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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS MENDEZ,

Defendant and Appellant.

E057981

(Super.Ct.No. FVA1201181)

OPINION

APPEAL from the Superior Court of San Bernardino County. Steven A. Mapes, Judge. Affirmed with directions.

Marianne Harguindeguy, 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, Charles Ragland, William M. Wood and Junichi Semitsu, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Luis Mendez, of inflicting corporal injury on the mother of his children (Pen. Code, § 273.5, subd. (a)),¹ with a finding by the trial court that defendant had suffered a prior conviction for domestic violence (§ 273.5, subd. (e)(2)), and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)), during both of which he inflicted serious bodily injury (§ 12022.7, subd. (c)). The jury also convicted defendant of dissuading a witness. (§ 136.1, subd. (b)(1).) In bifurcated proceedings, the trial court found that defendant had suffered a strike prior (§ 667, subds. (b)-(i)) and a serious felony prior (§ 667, subd. (a)(1).) He was sentenced to prison for 15 years and appeals, claiming certain evidence was improperly admitted and his *Marsden*² and *Romero*³ motions should have been granted. We reject his contentions and affirm, while directing the trial court to correct errors and omissions in the abstract of judgment.

FACTS

Defendant and the victim lived together, had had twins and she was eight months pregnant with their third child on August 15, 2012. Both had lost custody of their twins and were in substances abuse classes in an effort to get them back. In unfortunately typical fashion for many domestic violence victims, by the time this case came to trial, the victim appeared to suffer from amnesia as to how she became injured on August 15,

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

² *People v. Marsden* (1970) 2 Cal.3d 118.

³ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

2012, therefore the statement she made to law enforcement that day was introduced into evidence. In it she said that she called defendant on August 15, 2012 and he assured her that he would not miss his substance abuse class that day, but then he did not show up for it and she called him again, but he didn't answer. That night, she was given a ride home from her substance abuse class by a third party, then she eventually went to defendant's parents' house. Defendant opened the door to his parent's house and he seemed drunk and high on drugs. She walked inside and saw that he was drinking beer and using what she thought was methamphetamine with friends and she became angry and began to carry on. She asked his friends what they were doing in "her" house and she demanded that they leave. Defendant grabbed her hair and threw her to the ground onto her stomach. He began hitting her legs and she tried to hit him back from her position on the floor. He grabbed her hair and dragged her outside, dropping her onto the lawn. Although the victim had merely urinated on herself, she told defendant that her water had broken. Defendant looked at her, said, "Fuck, fuck" and went inside and told the others that her water had broken. He came back outside and the victim asked to use his phone. He said no because he feared she was going to call the police and have him taken to jail. She reiterated that her water had broken and he accused her of lying. He went back and forth between her and inside the house and he finally asked her what she wanted him to do. She said she wanted him to go to the neighbors and call for an ambulance because she was in pain. He said he wasn't sure and continued to go back and forth between her and the inside of the house. Then he told her that his friend, who was one of the people at the house, would take her somewhere in the friend's car. She cried and said that she was not

going to get in a car with someone she did not know. Defendant insisted and she got scared. Finally, after an hour of this back and forth, he dialed 911 and held the phone for her and told her to tell the dispatcher that her water had broken. While the phone was on speaker, she told the dispatcher that she was in labor, but when defendant walked back inside and was where he could not hear her, she told the dispatcher she was not, but that she was scared and she had gotten hit, but if defendant found out she was telling the dispatcher the truth, she did not know what he would do. Defendant got mad and tried to take the phone from the victim and he said he didn't want any police or paramedics there, and it was taking too long for the ambulance to arrive, so she should go with his friend. She continued to speak softly to the dispatcher and defendant got suspicious. When the police arrived, he ran inside the house and slammed and locked the door.

