H.L. testified that because she was angry, she went outside, called 911, and fabricated a story about defendant assaulting her.

H.L. testified that when Orner arrived at the scene, she told him the same version of events that she reported to the 911 operator. Additionally, she acknowledged that when she spoke with Wallace five days later, she repeated the allegations to him with some additional detail. H.L. testified that she told Wallace that while defendant was squeezing her neck and threatening to kill her, she really believed he was going to kill her and that he stopped only when his brother intervened. H.L. also testified that she told Wallace that defendant knew exactly where to push on her neck because defendant once showed her how to "pass people out." She testified that she repeated the allegations to Wallace because she did not want to get in trouble for contradicting her previous statements.

H.L. also testified about a prior domestic-violence incident on September 11, 2010. She testified that she and defendant had an argument that became physical, and defendant put both of his hands around her neck and squeezed until she lost consciousness. She stated that while he was strangling her, he said, "Today you're going to die." She testified that defendant also head-butted her and bit her finger during the altercation. Pursuant to Evidence Code section 1109, subdivision (a)(1), the prosecution introduced evidence of a prior domestic-violence incident involving a former girlfriend. Defendant's former girlfriend, A.H., testified that in July 2004, defendant beat her after she accused him of not helping her take care of their baby. She testified that defendant punched, kicked, and threatened to kill her. She testified that he also kicked a door into her while she was down on the floor.

The prosecution also introduced a series of jail phone calls between H.L. and defendant. During a call defendant made five days after his arrest, H.L. told defendant,

“I’m still going to do everything I can do to not have you there, and you know, whatever I have to do I’ll do it.” Later in the conversation, defendant told H.L., “The only thing you can say or do is that you made it up, and you know I don’t want you to be a liar, so-- that would fucking get me out right now.” H.L. then asked if she would get in trouble, and defendant told her she would not. In a subsequent call, H.L. told defendant, “I’ll still do everything I said I was gonna do and stuff, cause I don’t want you to be there.” She also told defendant that she was concerned that she could not prevent him from being violent in the future. She told defendant she would call the district attorney and say that they were arguing and “things got out of hand,” but she indicated she would not necessarily say that she had lied. She also told defendant she would refuse to testify and promised to do whatever she could do get defendant out. In another call shortly before trial, H.L. told defendant she was under a great deal of stress because no one wanted her to be with him and everyone told her that “once somebody’s physical, they’re always physical.” Defendant replied, “So then you’re gonna, you’re, so you’re . . . [¶] putting me away.” H.L. reassured him, “I am not putting you away for anything or anyone.” Later that day, H.L. told defendant, “You don’t even beat a frikken dog when they poop on the floor. You know? And they’re the ones that pooped on the floor. I just feel like, I just feel like I’ve been treated ways that I’m, I don’t deserve.”

H.L.’s mother, S.J., testified that H.L. called her shortly before trial, crying and “in a panic,” and told her that she and defendant had been speaking on the phone. H.L. told S.J. that defendant “had admitted to her that he had hurt her by promising not to hurt her again. And that he had told her that he was worried or concerned about her living by herself. She had told him that she had locks on the door. And he told her that some--he told her you and I both know how easy it is to kick in a door or break down a door. And that terrified her because he’d done that to her in the past.” S.J. also testified that H.L. said she was frightened that defendant would hurt her if he got out because things were worse for her after she testified against him in 2010.

Wallace testified as an expert on strangulation and behavioral patterns in intimate partner battering cases. Before Wallace testified, the court admonished the jury about the limited purpose of his testimony: “I anticipate that during his testimony, he’ll be offering information concerning common misconceptions that the average person may have regarding the responses, behavior or actions of an alleged victim of domestic violence. He is not providing testimony about [H.L.’s] actions or about the defendant’s actions in this particular case. He is talking in generalities. [¶] His testimony is offered for the limited purpose of showing, if it does show, that [H.L.’s] reactions as demonstrated by the evidence were not inconsistent with having been abused.”

After describing his experience and training, Wallace explained that a victim of domestic violence may not cooperate with law enforcement or the judicial system. He testified that in his experience, victims often recant their initial police-statements in order to try to stop the prosecution of their abusers. He explained that a recanting victim may not only deny the abuse occurred but also “take blame and say they were the batterer.” Wallace also explained the “cycle of violence” in abusive relationships and that victims often try to hide or minimize their injuries. Additionally, he described the effects of strangulation and the differences between strangulation and choking, explaining that strangulation does not always cause visible injuries even if it causes internal injuries or asphyxiation. Wallace testified that when he interviewed H.L., she told him that she feared for her life while defendant was squeezing her neck because he had “strangled her to the point of unconsciousness before.” He stated that H.L. described the pain during the strangulation as an eight on a scale from one to ten.

