

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

DARREN ANTHONY HERNANDEZ,

Defendant and Appellant.

E053433

(Super.Ct.No. FWV1001048)

OPINION

APPEAL from the Superior Court of San Bernardino County. Mary E. Fuller,  
Judge. Affirmed.

Thomas K. Macomber, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, James D. Dutton, Donald W.  
Ostertag, and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and  
Respondent.

A jury found defendant and appellant Darren Anthony Hernandez guilty of making criminal threats (Pen. Code, § 422) and false imprisonment (Pen. Code, § 236). Defendant was thereafter placed on supervised probation for a period of 36 months with various terms and conditions. On appeal, defendant contends the trial court erred when it admitted evidence of his past acts of domestic violence under Evidence Code section 1109.<sup>1</sup> We reject this contention and affirm the judgment.

## I

### FACTUAL BACKGROUND

#### A. *Evidence of Current Charged Offenses*

B.W. met defendant through a friend in December 2009, and the two began a relationship. B.W. characterized the relationship as one of “[b]oyfriend and girlfriend.” The relationship lasted about five months.

On April 10, 2010, B.W. was at her sister’s residence, when she began receiving numerous telephone calls from defendant. Defendant was calling B.W. names and telling her that she was lying about being with her sister. B.W. eventually ignored defendant’s telephone calls.

After sometime, defendant called B.W. again, telling her that he was at her sister’s residence and to come outside so that they could talk. When B.W. went outside, defendant began yelling at B.W., telling her that she was a liar and that he did not trust her. B.W. responded that she was “done” with defendant and told him to leave. As B.W.

---

<sup>1</sup> All further statutory references are to the Evidence Code unless otherwise indicated.

tried to walk away, defendant grabbed her tightly around the waist area and started squeezing her until B.W. felt pain. In addition, while still holding B.W., defendant threatened to kill B.W. and her family if she ever called the police. He also exclaimed, “[I am] not going to go to jail again.” B.W. was very scared.

B.W. eventually “wiggled out” of defendant’s grasp and began walking back toward her sister’s residence. Defendant tried to stop her by pulling her belt and preventing her from shutting the door to her sister’s residence. B.W. repeatedly told defendant to leave, but he did not comply. After B.W.’s sister told defendant to leave, B.W. was able to shut the door.

Defendant thereafter sat in his car for at least 30 minutes. Once B.W. noticed that defendant’s car had moved, she and her sister got into their car and tried to leave. When they began to exit the apartment complex’s driveway, defendant pulled up in his car in front of them, preventing them from leaving. He was yelling and calling B.W. names. He continued blocking their exit for about five minutes, until another car came up behind him and started honking. B.W. and her sister were able to leave once defendant pulled his car forward; however, defendant began to follow them for approximately two blocks. B.W. and her sister eventually lost defendant and notified the police.

Ontario Police Department Officer Freyer subsequently interviewed defendant. Defendant stated that “[h]e and his girlfriend [B.W.] were having some problems. He was jealous. He thought she was lying to him.” He therefore went to B.W.’s sister’s residence “to try and hash things out.” He admitted to confronting B.W. and closing the

door on her, but he denied trying to hit her with it. He further stated that “when he gave her the hug he probably flexed his muscles.”

B. *Evidence of Prior Acts of Domestic Violence*

A.C., who had dated defendant from March 2007 until January 2008, testified that on January 21, 2008, defendant became upset and bit the side of her face. She attempted to get away from defendant, but he chased her down and grabbed her hair. She eventually escaped.

Later that evening, A.C., intending to retrieve her belongings, went to defendant’s residence when she believed he would be asleep. While at the residence, defendant awoke and tried to talk A.C. into staying and maintaining the relationship. After A.C. refused, defendant pulled her arm so that her body faced him and then “headbutted” her. Defendant’s friend intervened, and A.C. was able to get away.

Later that same evening, A.C. called the police. Ontario Police Department Officer Bonilla contacted A.C. The officer observed “a bite mark” on her face and “a contusion on her forehead.” Defendant denied biting A.C., but admitted that he may have injured her forehead “when he was hugging her.” Defendant explained that he was hugging her because he did not want her to leave.

## II

### DISCUSSION

Defendant contends that the trial court abused its discretion when it admitted evidence of his prior uncharged acts of domestic violence under section 1109. He further

claims the admission of such propensity evidence denied him a fair trial and due process of law. We disagree.

A. *Additional Background*

Prior to trial, the People moved in limine to introduce evidence of defendant's past acts of domestic violence under section 1109 involving three victims, K.P., A.C., and S.C., occurring in 2003, 2008, and 2009, respectively. Defendant filed an opposition, arguing its prejudice outweighed its probative value.

Following a hearing on the motion, the trial court found the incident involving victim K.P., which occurred in 2003, would be excluded but admitted evidence involving victims A.C. and S.C. The trial court found the incidents involving victims A.C. and S.C. to be more probative than prejudicial under section 352, and noted that the jury could determine the "validity and the credibility of those witnesses."

At trial, A.C. and Officer Bonilla testified. S.C. did not testify because she was unavailable.

