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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sutter)

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THE PEOPLE,

Plaintiff and Respondent,

v.

ARTIES JOHNSON III,

Defendant and Appellant.

C075995

(Super. Ct. No. CRF122056)

Defendant Arties Johnson III appeals from a judgment of conviction following a jury trial. He was charged with one count of corporal injury upon a former cohabitant (Pen. Code, § 273.5, subd. (a) (Count 1)).<sup>1</sup> It was further alleged that defendant had been previously convicted of a domestic violence offense (§ 273.5, subd. (e)(1)) and that he personally inflicted great bodily injury (GBI) under circumstances involving domestic violence (§ 12022.7, subd. (e)). The information also alleged that defendant had been convicted of a strike offense (§ 667, subd. (e)(1)) and a serious felony (§§ 667, subd. (a),

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<sup>1</sup> Undesignated statutory references are to the Penal Code in effect at the time of the charged offenses.

1192.7, subd. (c)). It was further alleged that defendant had served five prior prison terms. (§ 667.5, subd. (b).). A jury found defendant guilty on Count 1 and found the GBI allegation to be true. Defendant admitted the prior domestic violence conviction, prior strike conviction, prior serious felony conviction, and prison term enhancements. The trial court sentenced defendant to an aggregate prison term of 23 years.

On appeal, defendant contends: (1) there is insufficient evidence to support the jury's finding of GBI; (2) the trial court failed to conduct a proper *Marsden*<sup>2</sup> hearing; (3) the trial court prejudicially erred in instructing the jury with CALCRIM No. 852; and (4) the trial court abused its discretion in denying defendant's request for a section 1203.03 diagnostic study.

We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **The Trial Evidence**

#### **The Charged Crime and GBI Enhancement**

Laisha Harris testified that she met and began dating defendant in 2009, and the two lived together in Sacramento for a period of about three to four months in 2010. In October 2010, Harris told defendant that she wanted to break up with him. Defendant responded by hitting her in the face more than once with his fist, cutting her lip. Harris stopped living with defendant that day.

In July 2012, Harris moved from Vallejo to an apartment in Yuba City. Defendant and his cousin assisted her with the move. After she moved to Yuba City, defendant started coming to her apartment, and while Harris did not want to rekindle the relationship, she found it difficult to “tell[] someone that has a[] temper and already doesn't deal with rejection well to tell them to go away.” Defendant came to her

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<sup>2</sup> *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

apartment for her birthday on July 10, 2012. He stayed overnight with her, and the two were physically intimate. The following day, Harris had a long conversation with defendant and told him that things would not work out between them. When she felt that she was done talking to defendant, she told him she was going to go to bed. She laid down in her bedroom, and the next thing she knew, defendant was on top of her, hitting her in the face with his closed fist. Harris could not recall the number of times defendant hit her,<sup>3</sup> but she testified it was more than once. Harris went to the bathroom to clean her face, and defendant followed her there and apologized for hitting her. Harris sent her son, who was sleeping in the living room, to get help.

After her son sought help, Harris went by ambulance to the Rideout Hospital in Marysville. She testified that her pain level was a 10 out of 10 on the pain scale. Her left eye was severely swollen, and it took several weeks for the swelling to go down. She had severe headaches daily for one year following the incident, and she continued to have headaches several times per week as of the time of trial. At the time of trial, Harris still had to take Vicodin for her headaches. She also developed a light sensitivity.

Dr. Daniel Dorsey, an interventional radiologist at the hospital, testified that he interpreted a series of head and maxillofacial CT scans. Harris's maxillofacial scan showed that she suffered a "blowout fracture," a fracture to her left eye socket. Dr. Dorsey described this type of injury as "[t]he second most common severe injury to the orbit." He further characterized the injury as "very serious" and "significant," and he noted the potential for serious complications such as ongoing headaches. He also testified that while the injury was consistent with a punch in the eye, this type of injury is

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<sup>3</sup> Officer Dennis Heitkemper, who interviewed Harris at the hospital, testified that she told him that defendant punched her in the face once and could not remember if he hit her again after that. However, Harris explained that she was taking various medications for asthma, Lupus, and fibromyalgia at that time, including Vicodin and a muscle relaxer.

typically seen in events like car accidents or a blow to the eye with a baseball. It is usually the result of a “fairly high-energy event” in terms of force.