An officer who arrived sometime later testified that by the time he got there, the house was dark. He and another officer knocked loudly and announced themselves several times, but no one answered the front door. Fifteen minutes later, defendant's sister arrived at the house and wanted to know what was going on. She gave the police the key to the house, which they used to open the front door. They announced themselves again and entered. Approximately four adults came out of a back bedroom. Defendant was very agitated and upset. He opened the back door and peeked out. The officers announced themselves again. Defendant was angry and overly aggressive. He cursed and yelled at the officers to get out of the house. He squared up. He was tazered, but only one of the darts hit him. However, the sound of it startled him and he went to

the ground and was arrested. There were beer bottles in the living room and defendant appeared to be intoxicated, but he was not injured.

The victim had a black eye, a swollen face, a cut on her mouth, abrasions and scratches on her left knee, calf and ankle, had vomited, was experiencing abdominal pain, was dizzy and nauseous and had blurred vision in her left eye. She told a police officer who arrived at the scene and care workers at the hospital where she was taken that defendant had injured her.

Defendant did not testify at trial. His friend, who did testify for him, was the only non-involved person who was at defendant's parents' house that night to take the stand, but his testimony proved the old adage that if you always tell the truth, you don't need to have a good memory.⁴

Other facts will be disclosed as they are pertinent to the issues discussed.

ISSUES AND DISCUSSION

1. Admission of Prior Acts of Domestic Violence

Before trial began, the People sought, pursuant to Evidence Code section 1109,⁵ to introduce evidence that on December 24, 2011, defendant was hitting the victim when

⁴ This witness's testimony was "all over the place" in ways that almost defy description.

Defense counsel said it best when he said, during argument to the jury, "I'm less than satisfied by [defendant's friend's] ability to recall what happened and . . . what he remembers seeing . . . , his timing of events." While *we* might criticize trial counsel for defendant for calling this witness, defendant, during his *Marsden* hearing, never did.

⁵ "Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the
[footnote continued on next page]

her stepfather walked in. Although defendant also attacked the stepfather and his friend, the trial court disallowed evidence as to acts involving them. Defendant pled guilty to hitting the victim on this occasion. The People also sought admission of evidence that on November 7, 2003, defendant's then-girlfriend asked him to stop drinking and she told him she no longer wanted to be with him. He choked her and pushed her against a wall and said, "If you don't want me, I'll kill you and your family." He then put their seven-week old baby in his car and drove off. She tracked him down, called the police and defendant was intoxicated when the police apprehended him. The People asserted that this incident was similar to the charged offense in that during the latter, the victim confronted defendant, who was intoxicated and under the influence of drugs, and he attacked her, just as he had his girlfriend in 2003. This earlier incident resulted in defendant sustaining a conviction for a strike, which was a violation of section 422 (criminal threats). Defendant had also been convicted of resisting/evading the police, who pursued him, but the trial court would not permit evidence of this to be admitted.

Defendant opposed the introduction of evidence of the December 24, 2011 incident on the ground that because it involved the same victim as the charged offense, its prejudicial impact outweighed its probative value. He opposed the introduction of evidence of the November 7, 2003 incident on the grounds that it was remote in time and its prejudicial impact outweighed its probative value. The trial court ruled that both were

[footnote continued from previous page]

defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352. (Evid. Code, § 1109, subd. (a)(1).)

admissible under Evidence Code section 352. As to the December 24, 2011 incident, the trial court also ruled that if there was evidence that defendant was intoxicated at the time, that evidence would be admitted. Before the defendant's ex-girlfriend took the stand, the prosecutor asked the trial court about the admissibility of evidence that when defendant accused her of not wanting him anymore, he pulled out a gun and loaded it, the ex-girlfriend told him to put the gun in a blue bag because he was scaring her, then she went into the shower, which defendant entered to assault and threaten her. After defendant got out of the shower, the ex-girlfriend finished her shower and got out, she tried to talk defendant out of leaving with the child, and after he left, she noticed that the blue bag was gone. Defendant objected to the introduction of evidence about the gun on the basis that no gun had been used in the charged offense and in the 2003 incident, the gun was not used in the making of the criminal threat. The trial court concluded that evidence that defendant pulled out the gun and loaded it, that the ex-girlfriend told him to put it away and he put it in the blue bag was "probative of the entire situation of what happened in the shower, [the] dynamics of the initial fight" and, therefore, it was more probative than prejudicial. However, evidence that after defendant left with their child, the ex-girlfriend noticed that the blue bag was missing was more prejudicial than probative and the trial court excluded it. Defendant here contests the rulings permitting introduction of this evidence.