### **Defendant’s Motion to Admit Evidence of Alleged Prior False Report**

During the trial, the defense expressed the intent to admit Shasta County Sheriff’s Deputy Nathaniel Benton’s testimony regarding another domestic-violence report H.L. made on July 3, 2010, contending that the report was false and that the evidence was relevant to the question of H.L.’s credibility. Defense counsel stated that Benton opined

in his police report that H.L. made false statements about defendant assaulting her. Benton observed that H.L.'s physical appearance during her initial report did not match her allegations that she jumped out of a car during an argument with defendant and he chased her up a hill and tackled her. After reviewing defendant's written offer of proof, the court stated it was inclined to rule that the evidence was tied to Benton's subjective beliefs, would create a mini-trial within the trial, and was more prejudicial than probative. However, the court agreed to defer a ruling and hear the proposed testimony in an Evidence Code section 402 hearing outside the presence of the jury.

At the hearing, Benton testified that he responded to a potential domestic abuse call around 1:15 a.m. on July 3, 2010. He testified that H.L. told him that she and defendant were arguing while driving home on the freeway, and she became afraid and reached for the door handle to jump out of the car. She told Benton that defendant then put her in a headlock and pulled over to the shoulder of the freeway. She stated that she then fled up a hill, and defendant chased her and tackled her to the ground. She stated that defendant then pulled her back to the car and when they arrived home, she ran to a nearby gas station where her neighbor called her and took her to the neighbor's apartment to call the police. Benton testified that he did not observe that H.L. had any visible injuries or dirt and grass on her clothing or sandals. Benton also testified that while he was speaking with H.L., he smelled alcohol on her breath. However, Benton admitted that he did not investigate the off ramp and hill where H.L. told him she was chased and tackled. Benton testified that when he followed up with H.L. approximately a week later, she recanted and said that she still loved defendant and did not wish to pursue charges. H.L. told Benton that "she was intoxicated and only believed he tackled her on the ground." Benton then explained to her that it was a crime to make false statements. Based on these two interactions with H.L., Benton opined that she falsely reported the assault.

The court recalled H.L. to testify about this prior report during the hearing, and she testified that she “ended up telling the police some things that were not true.” To explain her presence at the gas station, H.L. testified that she had gone there to use the pay phone. The court then asked trial counsel whether Benton’s report indicated that he interviewed the neighbor. The prosecutor stated that in his report, Benton noted that he spoke with the neighbor, who stated that H.L. and defendant fought frequently and she called H.L.’s cell phone on July 3 after she heard “loud thuds and banging” coming from H.L.’s apartment. The neighbor called H.L.’s cell phone to see if she was okay. The neighbor stated that H.L. was at the gas station when she called, and she arranged to meet H.L.

Upon hearing about the neighbor’s statement, the court observed, “So we have a different story from [the neighbor] that’s consistent with what I mentioned earlier about her being [at the] gas station. She’s now telling us that she went to use the phone and didn’t have her cell phone and that she walked back and met the neighbor there, which is contrary to what the neighbor is saying. [¶] . . . I don’t see any reason why the neighbor would have any reason to lie about what was going on. So it seems inappropriate to put on evidence that the victim made a false or may have made a false report when there is evidence that corroborates that it was not a false report.” The court ruled that the proposed evidence would result in a mini-trial within the trial and would likely confuse the issues for the jury. Additionally, the court ruled that it did not find H.L.’s testimony that she made a false report credible, particularly in light of the inconsistencies with the neighbor’s version of events. Finally, the court noted that it was not “particularly impressed by the Deputy’s testimony because, you know, he did not do a whole lot of investigation.” Accordingly, the court denied defendant’s motion to introduce the false report evidence.

## **Defendant's Trial Evidence**

Defendant testified in his own defense at trial. He denied assaulting, strangling, or threatening to kill H.L. on September 13, 2012. He testified that H.L. started an argument with him about seeing another woman earlier on the evening of September 12. He testified that H.L. threatened to call his probation officer during the argument. Defendant stated that he and H.L. left the house separately, and after arguing at a bench near their home, defendant asked Sarah to pick him up and went to her home in Redding. He testified that H.L. showed up at the house about an hour later and began arguing with Sarah, who asked them both to leave. He further testified that after they returned to their home, he tried to sleep on the couch but H.L. continued arguing with him and sat on him. Defendant explained that he then gathered some personal items in a backpack and attempted to leave, but H.L. blocked him at the door. He testified that he went back to sleep on the couch and awoke about 15-20 minutes later and went outside to look for H.L., and he found her speaking with a deputy.