Angela Maral, the nurse who treated Harris at the hospital, testified that she observed that Harris’s left eye was swollen shut. Harris was tearful and appeared to be in a great deal of pain. Harris rated her pain level as a 10 out of 10 on the pain scale. While in the ER, Harris vomited twice; on the first occasion, there was blood in the vomit that likely was the result of her sinuses draining back into her stomach. Harris was administered Toradol and morphine for the pain, as well as Zofran for nausea. Harris was discharged that night but returned for a recheck of her eye on July 13, 2012, and she was given an eye patch to protect her eye due to a corneal abrasion. Moral testified that a corneal abrasion is “very painful and it could make it difficult to see.”

#### **Evidence Code Section 1109 Evidence**

Quanisa Brooks testified that she dated defendant intermittently for a number of years, and she had one child with him. In August 2003, Brooks and defendant had an argument because he was trying to leave in her car. Defendant pushed and slapped her during the argument. Brooks hit him back after he started hitting her. In November 2003, Brooks and defendant had another argument in the driveway near Brooks’s car. Brooks’s daughter was in the car looking for her shoe, and the keys were also in the car. At some point during the argument, defendant jumped into Brooks’s car and drove it straight toward Brooks. Brooks jumped out of the way and defendant crashed the car. Defendant then got out of the car and began hitting Brooks with a closed fist, and she hit him as well. Brooks had some swelling on the side of her head, but she did not have to go to the hospital.

Sonia Payton Jones, defendant’s estranged wife, testified that she married him in November 2007 and lived in Sacramento with him for about seven to eight months. In March 2008, defendant and Jones had an argument, and he hit her in the face with a closed fist. Jones testified that he then used both hands to strangle her neck and “tried to

twist like you would [w]ring a towel” for about a minute and a half. As a result of this incident, defendant was convicted of felony spousal abuse in April 2008.

### **Verdict and Sentencing**

On October 2, 2013, the jury found defendant guilty on Count 1 and found the GBI allegation to be true. Defendant admitted the prior conviction and prior prison term enhancements. On March 7, 2014, the trial court sentenced defendant to an aggregate term of 23 years in prison, calculated as follows: the upper term of five years on Count 1 (increased from four to five years because of the prior domestic violence conviction), doubled to 10 years pursuant to section 667, subdivision (e)(1); the mid-term of four years on the GBI enhancement under section 12022.7, subdivision (e); a consecutive five-year term pursuant to sections 667, subdivision (a), and 1192.7, subdivision (c); a term of one year for the oldest prison prior (October 22, 1998), stayed pursuant to section 654; and four consecutive one-year terms for the remaining four prison priors pursuant to section 667.5, subdivision (b).

## **DISCUSSION**

### **I. Sufficiency of the Evidence of GBI**

#### **A. Defendant’s Contentions**

Defendant contends there was insufficient evidence to support the jury’s finding that he inflicted GBI upon Harris. He claims that because Harris was not hospitalized and her injury did not require surgery, her injuries did not amount to GBI. He contends that the evidence “showed only moderate harm” to Harris. We disagree.

#### **B. Analysis**

Whether a victim suffered GBI is a question of fact for the jury to decide. (*People v. Cross* (2008) 45 Cal.4th 58, 64 (*Cross*).) Accordingly, we review the jury’s factual finding of GBI under the substantial evidence standard. (*People v. Escobar* (1992) 3 Cal.4th 740, 745-750 (*Escobar*).) “ ‘In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we “examine the whole

record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] . . . “[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.” [Citation.] We do not reweigh evidence or reevaluate a witness’s credibility. [Citation.] [Citations.]” (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

