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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH LUIS MONTUY,

Defendant and Appellant.

F061884

(Super. Ct. No. MCR038069)

**OPINION**

APPEAL from a judgment of the Superior Court of Madera County. Joseph A. Soldani, Judge.

Alex Green, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Max Feinstat, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Joseph Luis Montuy was convicted of felony child abuse for striking his teenaged daughter with a belt. On appeal, he contends (1) the trial court erred by admitting evidence of his prior acts of domestic violence, (2) defense counsel was ineffective for failing to object to opinion testimony that defendant coached his children, and (3) the trial court erroneously imposed various fees. We will vacate some of the fees, remand with directions, and affirm in all other respects.

### **PROCEDURAL SUMMARY**

On June 23, 2010,<sup>1</sup> the Madera County District Attorney charged defendant with one count of inflicting cruel and inhuman corporal punishment on a child (Pen. Code, § 273d, subd. (a),<sup>2</sup> a felony; count 1).

A jury found defendant guilty as charged. The trial court sentenced defendant to five years' formal probation with 60 days of jail time. The court also imposed various fees.

### **FACTS**

#### **I. Prosecution Evidence**

##### ***Chantal***

Chantal was a 15-year-old ninth grader. She lived with her parents, defendant and Mary, and her 11 siblings. She had more siblings, but they no longer lived at home. Of the twelve children who lived at home, Chantal was the third oldest.

On February 10, Chantal was walking home from school with her two older siblings, Cheralyn and Moroni. Cheralyn said she was going to tell defendant about something she had done with her boyfriend. Moroni asked, “[O]h what did you do[?]” Chantal suspected it was something physical or sexual, and she told them she did not want to hear about it because she did not want to get in trouble for knowing it. Then she

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<sup>1</sup> All dates refer to 2010 unless otherwise noted.

<sup>2</sup> All statutory references are to the Penal Code unless otherwise noted.

removed herself from the conversation. In their family, if someone knew that a sibling had done something wrong, and failed to report it to defendant, he would punish that sibling along with the one who committed the wrong. They would receive the same whipping because the one who failed to report was just as guilty as the other.

As they approached their house, Chantal had fallen about a block behind Moroni and Cheralyn, and they reached the house first. When Chantal entered the house, a younger sibling came to her and told her defendant was mad. Chantal thought Cheralyn must have already told defendant whatever she wanted to tell him. Chantal did not think much about defendant's being mad because it was "kind of a usual thing." Cheralyn came down the hall and told Chantal that defendant wanted everyone in "the room." The five oldest siblings went into the room and stood side-by-side in a semi-circle around defendant, as they usually did. Mary was also present. Defendant looked mad and he spoke in an angry tone of voice, which was normal because he was angry most of the time. He told Cheralyn to tell everyone what she had done. He said, "[G]o ahead tell them, tell them what you did." Cheralyn spoke, but Chantal quit listening. Defendant turned to Chantal and asked her, "[D]id you know about that[?] ... [W]hat do you think I should do?" Chantal just looked at him because she was not sure what he was talking about. Then he asked her if she had the iPod, and she said she did. He told her to give it to him. He said, "[W]hat have I told you about the iPod?" Chantal was thinking, but could not remember anything he had told her about the iPod. She knew she could not have it while she was grounded, but she had just been "ungrounded" and did not see any reason she could not have the iPod. So she just stood there. Defendant asked, "[W]hat do you think I should do to you for it?" Chantal did not answer because she was not sure what he was talking about. Defendant said, "[Y]ou're not going to answer me[?]" When Chantal still failed to answer, defendant told Moroni to get the belt. At that point, Chantal knew someone was going to get hit, and she thought it was going to be her. She was not really sure why defendant's anger was directed at her and not Cheralyn. Moroni

got the belt and handed it to defendant. Defendant continued to ask Chantal, “[S]till not going to tell me what you want me to do[?]” Chantal still could not figure out what he was talking about. Defendant grabbed Chantal’s arm and hit her with the belt on her back and buttocks three to six times. Chantal was confused because she did not know why she was getting in trouble.<sup>3</sup> When Chantal pulled away, defendant let go of her arm and stopped hitting her. He told everyone to go do their chores. No one, including Mary, had tried to stop defendant from hitting Chantal.