B. *Analysis*

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. (*People v. Marshall* (1996) 13 Cal.4th 799, 832-833.) Generally, we will overturn the trial court's exercise of this discretion only "on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Under section 1109, a prior act of domestic violence is admissible to prove “the defendant had a propensity to commit domestic violence when the defendant is charged with an offense involving domestic violence. The trial court has discretion to exclude the evidence [under section 352] if its probative value is outweighed by a danger of undue prejudice or confusing the jury, or would result in an undue consumption of time. (Evid. Code, §§ 1109, subd. (a)(1), 352.)” (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1114 (*Rucker*)). The relevant factors in determining prejudice include (1) whether the prior acts of domestic violence were more inflammatory than the charged conduct; (2) the likelihood the jury might confuse the prior acts with the charged acts; (3) whether the prior acts were recent; and (4) whether the defendant had already been convicted and punished for the prior offense(s). (*Id.* at p. 1119 [upholding the admission of prior domestic violence evidence].) In excluding or admitting evidence under section 352, the trial court “need not expressly weigh prejudice against probative value, or even expressly state it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under . . . section 352.” (*People v. Williams* (1997) 16 Cal.4th 153, 213.)

1. Admission of Evidence under Section 1109

Defendant argues that the trial court should not have admitted evidence of the uncharged prior acts of domestic violence because this case did not involve domestic violence. According to defendant, the evidence was insufficient to prove he and B.W. were in a ““dating relationship,”” within the meaning of section 1109.

The People respond that defendant forfeited this issue by failing to object to or argue that he was not in a “dating relationship” with B.W. at the time of the prosecutor’s offer of proof. Defendant acknowledges defense counsel failed to object to the prosecutor’s characterization of the relationship as a “dating relationship,” and he asserts ineffective assistance of counsel due to the failure to preserve the issue for appeal. Notwithstanding the forfeiture, and to forestall the ineffective assistance of counsel claim, we reach the merits of the claim.<sup>2</sup>

“‘Domestic violence,’ [under] Evidence Code section 1109, is broadly defined as ‘abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship.’ (Pen. Code, § 13700, subd. (b); see Evid. Code, § 1109, subd. (d).) ‘Abuse’ is defined as ‘intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.’ (Pen. Code, § 13700, subd. (a); Evid. Code, § 1109, subd. (d).)” (*Rucker, supra*, 126 Cal.App.4th at p. 1114.)

Defendant argues that his offenses against B.W. did not constitute domestic violence because his relationship with B.W. was not the type of “dating relationship” contemplated under the relevant statutes. He asserts that despite the fact that B.W. characterized their relationship as “dating” or a “boyfriend and girlfriend” type of

---

<sup>2</sup> Even if we were to address defendant’s ineffective assistance of counsel claim, we would reject it because, as explained forthwith, there is sufficient evidence to show that defendant and B.W. were in a “dating relationship,” within the meaning of section 1109.

relationship, the evidence was insufficient to show the relationship between them was ““frequent, intimate associations.”” We disagree and conclude that there is substantial evidence to support the trial court’s conclusion that B.W. and defendant’s relationship constituted a ““dating relationship,”” such that defendant’s abuse of B.W. comes within the definition of domestic violence.

In *Rucker, supra*, 126 Cal.App.4th 1107, the appellate court considered whether there was substantial evidence that the victim and the defendant were in a “dating relationship” sufficient to warrant the trial court’s admission of evidence of prior domestic violence under section 1109. After the court rejected the defendant’s reliance on *Oriola v. Thaler* (2000) 84 Cal.App.4th 397, in which the court considered the meaning of the phrase ““dating relationship”” in the context of an application for a restraining order under the Domestic Violence Prevention Act (DVPA) (Fam. Code, § 6200 et seq.), it concluded that the “definition of a dating relationship adopted by the Legislature does not require ‘serious courtship,’ an ‘increasingly exclusive interest,’ ‘shared expectation of growth,’ or that the relationship endures for a length of time. [Citation.]” (*Rucker*, at p. 1116.) Rather, the court explained, because the statute requires only that there be ““frequent, intimate associations,”” the definition “does not preclude a relatively new dating relationship.” (*Ibid.*)

“The Legislature was entitled to conclude the domestic violence statutes should apply to a range of dating relationships. The Legislature could reasonably conclude dating relationships, even when new, have unique emotional and privacy aspects that do not exist in other social or business relationships and those aspects may lead to domestic

violence early in a relationship. An individual who engages in domestic violence may have a pattern of abuse that carries over from short-term relationship to short-term relationship. As the legislative history of Evidence Code section 1109 indicates, the Legislature recognized domestic violence is an ongoing problem.” (*Rucker, supra*, 126 Cal.App.4th at p. 1116.)