Section 12022.7, subdivision (f), defines “ ‘great bodily injury’ ” as “a significant or substantial physical injury.” (§ 12022.7, subd. (f).) To be considered “significant or substantial” within the meaning of the statute, the injury need not cause permanent, prolonged, or protracted disfigurement, impairment, or loss of bodily function. (*Escobar, supra*, 3 Cal.4th at p. 750.) “An examination of California case law reveals that some physical pain or damage, such as lacerations, bruises, or abrasions is sufficient for a finding of ‘great bodily injury.’ [Citations.]” (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1047; see also *People v. Jung* (1999) 71 Cal.App.4th 1036, 1042 [“Abrasions, lacerations, and bruising can constitute great bodily injury.”].) A “ ‘plain reading’ ” of the statute “ ‘indicates the Legislature intended it to be applied broadly.’ ” (*Cross, supra*, 45 Cal.4th at p. 66, fn. 3; see also *People v. Elder* (2014) 227 Cal.App.4th 411, 419.) The GBI “need not meet any particular standard for severity or duration, but need only be ‘a substantial injury *beyond* that inherent in the offense itself.’ ” (*People v. Le* (2006) 137 Cal.App.4th 54, 59.)

Applying these principles, the evidence of GBI here was more than sufficient. Harris testified that as a result of defendant punching her, her eye became severely swollen, and it took several weeks for the swelling to go down. She rated her pain level as a 10 out of 10 on the pain scale. She had severe headaches daily for a year following

the incident, and as of the time of trial, which was about fifteen months after the injury, she continued to have headaches several times per week. At the time of trial, Harris still had to take Vicodin for her headaches. Harris also suffered ongoing light sensitivity following the accident. While defendant attributes these ongoing injuries to Harris's fibromyalgia and lupus in his appellate brief, there is no evidence in the record to support this contention. In fact, Harris testified that she rarely had headaches before defendant's attack, and there is no evidence to the contrary. Significantly, Harris's description of her injury and ongoing effects is consistent with Dr. Dorsey's description of her injury as a "very serious," "significant" injury with potential for serious complications such as ongoing headaches. Dr. Dorsey described this injury as typically seen in events like car accidents or a blow to the eye with a baseball. Accordingly, while consistent with a punch, he opined that Harris' injury was the result of a great deal of force.

Nurse Maral's testimony about her observations of the injury and Harris's apparent pain, Dr. Dorsey's testimony about the nature of the injury, the severity of the trauma and complications in combination with Harris's testimony about her headaches and light sensitivity persisting fifteen months after the assault was more than sufficient to prove GBI within the meaning of section 12022.7. (See, e.g., *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 836 [bruising and swelling of the victim's hands, arms, and buttocks was sufficient to establish GBI].)

Defendant argues that because Harris's injuries did not require hospitalization or surgery and because she did not suffer scarring or permanent disfigurement, her injuries were insubstantial or insignificant.<sup>4</sup> As discussed *ante*, these are not deciding factors for

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<sup>4</sup> Defendant makes much of a note in Harris's medical records, which stated, "Patient is convinced that she needs an eye patch for corneal abrasion. I am willing to do this, although it's not particularly needed." In his appellate brief, defendant attributes this note to Maral; however, that is not established in the record. Maral was simply asked about the note in the records. Defendant claims this note is evidence that "perhaps

what does and does not constitute GBI. “ ‘ “A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description.” ’ [Citations.] Where to draw that line is for the jury to decide.” (*Cross, supra*, 45 Cal.4th at p. 64.) The jury was properly instructed on the definition of GBI, including that “[g]reat bodily injury means significant or substantial physical injury” and the injury must be “greater than minor or moderate harm” (CALCRIM No. 3163), and it reasonably concluded the injuries here were on the *significant* and *substantial* side of the line. Viewing the evidence in the light most favorable to the judgment, the jury’s conclusion was clearly supported by substantial evidence.

## **II. Marsden Hearing**

### **A. Background and Defendant’s Contentions**

Defense counsel Douglas Tibbitts was appointed to represent defendant in May 2013 after defendant had a conflict with his first counsel and filed a complaint with the State Bar. On July 5, 2013, defendant wrote a letter to the trial court requesting new counsel. He claimed that Tibbitts did nothing to help him and failed to keep him informed about his case.