Chantal went into the bathroom down the hall because she could feel her back throbbing. She wanted to see if there were any marks. She lifted her shirt and looked in the mirror and saw a red puffed line across her back on her ribs under her shoulder blade. Mary knocked on the door and told her she had better hurry up, go do her chores, and stop wasting time. Chantal left the bathroom and picked up her backpack in the living room. She looked around the room for her little brother, then she left out the back door. She explained: “[I left b]ecause I couldn’t take it no more. [¶] ... [¶] Just everything. Trying to—trying to do everything they said and then not be able to get it right and get in trouble for things that I wasn’t even doing and taking the blame for stuff that I wasn’t doing either.”

Chantal went to the house of her church youth group leader, Esther, because she lived nearby. Chantal could not stop crying. She was scared and hurt that defendant would do that to her. Chantal did not tell Esther anything, except that she had run away and was going to her friend’s house.

Chantal left Esther’s house and went to Christina’s apartment. She showed Christina the mark on her back and told her defendant had done it. Christina’s mother told Chantal she needed to call someone because she could not stay there. Chantal could

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<sup>3</sup> At trial, Chantal explained that the iPod belonged to her sister, who gave it to her. She still did not know why defendant was angry that she had it.

not think of anyone to call, but she did not want to go back home. She decided to call Sally.

When Sally arrived, Chantal told her she did not want to go home. Chantal chose to go the police station. There, Chantal spoke to Officer Webb. A female officer took a photograph of Chantal's back. A social worker came to the police station to pick up Chantal.<sup>4</sup>

Chantal explained that defendant acted differently outside the home than he acted inside the home. She could not explain easily, but she said he acted "high class, old. The way he walks around" when he was outside the home.

At the time of trial, Chantal was living with Sally. Chantal would rather have been living at home, but she did not feel safe going back there because she "opened [her] big mouth" and "things would be different now."

Chantal testified about a prior incident that occurred at the end of eighth grade before she went on a school trip to the beach. Defendant whipped her with the belt because she had cut her hair at school. As a result, she had two "puffed up bleeding lines side by side." On the school trip, she was wearing a bikini and her friend noticed the belt marks on her lower back.

***Esther, Sally, Christina, and Christina's Mother***

Chantal arrived at Esther's house around 4:00 p.m. on February 10. She was crying and shaking. She was very upset, and she said she was not going to go back. She left shortly after she arrived.

Around 5:30 or 6:00 p.m., Chantal arrived at the apartment of her good friend, Christina. Christina had seen Chantal cry once or twice per week, and Chantal had told her why she was crying. Christina had seen bruises on Chantal's upper arms and

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<sup>4</sup> Chantal noted that social workers had been to her house at least three times in the past.

shoulders. On this evening, Christina's mother answered the door and observed that Chantal was "just terrified." She was scared and crying "real bad." Chantal asked for Christina, and the two went into Christina's room to talk. Chantal was crying and was "really terrified, saying she didn't want to go back home ...." Chantal lifted her shirt and showed Christina the injury on her lower back. It was red, rectangular, and four or five inches long. Chantal told Christina how she got the injury.

Christina's mother told Chantal she needed to call a family member or someone she could stay with. Chantal decided to call Sally. When Sally and her husband arrived, Chantal looked extremely scared. She was sobbing and shaking, and she came directly to Sally and laid her head on her shoulder. When Sally put her arms around Chantal and hugged her, Chantal "grimaced or flinched or shuddered, like touching her bothered her." Chantal told Sally not to touch her back because it hurt. Sally and her husband took Chantal to the police station where Officer Webb interviewed them.

#### ***Officers Webb and Noriega***

Webb spoke to Chantal alone in an interview room. She was withdrawn, quiet and shy. She told Webb what had happened that day. Webb had Officer Noriega, a female, photograph Chantal's injury, which Noriega described as a raised, red welt, about two inches by three or four inches. Webb called social services.

Webb went to defendant's house that night around 11:30 or midnight. Defendant answered the door and invited him in. Defendant was calm and cooperative. He did not seem surprised or offended by the late visit. The house was cluttered, and there were five children and an adult female sleeping on the living room floor with blankets. Defendant told Webb he had been having problems with Chantal for over a year. She was out of control and required discipline. She had been taking items, such as iPods, from her siblings. And she had been disruptive in school. Mary agreed with what defendant said. She too was cooperative and did not seem upset or surprised. When Webb mentioned that Chantal was injured, defendant did not seem surprised. He said that Chantal had a

history of fighting at school and she could have gotten injured that way. Or she could have done it to herself. He said he had a meeting with the children and talked to them about chastity, taking each other's property, and other family issues. He repeatedly asked Chantal what her punishment should be for the iPod, but she did not answer. The meeting ended and he sent her to church class.