There is substantial evidence in this record to support a finding that defendant’s relationship with B.W. was a “dating relationship,” within the meaning of the statutory definition and not merely a casual, social relationship. B.W. testified that she met defendant through a friend and had dated for about five months. B.W. characterized it as a “dating” relationship and said they were “[b]oyfriend and girlfriend.” Defendant also repeatedly referred to B.W. as his “girlfriend,” and informed the investigating officer that “[h]e and his girlfriend [B.W.] were having some problems,” and that he went to her sister’s residence to “hash things out.” He further stated that he was upset and jealous because he believed B.W. was lying to him, and that he had heard that B.W. had a history of being unfaithful to her boyfriends. The evidence implicitly shows that defendant and B.W. had frequent, intimate associations over a period of approximately five months. Defendant and B.W.’s description of the relationship as a “dating relationship” or one of “boyfriend and girlfriend” establishes that the relationship between them was primarily characterized by the expectation of affection or sexual involvement, independent of financial considerations.

In *People v. Upsher* (2007) 155 Cal.App.4th 1311, the appellate court found sufficient evidence of a dating relationship where the victim of a battery was seen

running from the defendant's house at 4:30 a.m., screaming, with the defendant chasing her; the defendant told the witness, who was trying to intervene, that it was none of his business "what I do to my girl"; the defendant used a nickname for the victim during the incident, indicating familiarity between the two; and the defendant, throughout his testimony, referred to the victim as "my lady friend" and "my girl." (*Id.* at pp. 1316, 1323.) The court concluded that the evidence and "reasonable inferences that may be drawn from it were sufficient to permit a reasonable jury to conclude [the victim] and [the defendant] had enough of an emotional and affectional involvement to constitute a dating relationship." (*Id.* at p. 1324.)

Similarly, the evidence here compels the inference that defendant and B.W. had a relationship involving "frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement independent of financial considerations." (Pen. Code, § 243, subd. (f)(10).) Indeed, this is the only reasonable inference to be drawn from the consistent references to B.W. being defendant's "girlfriend," that the two were "dating," and B.W.'s desire to be "done" or break up with defendant. The evidence showed that defendant was jealous and did not trust B.W. B.W. and defendant's description of their relationship was fully consistent with the statutory definition.

Because there is substantial evidence in the record to support the trial court's predicate finding that B.W. and defendant had a "dating relationship," within the meaning of section 1109, we reject defendant's contention that the evidence of the prior domestic violence against A.C. was not relevant to the issues in his case. The trial court

did not abuse its discretion in allowing the prosecutor to present evidence of defendant's history of domestic abuse.

## 2. Admission of Evidence under Section 352

Defendant also appears to argue that even if the evidence of prior domestic violence was relevant to his case, its prejudicial effect outweighed its probative value and, thus, the trial court abused its discretion in allowing the jury to hear the evidence.<sup>3</sup> “Evidence is substantially more prejudicial than probative (see Evid. Code, § 352) if, broadly stated, it poses an intolerable “risk to the fairness of the proceedings or the reliability of the outcome” [citation].’ [Citation.]” (*People v. Jablonski* (2006) 37 Cal.4th 774, 824.)

The evidence of defendant's prior domestic violence was not so prejudicial as to pose an intolerable risk to the fairness of his trial. The prior act evidence included testimony pertaining to defendant's past violence toward a woman whom he was dating. The Legislature has determined that precisely this type of evidence may be used to show that the defendant has a propensity to commit the crimes charged, which in this case included falsely imprisoning B.W. and threatening her and her family with violence. Defendant's prior acts of violence against A.C. included behavior similar to that alleged in this case, tending to show defendant's propensity to become physically violent with

---

<sup>3</sup> Defendant also asserts that evidence of his prior acts of domestic violence was erroneously admitted under section 1101. However, we need not reach this issue because, as previously explained, the trial court properly admitted this evidence under section 1109. Section 1109 creates an exception to the general rule found in section 1101 that evidence of a person's character is inadmissible to prove his or her conduct on a specified occasion. (§§ 1101, 1109.)

women with whom he is romantically involved, and was also not unduly inflammatory or egregious than the charged offenses. In addition, the acts were not remote in time; they occurred within about two years of the charged offenses. Further, A.C.'s testimony was not likely to confuse the jury, and did not take up a considerable amount of time. We conclude that the trial court did not abuse its discretion in ruling that the evidence was admissible under section 352, since the prejudice of admitting the evidence did not outweigh its probative value.

### 3. Constitutional Issues

Defendant also argues that admission of the prior acts of domestic violence evidence resulted in a miscarriage of justice and deprived him of a fair trial under federal law. Contrary to defendant's view, admission of the uncharged act evidence did not violate his federal due process rights. Further, "We need not decide to what extent, if any, evidence solely going to character might violate due process [citation], for, as explained, here the evidence' of defendant's prior misconduct was highly probative on several issues at trial." (*People v. Kelly* (2007) 42 Cal.4th 763, 787.)

"Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.' [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose." (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920; see also *People v. Kelly, supra*, 42 Cal.4th at p. 787.) In this case, because the evidence had a permissible purpose, and the jury was instructed on the limited purpose, its admission did not violate federal due

process standards. Because the evidence was admitted for a permissible purpose, and the jury was properly instructed on how to consider the evidence, we reject defendant's due process contention.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

McKINSTER

J.

RICHLI

J.