On September 23, 2013, the trial court heard defendant’s *Marsden* motion. The prosecutor opposed the motion, contending that it was a delaying tactic because defendant had already made a *Marsden* motion with his former counsel, and “[h]e tried to Marsden Mr. Tibbitts before he had even talked with Mr. Tibbitts.” She noted that

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[Harris] exaggerated her symptoms.” That claim is also not supported by the record. Notably, Maral did not opine during her testimony that the eye patch was unnecessary. In fact, she testified that the medical record indicated Harris had a corneal abrasion and that type of eye injury can become infected. She further testified that such an injury is very painful and it can impair vision. There is nothing in Maral’s testimony or the medical record to suggest that Harris exaggerated her symptoms. In light of Maral’s testimony and Dr. Dorsey’s description of Harris’s fracture as a “severe,” “very serious,” and “significant,” we are not persuaded by defendant’s unsupported claim that Harris exaggerated her injuries.

defendant would benefit from delay because the victim “advised that she plans to be moving at the end of this year and would not be available.”

The trial court then cleared the courtroom and conducted a *Marsden* hearing. The court inquired why defendant was bringing the motion. Defendant said that he and his counsel were “not seeing eye to eye.” The court asked defendant to be more specific. Defendant replied that Tibbitts did not file any motions in preparation for trial and had done “nothing for [his] case.” The court pointed out that counsel had filed a motion to continue the trial. Defendant responded that he wanted counsel to file a motion to suppress all evidence. The court then asked Tibbitts if defendant had requested such a motion. Tibbitts replied that defendant never made that request. Defendant interjected, “That’s why this is not working. . . . [¶] The communication has broke[n] down.” The court then asked defendant what evidence he wanted counsel to move to suppress. Defendant responded that he had a right to have his counsel “diligently participate” in his case. The court asked defendant to answer the question. Defendant responded, “I want a new attorney. That’s what I want. . . . I can’t do Tibbitts.” Defendant claimed counsel had done nothing to help him and was incompetent. He went on to say, “you know what I mean, and now I’m sitting here talking, getting loud because I am adamant about getting off of this dude’s case. I can not [*sic*] do this, you know what I mean. I am losing here, you know what I mean. I am losing time out there with my family and loved ones, you feel me.” Defendant went on to repeat, “I can’t -- I’m not going to do it. I’m not going to do it” and “[n]o, no, no, no.” The court repeatedly tried to calm defendant, asking him to stop, and defendant replied, “I don’t care, man,” and told the court, “give me a fucking new attorney.” The court then denied defendant’s motion. The court offered to explain its reasoning and asked if defendant wanted to hear it, and defendant declined. The hearing concluded with defendant saying: “So you’re going to arrest me in the trial, fuck it then, you know what I mean. I don’t fucking care, man. This is bullshit. This is fucking bullshit, you know what I mean, for real. Don’t come get me on

Friday for court. Don't come get me, man, you know what I mean. Straight up. Straight up. This is -- man, you know what I mean, this is unreconcilable [*sic*] differences. You're going to force me to take somebody. Fuck that."

On appeal, defendant contends that "the summary manner in which the court conducted the Marsden hearing, failing to make inquiry of trial counsel, did not comport with the requirements of [*Marsden*] and its progeny." He asserts that because the trial court failed to adequately inquire into defendant's complaints, the record makes appellate review impossible and the court's *Marsden* ruling should be treated as prejudicial per se under *People v. Hill* (1983) 148 Cal.App.3d 744, 753 (*Hill*.) We disagree.

### **B. Analysis**

In *Marsden*, our high court established the right of a criminal defendant to make a motion to discharge court-appointed counsel and substitute new counsel. (*Marsden, supra*, 2 Cal.3d at pp. 123-124.) Under *Marsden*, a defendant who makes such a motion must be allowed to state the specific reasons for his dissatisfaction with counsel. (*Ibid.*) The defendant is entitled to substitute counsel only if the record clearly shows that defense counsel was not providing adequate representation or that "defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." (*People v. Crandell* (1988) 46 Cal.3d 833, 854, overruled on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) We review a court's denial of the motion for abuse of discretion, and a denial is not an abuse of discretion unless the defendant has shown a failure to replace appointed counsel would substantially impair his right to the effective assistance of counsel. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.)