Because the People did not seek admission of this evidence under Evidence Code section 1101⁶ and the trial court did not admit it under that section, we will not respond to defendant's assertion that this evidence was not admissible under that section.

Defendant claims the 2011 incident was dissimilar from the charged offense, and therefore not particularly relevant, in that during the former, defendant was highly intoxicated. However, the People made no representation whatsoever at the time the trial court ruled that the evidence was admissible about defendant's state of intoxication during the 2011 incident.⁷ Next, defendant asserts that the evidence of the 2011 incident was "far more shocking to the jury" than the charged incident because three witnesses were called by the prosecution to testify about it. However, this fact, even if a legitimate basis for a claim that the evidence was more shocking than evidence of the current crime, was not made known to the trial court when it determined that the evidence was admissible, therefore, it is not a legitimate basis for a claim that the trial court abused its discretion in admitting the evidence. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1393.) If, as defendant currently claims, the calling of these witnesses constituted an undue consumption of time, or made the prior seem far worse than what the People represented

⁶ That section governs the admission of evidence of defendant's past acts to prove a fact other than defendant's conduct on a certain occasion.

⁷ As we already stated, the trial court said, as part of its ruling, that IF defendant was intoxicated during this incident, evidence of that could come in but no one said at the time that he was or was not.

when they sought admission of this evidence,⁸ defendant should have objected to their testimony on that basis below.

Defendant reasserts the contention he made below that the 2003 incident was remote in time. The trial court noted when it had been committed, concluded that that was within the 10 year “wash out” period provided in Evidence Code section 1109, and admitting it, finding its probative value outweighed its prejudicial impact. Defendant here concedes that the prior, like the charged offense, sprung from accusations by his then love interest that he was not staying sober, but defendant argues that the “scope” of the 2003 incident “far exceeded the scope” of the charged crime in that during the earlier incident, defendant loaded a gun, put his ex-girlfriend in a choke hold, threatened to kill her and her family and left the house, drunk, with the couple’s child. However, the charged offense was no less shocking. According to the victim’s statement to the police, defendant grabbed her by the hair and threw her to the ground on her stomach and began hitting her legs. He then grabbed her hair and dragged her outside and dropped her onto the grass. Because the victim was eight months pregnant at the time, defendant could have easily killed the baby she was carrying or her or both or caused her to go into pre-term labor and harmed or killed both. The circumstances attending the 2003 incident were not more prejudicial than those of the charged offense.

⁸ We note that defendant did not file a written opposition to the prosecutor’s request to admit this evidence and made only the arguments at the hearing on admissibility that we have described in the text of this opinion. Defense counsel never asked the prosecutor how many witnesses the latter intended to call to prove up the prior acts and what, exactly, the prosecutor anticipated them saying. When these witnesses testified, defendant did not object to their testimony on the bases he now advances.

We disagree with defendant's current assertion that the evidence of the two priors was so prejudicial that it rendered defendant's trial fundamentally unfair.

2. *Denial of Defendant's Marsden Motion*

On the day set for defendant's *Romero* motion and for the court trial of defendant's priors, defendant moved for a new trial on the basis of incompetency of trial counsel and brought a *Marsden* motion. The trial court denied both motions and defendant here claims that the court abused its discretion in so doing.