Neither defendant nor Mary asked Webb if Chantal was safe. Defendant did not appear generally concerned with Chantal's well being.

### ***Mormon***

Chantal's 13-year-old brother, Mormon, testified that Chantal ran away because "she wanted to do whatever she wanted to do." She got in trouble because she borrowed people's cell phones and iPods. The children were not supposed to borrow things. On February 10, defendant was calm at the meeting; he was not angry and he was not yelling. Defendant told Chantal she had to give back the cell phone and iPod. Defendant did not hit Chantal. No one spoke during the meeting until they were dismissed. Chantal went to the bathroom because she was mad. Mormon saw her leave the house.

Mormon explained that he wanted to testify against his two sisters (Chantal and Cheralyn) because they were liars. He remembered speaking to social workers at school. Defendant did not tell him what to say to the social workers or what to say at trial.

On cross-examination, Mormon explained that during a visit with Chantal, she told the family that she had lied about what happened and she wanted to come home.

### ***Emerald***

Chantal's 14-year-old sister, Emerald, testified that on February 10, her three older siblings came home from school together. When they walked in, defendant told them to go to the room because Chantal had been grounded but kept using the cell phone and iPod when she was not supposed to. Defendant told Chantal all she had to do was give the cell phone and iPod back to her friend. Defendant did not hit Chantal with a belt or anything else. Mary was not present; she was feeding the younger children. After the

meeting, Chantal was mad and she stormed off. Emerald saw her take her backpack and leave the house.

When asked why she was subpoenaed, Emerald said, “Well, I know I was testifying on my sisters, testify[ing] against my two sisters because they are all a bunch of liars.”

Emerald spoke to social workers at school. They asked if her parents hit them, and she said they did not. Defendant did not tell Emerald what to tell the social workers.

On cross-examination, Emerald recalled a visit with Chantal when she told the whole family that she was sorry, she had lied, and she wanted to come home. Chantal was crying.

### ***Trinalyn***

Chantal’s 11-year-old sister, Trinalyn, explained that she was in court to testify against her sisters because they were liars. On February 10, Trinalyn saw her siblings go to the room, but she did not go. They went to the room because Chantal had a cell phone that was not hers, and defendant had already told her to give it back. Trinalyn admitted that because she was not in the room, she did not actually know what happened.

Trinalyn spoke to the social workers at school the next day and told them defendant never hit her but did make her stand in the corner for time-outs.

The court questioned Trinalyn about how she knew that she was there to testify against her sisters because they were lying. The court asked her how she knew that and who told her that. Trinalyn answered that no one told her that. “That’s the way they are, they [have] always been liars.” The court repeated the question: “How did you know why you were here and summoned to court?” Trinalyn answered, “Why else would I be here?” The court asked, “So you just concluded it on your own, nobody told you that?” She answered, “Nobody told me.”

### ***Moroni***

Chantal's 18-year-old brother, Moroni, currently lived with his uncle because social services removed him from the home. On February 10, he was walking home from school with Chantal and Cheralyn. He did not remember talking about anything in particular. When they walked into the house, he greeted his parents and began his chores. He assumed Chantal and Cheralyn began their respective chores elsewhere in the house. After about 10 minutes at his chores, Moroni began preparing for a family home meeting, which they held weekly. Everyone would meet around 5:00 p.m., pass out hymn books, and sing a song. Moroni was setting up the room. Meanwhile, Mary was feeding the younger children. As usual, they started getting ready for the family home meeting around 4:45 p.m. Defendant was "[h]appy as usual." On this evening, everyone got to the family home meeting around 5:15 p.m. When the meeting was about to start, they realized Chantal was missing. They looked around the house and yard for her. Worried that she might have run away, they called some friends. They decided she would come back if she wanted to come back, and they proceeded with the family home meeting.

According to Moroni, there was no other meeting before the family home meeting. Nothing else occurred right after they arrived home from school. Moroni did not tell defendant about the conversation he and Cheralyn had on the way home or about Chantal's possession of a cell phone or iPod. Defendant did not seem angry at either Chantal or Cheralyn. Moroni was in the room before the family home meeting, but only to vacuum it. After that, he did not see Chantal again. Defendant did not ask Moroni to get the belt, and defendant did not strike Chantal.

