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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNY VINCI,

Defendant and Appellant.

D060481

(Super. Ct. No. SCN274520)

APPEAL from a judgment of the Superior Court of San Diego County, Harry M. Elias, Judge. Affirmed.

A jury found Danny Vinci guilty on count 1, assault with caustic chemicals (Pen. Code,¹ § 244); count 2, making a criminal threat (§ 422); count 3, resisting an officer (§ 148, subd. (a)(1)); and count 4, corporal injury to spouse or cohabitant (§ 273.5, subd. (a)). Vinci pled guilty to count 5, failure to appear in another criminal matter (§ 1320,

¹ Unless otherwise noted, all statutory references are to the Penal Code.

subd. (b)) and admitted the out-of-bail allegations attached to counts 1, 2 and 4 (§12022.1, subd. (b)).

In a bifurcated proceeding, the trial court found true that Vinci had suffered five prison prior offenses (§§ 667.5, subd. (b) & 688), one of which qualified as a serious felony conviction (§§ 667, subd. (a)(1), 668 & 1192.7, subd. (c)) and a "strike" offense (§§ 667, subd. (b)-(i), 1170.12, & 668). The trial court sentenced Vinci to 16 years four months in state prison.

Vinci contends his convictions on counts 1, 2 and 4 must be reversed because Evidence Code section 1109—which, under certain circumstances, allows evidence of a defendant's commission of other acts of domestic violence to be admitted in a criminal action where the defendant is accused of an offense involving domestic violence—is unconstitutional on its face and as applied to him in this case. Vinci also contends that even if Evidence Code section 1109 is not unconstitutional, the trial court prejudicially erred by admitting under this statute and Evidence Code section 352 prior acts of alleged domestic violence by him against three other women in connection with the charged offenses involving his former wife, Cheryl Denise Kopp. As we explain, we disagree with Vinci's contentions and affirm his judgment of conviction.

FACTUAL AND PROCEDURAL BACKGROUND²

Kopp met Vinci in 1996. After dating a few months, Vinci was arrested. While Vinci was incarcerated, Vinci and Kopp married. Shortly thereafter, Kopp changed her mind and divorced Vinci while he was still incarcerated. Kopp did not hear from Vinci again until August or September 2008, when he called her.

Kopp and Vinci met face-to-face in December 2009 at Kopp's sister's house. Kopp had not seen Vinci since they were married in 1996. Kopp and Vinci began dating again. According to Kopp, they also were both using drugs. After a short while, Kopp testified "things started getting strange between" her and Vinci. For example, Vinci started questioning Kopp about her whereabouts and her acquaintances. Kopp also found a tape recorder near Vinci that had fallen out of Vinci's pocket while he was sleeping. Kopp listened to the tape recording and found it contained a conversation between her and a girlfriend that occurred in the kitchen of Kopp's home when Vinci was not present.

In early February 2010, Kopp confronted Vinci regarding the contents of a large trash bag Vinci was carrying as he was leaving Kopp's house. Kopp was concerned that Vinci might be taking some of her estranged husband's tools that were stored in the garage. Vinci became angry. In response, Kopp took a swing at Vinci but missed. Vinci in turn "got really angry" according to Kopp, took the bag and slammed it down on the

² We view the evidence in the light most favorable to the judgment of conviction, to the extent there is a conflict in the evidence. (See *People v. Osband* (1996) 13 Cal.4th 622, 690.) Certain portions of the factual and procedural history related to Vinci's claims of prejudicial error are discussed *post*.

top of Kopp's head, knocking her to the floor. Kopp described the blow as "extremely hard."

The next day, Kopp learned from a friend who had done a search on Vinci that he had restraining orders against him from three other women, none of whom she knew, which Kopp said "really scared" her. Kopp prepared and presented a letter to Vinci informing him that their relationship was over and that he had a day to move his belongings from her residence.

Late one evening in mid-February 2010, while Kopp was in her bedroom she saw a red "laser light" coming through the sliding glass door. She knew Vinci had a flashlight with a laser light on it as she had seen Vinci use it many times. When Kopp and her girlfriend went outside to lock their cars, her girlfriend told Kopp to "get in the house" because Vinci was standing in Kopp's yard. Kopp and her girlfriend ran back inside Kopp's house and called police. The police responded and patrolled the area looking for Vinci, but by then he was gone.