Defendant first asserted below that he had asked his trial counsel to call police officers from the Rialto and Fontana Police Departments to testify that they had seen the victim abusing him, but his attorney told him he could not do that, because the officers probably wouldn't show up to testify. He also asserted that an officer who had testified at trial had also arrested the victim in the past and defendant had asked his attorney to question the officer about this incident, but counsel said the latter could not be questioned by him because he was not a defense witness.⁹ Defendant had also wanted his attorney to bring out that when the victim attacked him, he did not file charges against her and during one particular incident, when the victim cold-cocked defendant and threw birthday cake at him, he did not touch her and she falsely accused him of kidnapping her.

Defendant also had wanted his attorney to bring in evidence of three or four other

⁹ The trial court put on the record that in his written motion for a new trial, defendant had asserted that his attorney had failed to cross-examine prosecution witnesses or law enforcement officers in such a way as to make them his witnesses or to keep them under subpoena and call them during defendant's case-in-chief. We assume that the subject matter of such anticipated testimony would be what defendant orally stated during the hearing on the motions.

instances in which the police were called and the victim had bitten, bruised or scratched defendant.

One of them occurred at the victim's stepfather's house one or two years previously, during which the victim had bitten and scratched the defendant, pulled his hair and threw beans on him after he told her he wanted to leave and both were arrested. Counsel responded that both the victim and her stepfather had testified at trial that defendant and the victim were always fighting, and the defense had shown that she was violent and aggressive. Additionally, counsel didn't want evidence of this incident introduced because it involved mutual combat, as evidenced by the fact that both had gotten arrested. Counsel felt it would show that defendant was violent towards the victim.

Another incident about which defendant wanted his attorney to introduce evidence was when the victim had stabbed him six times and the former had called the Fontana police and made a report. Defendant pointed out that this was the incident about which the victim had taken the Fifth Amendment outside the presence of the jury during trial. Defense counsel replied that because the victim took the Fifth Amendment and he could not question her about it, he had no information as to the identity of the police officer that took the report of this incident, this officer did not observe the stab wounds on defendant and defendant was unwilling to take the stand and testify to his version of it, counsel was unsure how to get evidence of it admitted. Defendant added that he could not recall whether he told his attorney that the victim's stepfather had seen defendant's wounds after this incident.

The last incident defendant wanted explored at trial occurred when defendant decided to leave the victim, packed his belongings and was in the process of leaving, when she grabbed his hair and hit him, he pushed her away and both ended up arrested, but neither got charged. Defendant said the brother of one of his neighbors (a neighbor who had testified at trial for the defense) and the victim's stepfather had witnessed this incident. Counsel explained that although the defense was anticipating the victim's stepfather offering evidence that was favorable to defendant, the former turned hostile towards defendant during trial.¹⁰ Counsel added that he tried to ask the neighbor whether her brother had told her that the victim had made false accusations against people, but the prosecutor successfully objected on hearsay grounds.¹¹ Counsel said that, despite some effort, he was unable to locate the neighbor's brother. Neither below nor here does defendant explain how he could have introduced the neighbor's testimony that her brother told her that the victim accuses people all the time of things they do not do.

Trial counsel for defendant said that defendant's assertion that he did not call these officers to testify because they would not show up was not true—what he had told defendant was that other things that would prejudice defendant would come out if these officers were called to testify. The trial court agreed with defense's counsel's response that the victim admitted during trial that she had attacked defendant. This was entirely

¹⁰ The victim's stepfather contradicted defendant's claim that during the December 24, 2011 incident, defendant had merely pushed the victim onto the bed.