Defendant testified that Orner asked him about the mattress, and defendant denied pushing H.L. against the wall with a mattress. He also testified that his brother, Keith Birse, was at work while defendant was arguing with H.L. on the evening of September 12 but was home in the early morning hours on September 13 after defendant and H.L. returned from Redding. Defendant also testified about the recordings of his phone conversations with H.L., saying that when he apologized to her, he did so only for telling her he did not love her.

Defendant testified that in September 2010, he did "lose control" and strangled H.L., but only after she provoked him by charging him and hitting his face. He admitted that during that incident, he lifted H.L. off the floor while strangling her and told her he was going to kill her. However, he testified that he took anger management classes after his conviction for that incident and had since learned techniques to control his anger. He

admitted that he lied to his probation officer about living with H.L. while the restraining order was in effect.

Defendant denied punching or kicking his ex-girlfriend, A.H., in July 2004.

Keith Birse, testifying on his brother's behalf, stated that he heard arguing on the night of September 12 but did not witness an assault or hear any threats. And he did not intervene.

Defendant's mother testified that she was present during the July 2004 incident involving A.H. She testified that she did not see defendant hit or threaten A.H. and denied telling a police officer that defendant struck A.H. with a door while she was lying on the floor.<sup>3</sup>

Finally, H.L. was recalled as a defense witness and testified that she lied to Orner and Wallace about her altercation with defendant. She acknowledged regularly contacting defendant since his arrest. She also denied telling her mother that she was afraid defendant would come after her. She testified that she merely told her mother that she was afraid of recanting her allegations in court because she did not want to "get in trouble for telling the truth."

### **Verdicts and Sentencing**

The jury found defendant guilty on all counts. Defendant then waived his right to jury trial on the two prison prior allegations, and they were found to be true by the court in a bifurcated proceeding.

The trial court sentenced defendant to an aggregate term of six years eight months in prison, calculated as follows: the upper term of four years on count two, assault with force likely to cause GBI (§ 245, subd. (a)(4)); a consecutive term of eight months (one-

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<sup>3</sup> The police officer was called as a rebuttal witness, and he testified that at the time that he took the report, defendant's mother told him that she saw defendant strike A.H. with the door and intervened to prevent him from continuing to hit her.

third the mid-term) on count one, criminal threats (§ 422); eight months (one-third the mid-term) stayed pursuant to section 654, on count three, false imprisonment by violence;<sup>4</sup> concurrent terms of one year in jail each for counts four and five, misdemeanor infliction of corporal injury on a cohabitant (§ 273.5, subd. (a)); and violation of a domestic violence protective order (§ 273.6, subd. (a)); and one consecutive year for each of the two prior prison allegations (§ 667, subd. (b)).

## **DISCUSSION**

### **I. Evidentiary Rulings**

Defendant contends that the trial court erred in excluding his proposed testimony of H.L.'s allegedly false prior report of abuse and in admitting the expert testimony provided by Wallace on strangulation and intimate partner battering. We disagree.

#### **A. Exclusion of Purported False Report Evidence**

Defendant contends the trial court erred in refusing to admit the testimony of Deputy Benton, who opined that H.L. made a prior false accusation of abuse against defendant in July 2010. Defendant claims that because there was a strong similarity between the July 2010 accusations and the instant case, the testimony was “relevant to determine whether [H.L.’s] displeasure with [defendant] caused her to file the report in this case.” Conversely, the People contend that the trial court did not err in excluding Benton’s testimony because defendant failed to conclusively demonstrate that H.L.’s statements to Benton about the alleged assault were substantially false.