On another occasion when Kopp was leaving in a truck from her mother's house, she saw Vinci standing outside, near a granny flat where her sister lived. Vinci unsuccessfully tried to speak with Kopp as she drove past him. Vinci then got inside his car and began pursuing Kopp, who also had her granddaughter and niece inside the truck. Vinci stopped pursuing Kopp when she drove into the parking lot of a police station about four miles from her mother's house.

Despite these incidents, Kopp and Vinci spent one more night together on February 20, 2010, because of "drugs and sex" according to Kopp. The following

morning, when Kopp awakened in her bed about 6:00 a.m. she heard the sounds of running water coming from the bathroom. After awhile, Vinci came out of the bathroom fully clothed, but with his face and hair wet. Kopp went to the living room and sat on the couch. Vinci asked Kopp to return to the bedroom. When she refused, they exchanged words and then Vinci came at Kopp, pushed her down on the couch and pressed his knuckles against her windpipe. As he pressed on her throat, Vinci said to Kopp, "I have to do this."

Kopp testified she could not move because Vinci was on top of her and she could not breathe because of the pressure he was applying to her neck. Kopp struggled to roll onto her knees. Vinci stayed on top of her and continued to press on her neck. Kopp testified she felt herself "slipping away."

With Vinci still on top of her choking her, Kopp tried unsuccessfully to yell out to her daughter, who was in her bedroom on the opposite end of the house. At that point, one of Kopp's dogs came into the room and lunged at Vinci. Kopp managed to free herself and run out the front door to a neighbor's house across the street. As Kopp waited across the street for police to arrive, she saw Vinci come out of the house and leave in his car. As a result of this incident, Kopp's neck, face, chest and arms were bruised, blood vessels in her eyes had burst and her tongue was lacerated from having bitten it during the struggle.

In mid-March 2010, Kopp went to a dance studio to pick up her daughter from dance practice. As she sat in her car waiting, Kopp smelled the strong order of gasoline. When Kopp looked up, she saw Vinci, who was familiar with Kopp's routine, standing

behind her car. Kopp next tried to open her car door but Vinci pushed it close. Kopp managed to open the door and attempted to step out of the vehicle. As she did, Vinci sprayed her ostensibly with gasoline. Vinci next attempted to ignite a lighter, and as he did, he told Kopp, "You're going to die, you fucking bitch." When he was unable to get the lighter to work, Vinci ran to his truck and fled.

In late March 2010, Vinci was riding with his nephew, Joseph Pearson, and Pearson's friend in Pearson's truck. They had just left Vinci's mother's residence when a police patrol car heading in the opposite direction passed them. The officer ostensibly recognized Vinci because the officer quickly made a U-turn and started following the truck. After a short distance, the officer turned on the car's overhead lights in order to pull over the truck. According to Pearson, Vinci started "getting upset" and "freaking out" and as Pearson began to pull over, Vinci instructed Pearson to keep driving. After a short pursuit, Vinci told Pearson to stop the truck. Vinci jumped out of the truck and started running to his own car, which was parked nearby. When the officer started to give chase, Vinci he ran to a parking lot where he ultimately gave himself up after the officer threatened him with a Taser.

A search of Vinci's vehicle pursuant to a warrant yielded several disposable lighters, fuel cells, three "propane-type torches," a "welder's torch lighter" and an empty five-gallon gasoline can in the backseat. Police also found several handwritten notes, including one addressed to the "Oceanside cops" that on the backside read, "The gas weapon is inside, and the gas is real, the lighter, what do you think?" Also inside the vehicle were several notes written on envelopes, including one that read, "You never

treated me with love, just lies, it's all about you and what you wanted, drugs have mad[e] you someone else." On another envelope, in the upper left hand corner where typically an addressee puts a return address, was the writing, "Death and Hell, P.O. Box Lies, Vista." That envelope was addressed to Kopp at her home.

Another envelope recovered from Vinci's car read: "I'm not going to prison for you, not one day. You made me this way. I asked you not to lie to me or cheat on me. This is your way of life. You're a drug slut. You will never be the same. . . . [Your] selfish ways have killed me. You can count all the lies you have told me. What about all the times you really hurt me."

DISCUSSION

A. Constitutionality of Evidence Code Section 1109

Vinci first contends his conviction on counts 1, 2 and 4 must be reversed because Evidence Code section 1109, the statute through which the prosecution admitted incidents of domestic violence by him on other women, is unconstitutional on its face and as applied to him in this case. Vinci concedes numerous courts have rejected these same or similar challenges to Evidence Code section 1109, but raises the issue to preserve it for possible federal habeas review.