Defendant contends, citing *Hill* and related authorities, that the trial court denied his *Marsden* motion without adequate inquiry into the factual basis of the request, which was prejudicial per se. This contention is not supported by the record. "The true question is whether [defendant's] statement offered any substantial grounds which called

for further inquiry by the court.” (*People v. Culton* (1979) 92 Cal.App.3d 113, 116 (*Culton*)). In this case, it did not. The court did not rule without providing defendant with multiple opportunities to state his reasons for wanting new counsel. When defendant provided only vague answers, the court asked defendant to be more specific. The one specific complaint defendant mentioned, that his counsel had not yet filed a motion to suppress evidence, was rebutted by defense counsel, who stated that defendant never requested such a motion.<sup>5</sup> When the court attempted to ascertain what evidence defendant wanted his counsel to suppress, defendant repeatedly refused to answer. He then returned to more vague complaints that his counsel had “done nothing” for him and was “not helping” him. As the court attempted to ask defendant more questions, he repeatedly interrupted and grew belligerent.

In his appellate brief, defendant quotes *Marsden* for the proposition that “a judge who denies a motion for substitution of attorneys solely on the basis of his courtroom observations, despite a defendant’s offer to relate specific instances of misconduct, abuses the exercise of his discretion to determine the competency of the attorney” (*Marsden, supra*, 2 Cal.3d at p. 124). But here, defendant did not “offer to relate specific instances of misconduct.” (*Ibid.*) In fact, while the court repeatedly solicited that information, defendant refused to provide it. The court’s attempts to inquire further were rebuffed and met with increasing antagonism and profane language. Defendant’s complaints, save for the complaint about the motion that counsel attested he never requested, were general and related more to disliking his counsel than any specific instances of misconduct. In other words, defendant’s statements “related dissatisfaction, but gave no hint of any factual grounds for that dissatisfaction.” (*Culton, supra*, 92

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<sup>5</sup> Notably, the hearing on defendant’s *Marsden* motion occurred eight days before the trial was set to begin, and defense counsel did, in fact, file a motion in limine to exclude prejudicial evidence several days before trial.

Cal.App.3d at p. 116.) Under these circumstances, it was not error to deny the *Marsden* motion. (See *ibid.*)

### **III. Claim of Instructional Error Concerning Evidence Code section 1109 Evidence**

#### **A. Background and Defendant's Contentions**

The trial court instructed the jury with CALCRIM No. 852 on evidence of uncharged domestic violence. In pertinent part, the instruction informed the jury: “You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. . . . A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit the infliction of a corporal injury on his former cohabitant in violation of Penal Code Section 273.5(a), as charged in Count 1. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the crime charged in Count 1. The People must still prove the charge and any allegation[] beyond a reasonable doubt.”<sup>6</sup>

Defendant contends CALCRIM No. 852 violated his right to due process and unconstitutionally reduced the prosecution's burden of proof because it expressly told the

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<sup>6</sup> Defendant did not object to this instruction below. However, defendant contends that the issue is cognizable on appeal because defendant's substantial rights would be implicated if, as defendant argues, the instruction reduced the prosecution's burden of proof. The People do not disagree. We therefore exercise our discretion under section 1259 to consider the issue despite the lack of objection.

jury it could infer defendant's guilt of the charged offenses if it found by a preponderance of the evidence that he had committed another domestic violence offense and from this, he has a propensity to commit such crimes. He contends that it was error to tell the jury it could infer guilt based on such a propensity and that the instruction's reference to the preponderance of the evidence could be understood to allow a finding of guilt based on that standard instead of proof beyond a reasonable doubt. Defendant acknowledges that the California Supreme Court has approved CALJIC No. 2.50.01, a substantially similar instruction in *People v. Reliford* (2003) 29 Cal.4th 1007, 1016 (*Reliford*), and that this court is required to follow our high court's decision; nevertheless, he raises the issue to preserve it for possible federal review.