This court has expressly held that a prior false accusation is admissible to challenge a victim’s credibility, but such evidence is appropriately excluded under Evidence Code section 352 if it is not first established that the prior accusation was false. (*People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1457 (*Tidwell*)) [purportedly false prior

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<sup>4</sup> As we explain *post*, it was error to impose one-third the midterm and stay that sentence pursuant to section 654.

allegations of sexual assault were properly excluded where inferences of falsity or truthfulness could be drawn either way and could be drawn that the reports were not false and undue consumption of time would result from parties attempting to bolster their view of the evidence].) When there is no “conclusive evidence” of falsity, a trial court may properly exclude the evidence under Evidence Code section 352. (*Id.* at p. 1458; see also *People v. Miranda* (2011) 199 Cal.App.4th 1403, 1424 [“Prior rape complaints do not reflect on credibility unless proven to be false”].) Admitting or excluding evidence under Evidence Code section 352 is a matter of discretion and we must uphold the exercise of that discretion unless the trial court acted in an “arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Here, defendant made an offer of proof at trial. The trial court interrupted the trial and held an Evidence Code section 402 hearing to assess the proposed impeachment testimony. However, the evidence presented did not conclusively establish that H.L. had made false allegations against defendant. The court observed that “something happened,” and “[t]here is no indication as to why the victim would have made it up, if she did. The Deputy never went back to the scene to see if there was anything to--you know, was she drug in the dirt or is there any reason to believe she would have had dirt transferred to her body. He doesn’t sound like he asked enough probing questions of exactly what happened.” The court further observed that the neighbor’s statement provided corroboration for the statement H.L. made to Deputy Benton, and the court found H.L.’s Evidence Code section 402 hearing testimony incredible, particularly in light of the inconsistencies between her version of the events and the neighbor’s version. H.L. said she went to the gas station to use the phone because she did not have her cell phone, yet the neighbor, who heard the loud thuds and banging noises, called H.L.’s cell phone to see if she was okay and spoke to H.L. on her cell phone while H.L. was at the gas station. The court noted the neighbor had no reason to lie about what was going on.

The court ruled that the proposed evidence was more prejudicial than probative and emphasized that allowing the evidence would result in a mini-trial within the trial and likely confuse the issues for the jury.

The value of false-report impeachment evidence depends on conclusive proof that the prior report was false. (*Tidwell, supra*, 163 Cal.App.4th at pp. 1457-1458.) Here, the proof defendant offered was Benton’s opinion that the condition of H.L.’s clothing did not match her story and H.L.’s recantation. However, given the totality of the evidence before the court, inferences could be drawn “either way” as to the truthfulness or falsity of the prior report, similar to the circumstances in *Tidwell*. (*Id.* at p. 1458.) Thus, the trial court properly concluded the evidence was insufficient evidence to prove a prior false report. Without conclusive proof of a false report, the probative value of the evidence was weak. Additionally, the trial court properly concluded the evidence would result in a “mini-trial” and confuse the jury. Given these factors, we cannot conclude that the court abused its discretion by precluding the evidence under Evidence Code section 352.

## **B. Expert Testimony on Strangulation and Intimate Partner Battering**

### **1. Qualifications of the Expert**

Defendant contends that the trial court erred in allowing Wallace to testify as an expert on strangulation and some aspects of intimate partner battering, including the patterns of behavior between victims and batterers. Specifically, defendant contends that Wallace was not sufficiently qualified to testify as an expert on these subjects because he was not a medical doctor, a sociologist, or a psychologist. We disagree.

Evidence Code section 801, subdivision (a), allows an expert witness to offer testimony “[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . .” “A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.”

(Evid. Code, § 720, subd. (a).) It is within the trial court’s discretion to determine whether expert witness testimony would aid the jury and whether a witness is competent and qualified to render an expert opinion. (*Huffman v. Lindquist* (1951) 37 Cal.2d 465, 476.) “The governing rules are well settled. First, the decision of a trial court to admit expert testimony ‘will not be disturbed on appeal unless a manifest abuse of discretion is shown.’ . . . ‘[E]ven if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would “assist” the jury. It will be excluded only when it would add nothing at all to the jury’s common fund of information, i.e., when “the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness.” ’ [Citation].” (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300 (*McAlpin*)). “Error regarding a witness’s qualifications as an expert will be found only if the evidence shows that the witness ‘ “ ‘clearly lacks qualification as an expert.’ ” ’ ” (*People v. Farnam* (2002) 28 Cal.4th 107, 162, italics omitted (*Farnam*)).