Evidence Code section 1109, subdivision (a)(1) provides: "Except as provided in subdivision (e) or (f),³ in a criminal action in which the defendant is accused of an

³ Evidence Code section 1109, subdivision (e) provides: "Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest

offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

As we noted, the contention that Evidence Code section 1109 violates due process has been repeatedly rejected, including by this court in *People v. Cabrera* (2007) 152 Cal.App.4th 695, 703-704, where we said:

"Appellant argues Evidence Code section 1109 violates due process because it unfairly allows a jury to consider evidence of a defendant's propensity to commit crime. In *People v. Falsetta* (1999) 21 Cal.4th 903, 917 (*Falsetta*), the court rejected a similar attack on analogous provisions of Evidence Code section 1108, subdivision (a), which permit evidence of prior sex offenses to be admitted when a defendant is charged with a sexual offense.^[4] The [*Falsetta*] court stated: 'In summary, we think the trial court's discretion to exclude propensity evidence under [Evidence Code] section 352 saves section 1108 from defendant's due process challenge. As stated in [*People v.*] *Fitch* [(1997) 55 Cal.App.4th 172], "[Evidence Code s]ection 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. Such evidence is still subject to exclusion

of justice." Evidence Code section 1109, subdivision (f) provides: "Evidence of the findings and determinations of administrative agencies regulating the conduct of health facilities licensed under Section 1250 of the Health and Safety Code is inadmissible under this section."

⁴ "Evidence Code section 1108, subdivision (a), states: 'In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.' "

under . . . section 352. [Citation.] By subjecting evidence of uncharged sexual misconduct to the weighing process of section 352, the Legislature has ensured that such evidence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. [Citation.] This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. [Citation.] *With this check upon the admission of evidence of uncharged sex offenses in prosecutions for sex crimes, we find that section 1108 does not violate the due process clause.*" [Citation.]" [Citation.]

"As the respondent points out, following *Falsetta*, the Courts of Appeal have consistently upheld the constitutionality of Evidence Code section 1108. As the court in *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095–1096, stated: 'Admission of evidence of prior acts of domestic violence under [Evidence Code] section 1109 is similarly subject to the limitations of [Evidence Code] section 352. (§ 1109, subd. (a).) Under the reasoning of *Falsetta*, this safeguard should ensure that section 1109 does not violate the due process clause. [Citation.] Since *Falsetta* was decided, several cases from the California Courts of Appeal have applied its reasoning to reject claims that admission of prior acts of domestic violence pursuant to section 1109 violates due process. [Citations.]"⁵

⁵ See also *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1120 [admission of prior acts of domestic violence in prosecution for attempted murder did not violate due process rights]; *People v. Price* (2004) 120 Cal.App.4th 224, 240–241 [rejecting the defendant's

As before, we again reject the contention that Evidence Code section 1109 on its face violates the due process clauses of the United States and California Constitutions. (See U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 7(a).)

The contention that Evidence Code section 1109 violates principles of equal protection was addressed in *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310-1311, where the court ruled as follows:

"In this case, appellant asserts that by treating those accused of offenses involving domestic violence differently from those accused of other criminal acts, section 1109 violates his right to equal protection of the laws. Furthermore, he argues that section 1109 is subject to a strict scrutiny analysis because it expands the scope of admissible evidence that may be used to secure a conviction, thereby allegedly infringing upon his constitutionally protected rights to a fair trial, due process, and proof of guilt beyond a reasonable doubt, as well as his fundamental interest in personal liberty. Thus, he maintains section 1109 may only be upheld if the disparate treatment of those accused of domestic violence is justified by a compelling state interest. He claims that there is no such state interest.

"In *People v. Fitch*[, *supra*,] 55 Cal.App.4th [at pages] 184-185 (*Fitch*) [cited approvingly by our Supreme Court in *Falsetta*, *supra*, 21 Cal.4th at p. 917,⁶] the Court of

federal and state constitutional facial due process challenges to the admission of propensity evidence pursuant to Evidence Code section 1109].