### **B. Analysis**

This court has previously rejected similar challenges to CALCRIM No. 852. (See *People v. Reyes* (2008) 160 Cal.App.4th 246, 250-253 (*Reyes*); *People v. Johnson* (2008) 164 Cal.App.4th 731, 738-740.) As explained in *Reyes*: "CALCRIM No. 852 makes clear the evidence of uncharged acts of domestic violence may only be considered at all if it has been established by a preponderance of the evidence and explains what is meant by that burden of proof. The instruction also explains that if that burden is not met, the evidence must be disregarded entirely. [¶] As with CALJIC No. 2.50.02, CALCRIM No. 852 explains that *if* the jury finds the defendant committed the uncharged acts, it *may* but is not required to conclude the defendant was disposed to or inclined to commit domestic violence and *may* also conclude that the defendant was likely to commit and did commit the crimes charged in the case. Also as with CALJIC No. 2.50.02, CALCRIM No. 852 clarifies that even if the jury concludes the defendant committed the uncharged acts, that evidence is only one factor to consider, along with all other evidence and specifies that such evidence alone is insufficient to prove the defendant's guilt on the charged offenses. CALCRIM No. 852 then goes on to state that the People must still prove each element of every charge beyond a reasonable doubt. In this, CALCRIM

No. 852 goes further than CALJIC No. 2.50.02 with a clarification which inures to the defendant's benefit." (*Reyes*, at p. 252.)

As defendant concedes, his constitutional arguments challenging CALCRIM No. 852 are not materially distinguishable from similar claims in reference to the instruction's predecessor, CALJIC No. 2.50.02, which were expressly rejected by the California Supreme Court in *Reliford*, *supra*, 29 Cal.4th at pp. 1013-1015. (See also *People v. Carpenter* (1997) 15 Cal.4th 312, 380-383; *People v. Medina* (1995) 11 Cal.4th 694, 762-764.) These decisions are binding on this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we continue to adhere to our high court's decision in *Reliford* and this court's decision in *Reyes*, and conclude that it is not error to instruct the jury it can infer from the commission of past domestic violence offenses a propensity to commit domestic violence and thus defendant's guilt<sup>7</sup>; nor is it reasonably likely the jury would have interpreted the instruction to authorize conviction on the charged offense based on a lower standard than proof beyond a reasonable doubt. (See *Reliford*, at pp. 1013-1015; *Reyes*, *supra*, 160 Cal.App.4th at pp. 252-253.)

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<sup>7</sup> As noted defendant asserts he makes this argument for purposes of preserving a federal constitutional claim, but the Federal Rules of Evidence also allow evidence of certain past criminal conduct to establish propensity to commit the same type of conduct. (See Fed. Rules Evid., rule 413 [admissibility of uncharged sexual assault misconduct]; rule 414 [admissibility of uncharged child molestation misconduct].) The Ninth Circuit Court of Appeal, agreeing with other federal courts, long ago upheld the constitutionality of such rules (*United States v. LeMay* (9th Cir. 2001) 280 F.3d 1018, 1031 [holding that the admission of prior child molestation to establish propensity did not violate due process]) and more recently upheld the constitutionality of California's Evidence Code section 1108, which authorizes the admissibility of uncharged sexual misconduct to establish propensity, against a due process challenge to the admissibility of such evidence to establish propensity. (*Mejia v. Garcia* (9th Cir. 2008) 534 F.3d 1036, 1047, fn. 5.)

#### **IV. Section 1203.03 Diagnostic Study**

##### **A. Background and Defendant's Contentions**

Prior to sentencing, defendant filed a written request that the trial court order a diagnostic study pursuant to section 1203.03. In support of that request, defendant submitted an 10-page, single spaced psychological evaluation report prepared by Dr. Lesleigh Franklin, Ph.D., in which she opined that defendant suffers from a Post Traumatic Stress Disorder (PTSD) and has low cognitive function related to abuse he experienced during his childhood, including exposure to domestic violence in his home. She opined that this childhood abuse influenced his violent behavior as an adult. Defendant told Dr. Franklin that he “would regularly have to protect his mother from the Domestic Violence perpetrated on her by the men she would bring home.” Defendant also reported that “he has had several relationships with each of them ending due to his anger issues, and him becoming violent in the relationship.” Dr. Franklin also conducted cognitive tests, which “revealed marked intellectual impairments, which lead to a diagnosis of Intellectual Disability.” Dr. Franklin opined that PTSD can “play a role in an individual’s ability to control impulses, anger, depression, anxiety, and mood swings.” She noted that defendant reported struggling with all of these issues. Defendant contended that his cognitive limitations and PTSD explained his five felony convictions for violence against women.