Defendant has failed to present any persuasive argument on appeal that Wallace was not qualified to testify as an expert. He mentions that Wallace “had no background in sociology or psychology nor did he possess any medical degree.” However, it is a longstanding rule that “[a] university degree, earned by scientific pursuits, is helpful, but it is not indispensable to the qualification of an expert to testify on subjects in the field of his specialty.” (*People v. Smith* (1956) 142 Cal.App.2d 287, 293.) Moreover, while Wallace did not possess such a degree, it is clear from the record that he possesses significant training and experience in the areas about which he testified. Wallace personally interviewed over 100 alleged domestic-violence victims between July 1, 2008 and July 1, 2010. He encountered thousands of domestic-violence incidents over the course of his 25-year career as a police officer and investigator. Additionally, he attended multiple local, state, and national training conferences on intimate partner battering, including approximately 56 hours of training specifically on strangulation in

domestic-violence cases. Accordingly, we cannot conclude that Wallace “ ‘ ‘ ‘clearly lacks qualification as an expert’ ” ’ ” in the areas of intimate partner battering and strangulation. (*Farnam, supra*, 28 Cal.4th at p. 162, italics omitted.)

## **2. Intimate Partner Battering**

Wallace’s testimony concerning intimate partner battering was properly admitted. Wallace testified about the generic patterns of behavior associated with victims of domestic violence, including their tendency to recant their accusations against the abusers, to minimize the events, to blame themselves, and to become uncooperative with police. Such expert testimony about the behavior of domestic-violence victims is admissible to assist the trier of fact in understanding the tendency of victims of domestic violence to recant or minimize their initial reports of that violence. (*People v. Brown* (2004) 33 Cal.4th 892, 904-908 (*Brown*) [expert testimony that domestic violence victims often later deny or minimize the batterer’s conduct was admissible even though only one incident of domestic violence had occurred]; *People v. Kovacich* (2011) 201 Cal.App.4th 863, 896-902 (*Kovacich*) [general testimony about intimate partner abuse, the cycle of violence, misconceptions concerning victims of intimate partner abuse, the development of coping strategies, including denying, minimizing and rationalizing abuse was admissible in a domestic violence murder prosecution].) However, the expert testimony may not include discussion and diagnosis of the complaining witness in the case. (*People v. Roscoe* (1985) 168 Cal.App.3d 1093, 1099-1100.)

Here, Wallace did not testify that H.L.’s initial reports of abuse were true or that H.L.’s trial testimony was false. Nor did he testify that the victim’s recantation showed she was the victim of intimate partner abuse. Rather, he provided general testimony about the cycle of violence and the behaviors of domestic violence victims in general, including the fact that such victims often recant reports they have made to the police. This testimony was clearly admissible. (*Brown, supra*, 33 Cal.4th at pp. 904-908; *Kovacich, supra*, 201 Cal.App.4th at pp. 896-902.)

Moreover, the court carefully instructed the jury about the scope of Wallace's testimony on this subject just before he testified and again at the close of the trial when the jury was provided the final instructions. Before Wallace testified, the court admonished the jury: "I anticipate that during his testimony, he'll be offering information concerning common misconceptions that the average person may have regarding the responses, behavior or actions of an alleged victim of domestic violence. He is not providing testimony about [H.L.'s] actions or about the defendant's actions in this particular case. He is talking in generalities. ¶ His testimony is offered for the limited purpose of showing, if it does show, that [H.L.'s] reactions as demonstrated by the evidence were not inconsistent with having been abused." At the close of the trial, the court instructed, pursuant to CALCRIM No. 850: "You have heard testimony from Investigator Michael Wallace regarding the effect of intimate partner battering. That specific testimony is not evidence that the defendant committed any of the crimes charged against him. ¶ You may consider this evidence only in deciding whether or not [H.L.'s] conduct was not inconsistent with the conduct of someone who has been abused, and in evaluating the believability of her testimony."

The trial court did not abuse its discretion by allowing the expert testimony on intimate partner battering, and the court properly instructed the jury on this evidence.

### **3. Strangulation**

Defendant contends that "[t]he clear purpose of [Wallace's] testimony was to convince the jury that, despite the lack of any physical evidence showing [H.L.] had been strangled, this lack of any physical manifestations does not mean it did not occur." He suggests that Wallace offered an opinion about "whether [H.L.] had actually been strangled." Defendant further contends that "[a]bsent this improper opinion, it is reasonably probable the jury would have found the offense to be not proved" beyond a reasonable doubt. We disagree with defendant's characterization of Wallace's testimony

and the propriety of establishing the inference that the lack of physical injury does not mean there was no strangulation.

Wallace described the mechanics of strangulation based on his training and experience as well as the difference between strangulation and choking. Wallace did not opine that H.L. was, in fact, strangled. Indeed, he clarified that he never personally examined H.L. He simply explained that based on his experience, strangulation does not always result in visible injuries. This evidence was admissible to disabuse the jury of any notion that there could be no strangulation if there were no strangulation marks on the victim's neck or other associated injuries.