⁶ The court in *People v. Jennings* noted that although our high court in *Falsetta* "did not directly address the equal protection issue with respect to [Evidence Code] section 1108, immediately after citing *Fitch* favorably in support of its own due process analysis

Appeal upheld [Evidence Code] section 1108, the parallel statute permitting admission of prior sex offense evidence, against just such an equal protection challenge. The *Fitch* court first held that section 1108 does not infringe upon the cited constitutional rights to due process, fair trial, and conviction only upon proof beyond a reasonable doubt. The court then affirmed that an equal protection challenge to a criminal statute which, like section 1108, creates two classifications of accused or convicted defendants without implicating such a constitutional right, is subject to a rational-basis analysis. (*Fitch, supra*, at p. 184, citing *Estelle v. Dorrough* (1975) 420 U.S. 534, 537-538 [95 S.Ct. 1173].) The *Fitch* court concluded that section 1108 easily withstood 'this relaxed scrutiny.' 'The Legislature determined that the nature of sex offenses, both their seriousness and their secretive commission which results in trials that are primarily credibility contests, justified the admission of relevant evidence of a defendant's commission of other sex offenses. This reasoning provides a rational basis for the law. . . . In order to adopt a constitutionally sound statute, the Legislature need not extend it to all cases to which it might apply. The Legislature is free to address a problem one step at a time or even to apply the remedy to one area and neglect others. [Citation.]' (*Fitch, supra*, 55 Cal.App.4th at pp. 184-185.)

"In our opinion, this analysis applies with equal force to the admission of evidence of a defendant's commission of other acts of domestic violence under [Evidence Code]

the Supreme Court in *Falsetta* appeared to indicate its agreement" with the *Fitch* court's rejection of defendant's equal protection challenge. (*People v. Jennings, supra*, 81 Cal.4th at p. 1212, fn. 4, citing *Falsetta, supra*, 21 Cal.4th at p. 918, citing *Fitch, supra*, 55 Cal.App.4th at p. 184.)

section 1109. On its face, section 1109 treats all defendants charged with domestic violence equally; the only distinction it makes is between such domestic violence defendants and defendants accused of other crimes. Neither the federal nor the state constitution bars a legislature from distinguishing among criminal offenses in establishing rules for the admission of evidence; nor does equal protection require that acts or things which are different in fact be treated in law as though they were the same. The equal protection clause simply requires that, 'in defining a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which the classification is made."' (*Estelle v. Dorrough*, *supra*, 420 U.S. at pp. 538-539.) Absolute equality is not required; the Constitution permits lines to be drawn. (*Douglas v. California* (1963) 372 U.S. 353, 357 [83 S.Ct. 814].) The distinction drawn by section 1109 between domestic violence offenses and all other offenses is clearly relevant to the evidentiary purposes for which this distinction is made."

The court in *People v. Jennings* noted that like the sex crimes analyzed by the court in *Fitch*, "domestic violence is quintessentially a secretive offense, shrouded in private shame, embarrassment and ambivalence on the part of the victim, as well as intimacy with and intimidation by the perpetrator. The special relationship between victim and perpetrator in both domestic violence and sexual abuse cases, with their unusually private and intimate context, easily distinguishes these offenses from the broad variety of criminal conduct in general. Although all criminal trials are credibility contests to some extent, this is unusually—even inevitably—so in domestic and sexual abuse cases, specifically with respect to the issue of victim credibility. The Legislature could

rationality distinguish between these two kinds of cases and all other criminal offenses in permitting the admissibility of previous like offenses in order to assist in more realistically adjudging the unavoidable credibility contest between accuser and accused. The facts that other crimes such as murder and mayhem may be more serious and that credibility contests are not confined to domestic violence cases do not demonstrate the absence of the required rational basis for the Legislature's distinction between these crimes." (*People v. Jennings, supra*, 81 Cal.App.4th at p. 1313.)

We find the reasoning of *People v. Jennings* persuasive and likewise reject the contention that Evidence Code section 1109 on its face violates the equal protection clauses of the United States and California Constitutions. (See U.S. Const., 14th Amend.; Cal. Const., art. I, § 7(a).)

We also reject Vinci's contention that Evidence Code section 1109 is unconstitutional as applied to him because the Legislature allegedly intended to limit this statute to address "difficulties in proof" where victims of domestic violence are unwilling to cooperate, which he contends was *not* the case here. However, if the Legislature had wanted to limit the use of prior bad acts evidence in Evidence Code section 1109 (or in related Evidence Code section 1108, for that matter) as Vinci contends, it certainly could have done so. We note from the language of Evidence Code section 1109 that the Legislature did not so limit the statute, nor can we: "'Crafting statutes to conform with policy considerations is a job for the Legislature, not the courts; our role is to interpret statutes, not to write them. [Citations.]'" (*California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (2004) 117 Cal.App.4th 350, 362; see also *People v. Coronado*

(1995) 12 Cal.4th 145, 151 [" 'If there is no ambiguity in the language of the statute, "then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs." [Citation.]. . . ' "].)