At the sentencing hearing, the trial court accepted Dr. Franklin’s evaluation into evidence. Defense counsel argued that the evaluation indicated that defendant’s PTSD “surfaces when he’s stressed and in a stressed position with various women in his life.” He argued that a section 1202.03 diagnostic study was pertinent to the court’s final adjudication and sentencing. Conversely, the prosecutor argued that Dr. Franklin’s report indicated that defendant “is an angry individual and part of that might be due to some [PTSD].” He argued that such a condition was not uncommon among the prison population. He further argued that defendant’s purported cognitive impairment was

overstated because defendant exhibited “some sophistication with regard to the legal process, making multiple Marsden motions, filing a complaint with the State Bar against his first attorney after his first Marsden effort failed and, thereby become [*sic*] successful in his effort to fire his first attorney.” The prosecutor also noted that the prohibition in the Three Strikes law in section 667, subdivision (c)(4), against committing defendant to some facility other than state prison makes a section 1202.03 evaluation of little utility unless the court dismissed the strike allegation.

After hearing argument, the trial court denied defendant’s motion for a 90-day diagnostic study: “The Court does not find that a just disposition in this case requires diagnosis and treatment. The Court believes that the defendant is wholly outside the frame of evaluation that a 1203.03 diagnostic study is ordered for or would benefit.”

Defendant argues that the trial court abused its discretion in failing to order the 90-day study and had the court ordered the study, it “would have yielded further data that would have offered the trial court” reasons to reduce the conviction to a misdemeanor, grant defendant’s motion to dismiss the strike allegation, or impose the midterm. We disagree.

## **B. Analysis**

Section 1203.03, subdivision (a), provides: “In any case in which a defendant is convicted of an offense punishable by imprisonment in the state prison, the court, *if it concludes that a just disposition of the case requires such diagnosis and treatment services as can be provided at a diagnostic facility of the Department of Corrections, may order that defendant be placed temporarily in such facility for a period not to exceed 90 days, with the further provision in such order that the Director of the Department of Corrections report to the court his diagnosis and recommendations concerning the defendant within the 90-day period.*” (Italics added.) A trial court is warranted in ordering such a placement if it concludes a diagnostic study is required for a just disposition of the case. (*People v. Peace* (1980) 107 Cal.App.3d 996, 1001 (*Peace*).

We review the trial court’s decision for abuse of discretion. The trial court does not abuse its discretion unless the ruling exceeds the bounds of reason. (*Id.* at pp. 1001-1002; see also *People v. Harris* (1977) 73 Cal.App.3d 76, 85.)

Here, the record shows no abuse of discretion in sentencing defendant without a section 1203.03 diagnostic study. (See *People v. Swanson* (1983) 142 Cal.App.3d 104, 110-111 [“The fact that a trial judge uses his discretion in a manner different from that requested or suggested, does not mean that the trial judge has abused his discretion.”].) The trial court had the benefit of reviewing Dr. Franklin’s psychological evaluation before sentencing. The court therefore had a recent evaluation of defendant’s mental condition and was well within its discretion in determining a diagnostic study was not essential for a just disposition of the case. (*Peace, supra*, 107 Cal.App.3d at p. 1001 [“In the instant case the trial judge had before him a great deal of information on appellant’s mental condition. Given this fact, the trial judge did not abuse his discretion in not obtaining another psychiatric report.”].) Accordingly, the trial court did not abuse its discretion in not obtaining another psychiatric report before sentencing defendant.

**DISPOSITION**

The judgment is affirmed.

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MURRAY, J.

We concur:

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ROBIE, Acting P. J.

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HOCH, J.