The trial court then properly instructed the jury, pursuant to CALCRIM No. 332, that it was not required to accept Wallace's opinion. The court instructed the jurors that it was their responsibility to "decide whether information on which the expert relied was true and accurate," and to disregard any opinion they found "unbelievable, unreasonable, or unsupported by the evidence."

We conclude that the trial court did not abuse its discretion in allowing the expert testimony about strangulation.

## **II. Belated Acceptance of Plea Offer**

Defendant argues that the trial court abused its discretion in refusing to accept his negotiated plea after his trial began. Specifically, he contends that the trial court failed to "follow the procedures set forth in the local rule and thereby deprived [defendant] of the right to enter into the plea agreement that had been approved by the parties."

Additionally, he argues that the court erred in finding that there were no changed circumstances. We disagree with both points.

### **A. Background**

On November 19, 2012, the People proposed to settle this case if defendant pleaded guilty to the felony charge of making criminal threats, count one. Defendant rejected the offer. On the first day of trial, January 9, 2013, the trial court noted that there

were additional discussions about “a possible resolution of this matter because of changed circumstances.” The trial court judge then explained that he attempted to contact the home court judge, Judge Flynn, but was unable to speak with him. The court pointed out that the district attorney had made a new offer and asked defense counsel whether defendant was willing to accept it. Defense counsel replied, “I guess no.” The court then stated that the offer was “off the table.” After discussing the schedule for the next day--in limine motions in the morning and beginning jury selection in the afternoon--the trial court emphasized the status of the plea negotiations with defendant. The court told defendant: “Mr. Birse, at his point you are going to have to plead to the sheet. Basically, plead straight up if you decide you want to plead. I’m not going to entertain any new offers at this point. Okay. So I just want to put you on notice of that.” Defendant replied, “Okay.” The court made it clear it would not “entertain any new offers at this point.”

Before recessing the proceedings, the trial court again addressed the subject of plea negotiations. The court said: “I guess we should state for the record that the offer that the prosecutor . . . made today was Count 1, the Penal Code Section 422, the felony, with a sixteen-month prison lid. And I attempted to call the judge, Judge Flynn in Department 1, who is the home court judge, pursuant to our policy of if there is a change in the offer and there is potential resolution, contact the home court judge to get their input, but I wasn’t able to get ahold of him.” Defense counsel then stated: “Your Honor, my client is indicating he does want to consider that offer. The court stated: “It’s too late. Sorry. If he wants to plead to the charges, he can plead and we will refer it to Probation. That’s all I can do at this point. [¶] You can think about it overnight, what you want to do. Okay? And we will see you tomorrow morning.”

The next morning, the trial court made a further record of the previous day’s plea discussions: “[Y]esterday I met with both counsel in chambers and they expressed to me that there had been a new offer made of I think a 16-month lid on Count 1, which I

believe was a felony violation of Penal Code Section 422, and [defense counsel] had indicated that defendant was kind of going back and forth on whether to accept or not accept that offer. The prior offer I think had been a local time offer on that count. . . . [¶] . . . [¶] . . . I explained to both attorneys, and they were already aware, that this court has a rule against settling cases on the morning of trial unless the defendant pleads to the entire information or the charges, unless there's a change in circumstances, and usually that occurs after the trial has already begun . . . . [The rule] indicates that: [¶] Prior to the start of trial, the judge shall not engage in or initiate settlement discussions. The trial judge shall only communicate any already agreed upon proposed disposition . . . and the asserted changed circumstances to the home court judge. Otherwise the trial judge shall simply begin trial. [¶] . . . [¶] The purpose of the rule is to not have parties seeking to resolve the case at the last minute after we've already ordered jurors and the case has been sent to the trial court. [¶] If there are changed circumstances articulated, then the trial judge is to contact the home court judge where your case came from. . . . [¶] I didn't express either way to [the] parties whether I'd accept that offer or not, only that I would need to contact the home court judge. I was not able to contact him to run this information by him." (See Super. Ct. Shasta County, Local Rules, rule 13.05(A)(1)(b)-(c).)