In any event, Vinci cites no authority, nor are we aware of any, for the proposition that evidence regarding prior bad acts of domestic violence committed by a defendant in a case with an "uncooperative" victim (however that term is defined) of domestic violence is somewhat unconstitutional.

B. The Trial Court Properly Exercised Its Discretion in Admitting under Evidence Code Sections 1109 and 352 Prior Instances of Domestic Violence by Vinci

Vinci next contends the trial court abused its discretion when it ruled to admit other acts of domestic violence by him under Evidence Code section 1109. In making this contention, we note Vinci neither challenges the sufficiency of the evidence to support the verdicts nor the fact the current and prior charges involved "domestic violence" within the meaning of Evidence Code section 1109, subdivision (d)(3), and thus the evidence was potentially admissible as disposition evidence under the code section. (See Evid. Code, § 1109, subd. (a)(1); see also § 13700, subd. (b).) Vinci instead contends that the court abused its discretion when weighing the probative value and the potential prejudicial effect of the evidence.

1. Brief Additional Background

Jackie O'Dell testified she dated Vinci in 1999 for about three weeks. She testified that after they had been dating about two weeks, Vinci started to become "possessive" and wanted to know where she was "at all times, who [she] was with, what [she] was

doing," and was "constantly calling." When O'Dell told Vinci she did not want to date anymore, he responded by telling her he did not understand her decision, by making even more phone calls to her, including calling her 35 times "in a couple of hours of time" and by watching her while she was working.

O'Dell testified she next agreed to meet Vinci face-to-face. Because Vinci's conduct scared O'Dell, she agreed to meet with him at his mother's residence. Vinci met O'Dell outside and suggested they talk in the garage. O'Dell entered the garage through a side door. Vinci followed and then locked the door behind her, telling her she was not going anywhere. When O'Dell went to open the door to leave, Vinci pushed her down to the floor.

O'Dell testified she managed to escape from the garage, ran to the back of Vinci's mother's residence and entered the residence through a sliding glass door. Once inside, O'Dell asked Vinci's mother to call 9-1-1, telling Vinci's mother that her son "was trying to hurt me" and he "wasn't going to let me leave." Vinci's mother refused to call the police on her son. As O'Dell picked up the phone to make the call herself, Vinci entered the residence and ripped the telephone (e.g., the cord from a landline) out of the wall. O'Dell told Vinci's mother she wanted to leave and asked Vinci to return her keys, which O'Dell surmised fell from her pocket when he pushed her to the floor. Vinci's mother told her son to return O'Dell's keys and O'Dell grabbed them from Vinci and fled. Before she sped away, Vinci came outside, began yelling at O'Dell and then took his fists and slammed them down on the hood of her truck, denting it.

As O'Dell drove down the street, she saw Vinci in the rearview mirror following behind her in his mother's minivan. Vinci then chased O'Dell through the streets of Vista. O'Dell testified she finally managed to lose him, went home and locked her doors because she was fearful of Vinci. She later obtained a restraining order against Vinci.

Amy Seckman testified⁷ she met Vinci in 2000. According to Seckman, they did drugs together and had a brief sexual relationship. When Seckman broke off their relationship, Vinci responded by leaving notes on her, by calling her "at all hours of [the] night" and by coming to her house and her work. Seckman estimated that on one day Vinci called her about 20 times. That same day, as Seckman sat in her living room at night with a male friend doing drugs, Vinci called and told Seckman that he knew Seckman had a male friend inside her house and that he did not like this person. Vinci called Seckman a "bitch" and a "whore."

Shortly after the call ended, Seckman testified a wooden patio chair came crashing through her living room window, breaking the window. Seckman testified she was hit in the back by glass and by the chair, injuring her. In response, one of Seckman's neighbors called police.