¹¹ Not only does the record contain no question asked of this witness about her brother, but it contains no question asked of this witness by defense counsel that was successfully objected to by the prosecutor on hearsay grounds.

accurate—the victim testified that in the past, when she had reached her highest level of anger, this had started physical fights with defendant, during which she has struck defendant. She went on to say that there had been times when she has gotten so angry that she became physically violent with defendant. Additionally, she testified to incidents of what she called “mutual combat” between them, and conceded that during the December 24, 2011 incident, she was afraid *she* would be arrested for *her* actions. She also conceded that eighteen months before the August 15, 2012 incident, she engaged in an altercation with defendant. Her stepfather, who had been married to her mother for 15-17 years at the time of trial, testified that during the December 24, 2011 incident, defendant and the victim were wrestling with each other, exchanging blows, and pushing and shoving each other. He was asked, “So it wasn’t just one-sided, with [defendant] being aggressive towards [the victim]?” The stepfather replied that that was why he wanted to stay out of it when he walked in on the two of them during that incident. He added, “They go all the time . . . I get tired of the police coming . . . every time.” The stepfather also testified that it was the victim’s nature to be very aggressive and vocal. He added that sometimes the victim “is a little firecracker[,]” this “ran in the family” and she was like her mother. A neighbor of defendant, who also knew the victim, testified that the latter had a reputation for being “wild and crazy.” As to the cold-cocking/cake throwing incident, a defense witness had testified that two or three months before the August 15, 2012 incident, the victim, who was six months pregnant at the time, cold cocked defendant from behind, for no apparent reason, and threw birthday cake all over him. Then, she continued to swing and kick at him while he pulled her out of the car they

were in and left her in the parking lot of the grocery store where the cake had been purchased, despite her attempts to jump back into the car through the window.¹² Despite all this, defendant did not call the police. The victim, herself, admitted that she was mad on August 15, 2012 because defendant was drunk and failed to show up for his class which caused her to fear that they would not regain custody of their twins. She admitted cussing defendant out when he came to pick her up from her class. In contrast to her behavior, she testified, defendant was apologetic. She admitted yelling at her stepdad shortly before going to defendant's parents' house on August 15, 2012, even though the former had given her a ride to her house and she offered no explanation for this. Frankly, in *her own* description at trial of her conduct leading up to and including her interaction with defendant at the time of the crime, she sounded hysterical, angry, paranoid and unbalanced. We note with interest that she testified that she obtained the intervention of her best friend in the middle of the events of August 15, 2012, and, after interacting with defendant, the friend apparently did not believe the victim was in any danger, or he would not have left her at defendant's parents' house with defendant. Certainly, the victim avoided testifying at trial that defendant caused her injuries that day and she admitted having previously failed to appear at a hearing on this case and having to be tracked down by the prosecutor, who was armed with a warrant. She testified she was reluctant to talk about the August 15, 2011 incident, and she had visited defendant in jail

¹² As the trial court wisely pointed out, this evidence was a double-edged sword in that it made defendant look bad for leaving the pregnant victim stranded in a store parking lot.

before trial, and was interested in getting back together with him if he did not drink. The trial court correctly pointed out to defendant that a police officer would not have been able to testify that during incidents where defendant got hit by the victim, the victim was more the aggressor than was defendant unless the officer was there to observe the encounter.

As to defense counsel failing to question the police officer about his previous arrest of the victim, defendant, himself, disproved his assertion by pointing out to the trial court that counsel had successfully sought to have the victim's stepfather, who had been called by the prosecution, questioned as a defense witness.

Next, defendant criticized his trial counsel for not cross-examining the victim sufficiently, asking her if she had hit defendant.¹³ Defense counsel responded that for tactical reasons, he did not want to appear to be mean to the victim. Beyond what we have already recounted as to the evidence that the victim was physically aggressive towards defendant, her trial testimony was shockingly inconsistent with the statement she made to law enforcement hours after the August 15, 2012 incident and with the testimony of defendant's sister and a police officer at the scene. That, alone, would be cause for the jury to question the veracity of her claims in her statement to the police that defendant had beaten her that day, except for one thing, i.e., her visible injuries. Unfortunately for

¹³ At the end of the hearing, defendant added that he also had wanted his attorney to bring out the fact that the victim was a bad mother and drug addict and he always had to take care of their children "for her." However, as the trial court correctly pointed out, the jury was informed that the victim had lost custody of her 11 month old twins, they had been placed with defendant's sister, and she was taking parenting and substance abuse classes in an effort to get them back.