The trial court went on to find there were no changed circumstances. The court said, "Whether there's really changed circumstances I think is questionable, under the situation. It really had to do with some phone conversations that [defendant] apparently had with the alleged victim in this case from the jail, and the prosecutor had at that time informed me that there had been I think 220 phone calls made from the jail to her--to the victim's house. [¶] . . . [¶] . . . I'm not sure that that really constitutes a changed circumstance. It's maybe new information, something like that. [¶] Regardless, knowing that the defendant was unequivocal [*sic*] as to whether he wanted to accept that offer, I--and without really having decided in my own mind whether I'd even entertain

that offer, except that I just asked and inquired whether or not the defendant wanted to-- was still interested in that offer and he indicated that he was not, and then after some further discussion yesterday on the record he--his attorney then indicated that he did want to accept it. [¶] I told him it was too late, and the reason I said that was because, in my view, this really is not a situation of changed circumstances. This is--there's been plenty of time to try and resolve this case up to this point. And . . . I know that there's issues on both sides. You know, there's questions whether the victim will testify or not. [¶] In my experience, what it really comes down to is, the victim is probably likely to testify, and even if she didn't testify it sounds like the People may . . . be able to go forward anyway[] . . . . And, based on my understanding of the facts, I do not feel that the suggested disposition was appropriate under the circumstances. [¶] . . . [¶] . . . I don't find that there's truly changed circumstances. There's maybe some new information, but I don't think it's a changed circumstance case, and if something changes during the trial that I find does change circumstances and something changes, then we'll deal with it then." The court then proceeded with the in limine motions.

### **B. Analysis**

“ ‘The process of plea bargaining which has received statutory and judicial authorization as an appropriate method of disposing of criminal prosecutions contemplates an agreement negotiated by the People and the defendant *and approved by the court*. [Citations.] Pursuant to this procedure the defendant agrees to plead guilty in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged. . . . *Judicial approval is an essential condition precedent* to the effectiveness of the ‘bargain’ worked out by the defense and the prosecution. [Citation.]’ ” (*People v. Clancey* (2013) 56 Cal.4th 562, 569-570, italics added.) Accordingly, a trial court is not required to accept a plea bargain, and it is within the court's discretion to approve or reject a proposed plea in accordance with the “promotion of the public's interest in vigorous prosecution of the

accused, imposition of appropriate punishment, and protection of victims of crimes.” ( *In re Alvernaz* (1992) 2 Cal.4th 924, 941.)

Courts balance competing interests in deciding how late in the criminal proceedings to consider plea bargains. In *People v. Cobb* (1983) 139 Cal.App.3d 578, the court observed that “the competing interests of accurately scheduling court calendars and judiciously taking pleas to avoid trial can be accommodated while reasonably restricting pleas to certain time periods. The purpose of improving calendar management justifies the setting of deadlines beyond which no conditional plea may be taken.” (*Id.* at p. 585.) The court in *Cobb* upheld the so-called “Fresno rule” that prohibited plea bargaining after the trial setting conference, and required any pleas after that time to be “straight up” pleas, that is, admissions to all the charges and allegations. (*Id.* at p. 581.)

Here, the trial court applied its local rule (Super. Ct. Shasta County, Local Rules, rule 13.05(A)(1)(a)-(c)), which provides, “(a) . . . [¶] (i) If trial counsel on the day of trial present to the trial court a negotiated disposition, and they are able to articulate changed circumstances that are *both material and demonstrated to have been unforeseeable at the trial assignment calendar*, the home court judge is to be contacted by the trial court judge and advised of the foregoing. The purpose of this is to avoid ‘forum shopping.’ . . . [¶] . . . [¶] (b) Prior to the start of trial, the judge shall not engage in, or initiate settlement discussions. The trial judge shall only communicate any already agreed upon proposed disposition and the asserted changed circumstances to the home court judge. Otherwise the trial judge shall simply begin trial. [¶] (c) Once trial has commenced, any changed circumstances that arise during the course of the trial may be cause for the trial court to accept a negotiated plea. Under these circumstances the trial judge shall exercise its own independent discretion whether to accept a negotiated plea, and if it does so, shall conduct any sentencing proceedings that result from the negotiated plea.” (Italics added.) The trial court cited this rule and explained that “[t]he purpose of the rule is to not have

parties seeking to resolve the case at the last minute after we've already ordered jurors and the case has been sent to the trial court.”