Five minutes after the chair incident, with police present, Vinci called Seckman yet again and told her that he knew the police were at her house and that he was pointing a gun at her. Seckman left for the weekend because she was afraid of Vinci. When she

⁷ As discussed *post*, Seckman, who lives out of state, was unable to appear personally to testify at trial because of a sickness in her family. The trial court ruled Seckman was unavailable and allowed her former testimony to be read into the record.

returned, the word "slut" was written on a window of her house; she also found notes left on her car saying she was a "whore," a "bitch" and a "slut" and four or five hypodermic needles stuck in the deflated tires of her car and one in her car door.

Casha Leicester testified she met Vinci in 2004. They did drugs together and eventually moved in together. In March 2005, they got married while Vinci was incarcerated. On his release, everything seemed fine according to Leicester until one day in early July 2005 when Vinci wanted to have sex. When Leicester told Vinci she was not feeling up to sex, Vinci got angry, called her a "fucking bitch" and then hit Leicester in the back of the neck with a closed fist. Leicester described the blow as painful. Leicester had seen the blow coming and was able to cover up her face.

When Leicester returned to the house the following day, Vinci had placed a padlock on the garage door. Leicester in response called police and also reported the hitting incident from the day before. She obtained a restraining order against Vinci.

2. Governing Law

Evidence Code section 1109 provides an exception to the general rule codified in Evidence Code section 1101, subdivision (a) that prior acts may not be used to prove a defendant's conduct on a specified occasion. As we have seen, under Evidence Code section 1109 prior acts of domestic violence are admissible when the defendant is charged with a criminal offense "involving domestic violence . . . if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1109, subd. (a)(1).) If evidence is admitted under Evidence Code section 1109, a trier of fact may infer from the evidence that the defendant had a disposition or propensity to commit other offenses involving

domestic violence and may infer that the defendant was likely to commit and did commit the current domestic violence offense. (*People v. Ogle* (2010) 185 Cal.App.4th 1138, 1143; *People v. Johnson* (2010) 185 Cal.App.4th 520, 528.)

Under Evidence Code section 352, the trial court has discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "In applying section 352, "prejudicial" is not synonymous with "damaging." [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Instead, prejudice under section 352 refers to evidence " "which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." [Citation.]" (*Ibid.*; see *People v. Rucker, supra*, 126 Cal.App.4th at p. 1119.)

Evidence Code section 1109, subdivision (a) creates a presumption in favor of admissibility. (*People v. Johnson, supra*, 185 Cal.App.4th at p. 537.) However, evidence of acts of domestic violence "occurring more than 10 years before the charged offense is inadmissible . . . unless the court determines that the admission of this evidence is in the interest of justice." (Evid. Code, § 1109, subd. (e).)

We apply an abuse of discretion standard to a trial court's admission of prior acts of domestic violence under Evidence Code section 1109 and its refusal to exclude the evidence under Evidence Code section 352. (*People v. Johnson, supra*, 185 Cal.App.4th at p. 539; *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.)

3. *Analysis*

Here, we note that the incidents of domestic violence involving Seckman and Leicester are within 10 years from the date of the charged offenses, while the incidents of domestic violence involving O'Dell took place more than 10 years after the charged offense involving Kopp. The record shows the trial court was aware of the timing of past incidents of domestic violence but ruled to admit these prior acts by Vinci—including those involving O'Dell—because the "probative value as it relates to propensity outweighs the prejudicial impact that will be involved" The record also shows that the trial court ruled to exclude an incident involving O'Dell and a Molotov cocktail because there was insufficient evidence of a nexus between Vinci and that incident.

We conclude the trial court properly exercised its broad discretion when it concluded the prior incidents of domestic violence by Vinci were admissible under Evidence Code sections 1109 and 352, including those acts involving O'Dell, which occurred a little more than 10 years before the charged offenses.⁸ (See Evid. Code, § 1109, subd. (e); see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125 [a trial court has broad discretion in determining whether the probative value of evidence is substantially outweighed by the probability the evidence will consume an undue amount

⁸ We note from the record that Vinci was incarcerated for extended periods of time during the 10-year period between the domestic violence involving O'Dell and the charged offenses, including from August 2003 to November 2003 and then from November 2004 until April 2008. (See *People v. Harris* (1998) 60 Cal.App.4th 727, 739 [noting the "'staleness' of an offense is generally relevant if and only if the defendant has led a blameless life in the interim."].)

of time or create a substantial danger of undue prejudice, confusion of issues or mislead the jury].)