defendant, there was just no getting around the fact that the victim had a black eye, a swollen face, and injuries on her legs that were not only seen by law enforcement, but documented in photographs that were shown to the jury and she had told the police and health care providers immediately afterward that they had been caused by defendant. Defendant chose not to take the stand and testify as to how it became necessary for him to inflict these injuries in order to defend himself from the very pregnant victim who was much smaller than he was. Defendant's "star" witness, the only one at trial who testified to the precipitant events of August 15, 2012, was a huge disappointment to the defense.¹⁴

As to all these asserted evidentiary failings on the part of trial counsel for defendant, the trial court found that even if defense counsel had managed to get them all admitted, the verdict would not have been different, because of the way defendant behaved when the officers came to his parents' home on August 15, 2012, a point we have not even included in our discussion here. The court stated its understanding of counsel's position that much of the evidence defendant wanted introduced also had the effect of making defendant look bad¹⁵ and, for that reason, counsel had made a reasonable tactical decision to limit the evidence on these prior incidents. The court also noted that the victim's own stepfather had testified that the victim was a hot-head and that she instigated a lot of conflict with defendant in that she was violent towards him, thus provoking him to respond in kind.

¹⁴ See footnote four, *ante*, page five.

¹⁵ See footnote 12, *ante*, page 14.

Defendant also claimed that his trial attorney failed to communicate adequately offers of settlement that had been made to him. However, defendant also said that the first offer that had been made had been for nine years “with two strikes,” which he repeated later during the hearing. Counsel contradicted defendant’s representation that he had not communicated offers to defendant, telling the trial court that the first offer had been nine years, which defendant rejected, and a second offer had been made during trial, which was four years, and it had been “clearly and unequivocally related to [defendant].” Counsel went on to say that defendant felt that because the victim admitted that she had lied to the police, that he would not be convicted, therefore, he rejected this second offer. Later during the hearing, defendant conceded that the four year offer made during trial had been conveyed to him, although he claimed that the day after this, counsel told him that the deal was six years with a strike. Defendant added that he counter-offered for two or three years, with half of it being an 18 month in-house program for alcohol abuse. Counsel said he had given defendant’s counter offer to the prosecution, but they rejected it. Without making any specific factual findings about this matter, the trial court concluded that trial counsel had competently represented defendant.

Having addressed all the points defendant brought below to which defendant now takes issue and concluded our agreement with the trial court that they did not amount to incompetency of counsel, we reject defendant’s assertion that the trial court’s denial of his *Marsden* motion was an abuse of discretion.

3. Denial of Defendant's Romero Motion

In his written motion to have the strike for his 2003 conviction for making criminal threats dismissed, defendant stated only that he had an extensive history of alcohol and drug abuse and the victim stated her desire that he get sober so he could assume his co-parenting duties with her. The motion also vaguely referenced the “mitigating and aggravating [*sic*] factors . . . stated in the probation report” The probation report lists the following circumstances in aggravation: “The crime involved great violence, great bodily harm, threat of great bodily harm, and/or other acts disclosing a high degree of cruelty, viciousness and callousness[,] [¶] . . . [t]he victim was particularly vulnerable[,] [¶] . . . [¶] . . . [t]he defendant has engaged in violent conduct, which indicates a serious danger to society[,] [¶] . . . [t]he defendant's prior convictions as an adult[] are numerous and of increasing seriousness[,] [¶] . . . [t]he defendant has served a prior prison term[,] [¶] . . . [t]he defendant was on a grant of probation when the crime[s were] committed [and] [¶] . . . [t]he defendant's prior performance on probation and parole was unsatisfactory.”¹⁶ The report also stated that “defendant has not shown remorse.” As to mitigating factors, the probation officer found none. The probation officer concluded, “It is obvious the defendant has no interest in following the orders of the [c]ourt. He showed no regard for the mother of his children and the life of the unborn child as he refused to obtain medical aid for them. [¶] The defendant was on probation for domestic violence and was supposed to be taking classes to work toward