The judge explained that he attempted to contact the home court judge, and he could not be reached. The local rule does not expressly contemplate situations, as here, when the home court judge is unavailable. (Super. Ct. Shasta County, Local Rules, rule 13.05(A)(1)(a)-(c).) Regardless, the rule only requires the trial judge to contact the home court judge *if* the parties have first demonstrated changed circumstances that are both material and unforeseeable. (*Ibid.*) The court analyzed whether there were changed circumstances and determined that the only changed circumstances were the discovery of phone calls defendant made to H.L. from the jail. The trial court regarded this as “new information,” not changed circumstances. The record thus discloses that the trial judge understood the local rule, evaluated whether there were changed circumstances, and ruled there were no changed circumstances under the rule. While the rule did not require the trial court judge to contact the home court judge without a finding of material and unforeseeable changed circumstances, it extended a courtesy to the home court judge and defendant by attempting to contact the home court nevertheless. The court’s actions were consistent with the procedure set forth in the local rule.

Defendant argues that defense counsel was not informed of “the existence of numerous recorded calls [defendant] made from jail to the victim,” and counsel only received the information one day before trial. Defendant asserts, “[i]n that defense counsel had only received information as to the existence of the calls one day before, there had not been adequate time to discuss them with [defendant] and/or have the contents investigated.” Thus, defendant challenges the court’s express finding that the circumstances described by defendant did not constitute changed circumstances that would justify an exception to the local rule.

Assuming for argument’s sake that the late disclosure of the phone calls amounts to material changed circumstances as contemplated by the rule, the record supports the

court's ruling because this evidence was not unforeseeable. Defendant was certainly aware of the phone calls because he made the calls, and he was warned at the beginning of each call that the conversation "may be recorded or monitored." Further, the prosecution furnished the defense with two earlier call transcripts from September 2012, well ahead of trial. Like the newly disclosed calls that took place just a few days before trial, the September 2012 call transcripts contained statements indicating that H.L. would recant in order to prevent defendant from going to prison. It was foreseeable that additional similar recordings would surface.

We conclude that the court did not abuse its discretion in finding that there were no changed circumstances and declining to accept the late plea.

### **III. Sentencing Error**

There is an error in sentencing that requires remand. The trial court imposed a sentence of "one-third the midterm" on count three, false imprisonment by force or violence. The court said it was imposing this term consecutively and concurrently<sup>5</sup> and then stayed this term pursuant to section 654. This was error.

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<sup>5</sup> In imposing the sentence on count three, the court said: "I'll impose an eight-month *consecutive*, one-third the midterm term but stay that pursuant to the provisions of Penal Code section 654; however, if--if for any reason something happens with the consecutive sentencing on Count 1, my intention would be to sentence the defendant *consecutively* on Count 3 as well to a term of eight months consecutive, . . . because the victim was particularly vulnerable and-- . . . due to her lack of self-esteem, and she was dependent upon the defendant, . . ., she's known to recant in the past, there was a restraining order in effect at the time, the defendant was well aware of the restraining order, . . . when he acted, and I believe that this--the act of confining the victim was done to instill fear in the victim. [¶] So, although I'm sentencing him *concurrently* and we're staying that eight-month term, . . . pursuant to [section] 654, my intention would have been to sentence to a *consecutive* term." (Italics added.)

“The one-third-the-midterm rule of section 1170.1, subdivision (a),<sup>6</sup> only applies to a consecutive sentence, not a sentence stayed under section 654.” (*People v. Cantrell* (2009) 175 Cal.App.4th 1161, 1164 (*Cantrell*)). “Furthermore, the imposition of a ‘consecutive’ and ‘stayed’ sentence would be meaningless because the stayed sentence would only operate if the principal count were eliminated. Therefore, a stayed sentence cannot be consecutive to a principal sentence.” (*Id.* at p. 1164.) Nor can the eight-month term be both concurrent and stayed.

The trial court selected the sentence on count two, assault by means of force likely to cause GBI, as the principle term. If a conviction on the principle term were ever invalidated, a *full term* sentence on the stayed term would come into effect. (*Cantrell, supra*, 175 Cal.App.4th at p. 1164.) Thus, a full term sentence must be imposed and stayed. Because that sentence should be commensurate with the trial court’s determination of defendant’s punishment, we remand this matter to the trial court for a determination of whether the full lower, middle, or upper term should be imposed and then stayed on count three.

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<sup>6</sup> Penal Code section 1170.1, subdivision (a) provides in pertinent part: “Except as otherwise provided by law, *and subject to Section 654*, when any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court, and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses.” (Italics added.)

**DISPOSITION**

We remand this matter to the trial court for resentencing on count three, false imprisonment by force or violence, to impose the low, middle, or upper term and then stay execution of that term. The judgment is otherwise affirmed.

MURRAY, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.