First, the record shows the evidence of such prior acts by Vinci did not take an undue amount of time. Second, despite Vinci's contentions otherwise, the probative value of the prior acts of domestic violence involving each victim was strong because the prior acts and the charged offenses were all of the same general character and tended to involve drug use, threats of violence and violence by Vinci against a former partner seeking to end their relationship. (Compare *People v. Harris*, *supra*, 60 Cal.App.4th at p. 738.)

Third, the prior acts of domestic violence involving the three victims were not more inflammatory than the charged conduct, which included Vinci choking Kopp on one occasion when she felt herself "slipping away" and dousing Kopp with a gasoline-type substance on another occasion and then trying to light her on fire. (See *People v. Rucker*, *supra*, 126 Cal.App.4th at p. 1119 [relevant factors in determining prejudice under Evidence Code sections 1109 and 352 include whether the prior acts of domestic violence are more inflammatory than the charged conduct].)

For these reasons, we conclude the trial court acted well within its discretion under Evidence Code section 1109, subdivision (a) when it ruled to admit Vinci's acts of prior domestic violence.

C. Admission of Seckman's Testimony

Evidence Code section 1291, subdivision (a)(2) provides a hearsay exception for former testimony when the witness is unavailable and "[t]he party against whom the

former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

The record here shows that Seckman intended to testify at trial but could not do so because her daughter had surgery. In disclosing this fact, the prosecutor noted that Seckman, although living out of state, had not been subpoenaed because all along she had been cooperative, including voluntarily appearing to testify in Vinci's first trial,⁹ where she was subject to cross examine. Based on the prosecutor's representation, the trial court ruled Seckman was "medically unavailable" and, as noted *ante*, allowed her former testimony on direct and cross-examination to be read into the record.

Vinci contends the trial court erred and violated his right to "confront" a witness (see U.S. Const., 6th Amend. & Cal. Const., art. I., § 15) when it found Seckman "unavailable" under Evidence Code section 1291 and allowed her former testimony to be read into the record at trial. We disagree.

"Both the United States Supreme Court and [our Supreme Court] have concluded that 'when a defendant has had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement [citation], regardless whether subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony. [Citation.]' "

⁹ Vinci's first trial ended in a mistrial after a witness (not Seckman) testified about an incident previously ruled inadmissible by the court.

(*People v. Wilson* (2005) 36 Cal.4th 309, 343, citing *California v. Green* (1970) 399 U.S. 149 [90 S.Ct. 1930].)

In any event, even assuming the trial court erred in finding Seckman medically unavailable for purposes of Evidence Code section 1291 based on the representation of the prosecutor, we conclude that error was harmless beyond a reasonable doubt. (See *People v. Geier* (2007) 41 Cal.4th 555, 608 [applying harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824] to alleged confrontation clause violation].) Indeed, the record shows Seckman testified in Vinci's first trial and was subject to rigorous cross-examination regarding Vinci's acts of domestic violence against her. In addition, the record also shows that O'Dell and Leicester each testified about prior acts of domestic violence by Vinci. Thus, evidence of Vinci's prior acts of domestic violence did not hinge solely or exclusively on Seckman's testimony.

Finally, the evidence against Vinci with respect to the charged crimes was overwhelming and, in any event, as we have noted Vinci does *not* directly challenge the sufficiency of that evidence in contending the trial court erred in finding Seckman unavailable. That evidence included the testimony of two eyewitnesses who saw Vinci spray Kopp with a liquid that smelled like gasoline (count 1, assault with caustic chemicals in violation of section 244) and then pursue her as she attempted to get away; Vinci's threat to Kopp when he sprayed her with gasoline that "[y]ou're going to die, you fucking bitch" as he attempted to light her on fire (count 2, making a criminal threat in violation of section 422); and the testimony of Kopp that on February 21, 2010, Vinci choked her after she refused to return to the bedroom with him, which testimony was

corroborated by a series of photographs taken after the incident showing bruising to Kopp's neck, face, chest and arms; a laceration to her tongue that she bit during the struggle to free herself; and discoloration to her eyelids from small blood vessels that had burst while she was being choked (count 4, corporal injury to spouse or cohabitant in violation of section 273.5, subd. (a)).

We thus conclude beyond a reasonable doubt that a rational jury would have found Vinci guilty of counts 1, 2 and 4 absent the trial court's presumed error in admitting Speckman's former testimony recounting acts of domestic violence by Vinci.

DISPOSITION

Vinci's judgment of conviction is affirmed.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

O'ROURKE, J.