¹⁶ The report states that defendant suffered two violations of the parole granted for his 2003 conviction, a matter the sentencing court noted.

being reunited with his twins at the time of th[ese] offense[s]. His continued abuse of drugs and alcohol combined with his defiance of [c]ourt order [sic] prove he is not interested in becoming a law-abiding, productive member of society. He is a threat to his children's mother and his children. As such, *he deserves to be punished to the full extent of the law.*”

At the hearing on the motion, defense counsel asserted that the victim had pushed defendant's buttons and “but for her conduct, [the instant crimes] would not have happened.” He added that alcohol and, possibly, drug, intoxication were issues in both the charged offense and the 2003 strike. He reiterated the point he made in his written motion that defendant's children would be negatively impacted by the loss of him as a provider and parent. The People countered by arguing that if defendant had regard for his children, he would not have endangered his unborn child by assaulting her mother.

The sentencing court concluded that due to defendant's conviction for battery on the victim in 2011, “I'm not seeing enough of a time gap between the . . . strike [in 2003] . . . and the current offense to show that he's changed his life and had a slip up What I see is he's on the same spiral of his negative behavior. [¶] I appreciate when the defendant is sober everything is great and he may be a kind and loving person. . . . But when you add alcohol—and I appreciate that this . . . is something that the defense wants to ask the [c]ourt to use as mitigat[ion], but with the defendant's history and the repeated use of alcohol connected to . . . domestic violence . . . and not dealing with [the] stress of certain situations and relationships and adding alcohol to that, and his choice not to take steps to refrain from the thing that makes him lose control over his actions . . . it's not

something that, in my mind, mitigates in this circumstance because it's repeated instances. So in my mind . . . the fact that he was under the influence of alcohol does not mitigate. . . . It actually aggravates . . . [¶] . . . I believe alcohol was involved in th[e 2003] crime. [¶] . . . [¶] And it's not something that I find would be a wise exercise of my discretion to [dismiss] the strike in this case because we have a repeat offender. . . . [T]he statute intended to make sure that certain behavior does not continue, that people have an incentive not to continue that behavior. If they don't have an incentive, . . . [for] any woman that's in a relationship with [defendant], especially if [he's been] drinking and there might be some . . . argument . . . [things] . . . could easily get out of hand."

Defendant here contends that the trial court failed to address the point he raised that the victim's behavior was a mitigating factor. However, the trial court's remarks belie this. The court addressed defendant dealing with "the stress of certain situations and relationships" and getting into arguments with the women with whom he was having relationships. Had defendant not engaged in acts of domestic violence with his ex-girlfriend, he might have had a more persuasive argument that the current victim's seemingly dramatic behavior sets his off. However, at least based on the cold record before us, the ex-girlfriend appeared to be far more rational than the current victim, but this did not prevent defendant from assaulting her, loading a gun in her presence, threatening her and her family and driving their very young child away from her while intoxicated.

Defendant also takes issue with the sentencing court’s finding that there was not a adequate gap between the 2003 strike and the current offense to demonstrate that he had changed his life and the current offense was a mere “slip up.” That was, the court said, because of his 2011 battery of the victim. Defendant contends that this does not demonstrate a “spiral of negative behavior.” The sentencing court concluded otherwise and this conclusion is not irrational. (*People v. Garcia* (1999) 20 Cal.4th 490, 503.) As the People point out, defendant was in prison for the 2003 offense until August 1, 2004, then he was re-incarcerated for violations of parole for 150 days each in 2005 and 2007, thereby shrinking the seemingly long gap between his 2003 crime and either the 2011 offense or the present crimes.

DISPOSITION

The trial court is directed to amend the abstract of judgment to show that this was a jury, not a court, trial, that the sentencing court imposed a two year concurrent term on dissuading a witness (count 3) and that the box at #4 should be checked. In all other respects, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.