When asked if he knew why he was testifying, Moroni answered, "I am here to testify that my sister is a liar and that she is a drama queen." He said, "She is lying about my father being abusive, angry, and a liar." Moroni did not speak to social workers until months after Chantal ran away. Defendant did not tell him what to say to the social workers.

*Mary*

Mary testified that Moroni, Cheralyn, and Chantal arrived home from school between 4:00 and 4:15 p.m. on February 10, and they greeted her in the kitchen. Mary assumed they then walked back to the room, and she assumed defendant was already in the room, where there was a television and computer. Mary fed the younger children, then went to the room for the family home meeting at 5:00 p.m. She had not seen the three older children for the intervening 45 minutes or so. When Mary got to the room, she realized Chantal was missing. Mary looked around the house and the front yard, but nowhere else.

Mary did not see Chantal go into the bathroom, she did not knock on the bathroom door, and she did not hear Chantal crying in the bathroom. Mary was worried, but she knew Chantal had a lot of friends in the neighborhood, and she assumed Chantal was with them. Defendant told her, “Don’t worry, she’ll come home. She always comes home.” Several years earlier, Chantal had left around 4:00 p.m. on Halloween and returned around 10:00 p.m.

When Webb arrived late that night, Mary jumped up to answer the door because she thought it was Chantal. Defendant told Webb he did not hit Chantal with a belt. Mary believed defendant because he was not a liar. Mary was not in the room during the events and she did not witness what happened, but she knew defendant spoke the truth because he did not lie. And she knew defendant was not mad because he did not get mad.

Mary believed Chantal ran away because she was upset that she was told to give the cell phone back to its owner. Chantal was tired of being at home and tired of following the rules at home. She wanted to “live a different manner.” Mary believed Chantal would rather wear makeup or have a cell phone than live with her own family. That was what Chantal had chosen. Mary learned that Chantal and her sister had been planning to run away, so this was Chantal’s opportunity and she took it.

When shown the photographs of Chantal's injury, Mary said she did not know how the injury occurred, but she had her guesses. She proposed that Chantal was injured when she rolled over the top of their cement wall. Chantal frequently went over the wall.

The day after Chantal ran away, Mary spoke to the social worker, Heather Sharp. Mary told Sharp she did not see defendant strike Chantal and did not see any marks or bruises on Chantal. Mary told Sharp that physical discipline was not used in their home. Instead, they used time-outs and groundings. Mary could not remember telling Sharp various things about February 10 and about her family.

On cross-examination, Mary explained that the family had rules that the children were expected to follow while they lived in the household. Once they reached 18 years of age, they could choose how to live. Until then, they had to dress appropriately—for example, by not wearing sleeveless tops or makeup—and they had to respect each other's property—for example, by asking to borrow items. They were not allowed to borrow items from anyone outside the family. Chantal was constantly borrowing a cell phone and an iPod from her friend.

Mary had never struck the children, and she had never seen defendant strike the children with a belt.

### ***Cheralyn***

Chantal's sister, Cheralyn, testified that while she, Moroni, and Chantal were walking home from school on February 10, she was talking to Moroni about confessing something at church and having to tell defendant. When they got home, Cheralyn went to tell defendant that she needed to talk to the bishop. Defendant was upset and he called her a slut. Cheralyn was crying because she knew she had made a mistake and defendant was disappointed in her. Defendant called Moroni, Emerald, Chantal, and Mary into the room. Cheralyn was going to tell them she violated the rule of chastity and explain why they should not do certain unchaste things. Defendant was seated, and everyone else was standing in a line, facing defendant and Cheralyn. Cheralyn spoke for five to seven

minutes until defendant saw that Chantal was holding an iPod. He might have thought she had gotten it from a friend, but Cheralyn had lent it to her that day and she was not grounded at the time. Defendant was angry and he asked Chantal loudly, “What do you think your punishment should be?” He said he had already warned her not to borrow electronics from her friends. She did not answer. He asked again, but again she did not answer. He asked a third time, and still she did not answer. Defendant asked Moroni to get the belt. Cheralyn thought defendant was going to hit Chantal instead of her. Defendant held one of Chantal’s arms and hit her with the belt about three times on the back. Chantal was struggling to stay still, probably because it hurt. No one tried to stop defendant. Cheralyn did not try to stop him because she was scared of him. Mary was watching, and she did not try to stop him. When defendant stopped hitting Chantal, he told everyone to go do their chores and get out of his face. Chantal was crying. She went into the bathroom and closed the door. Cheralyn went to clean the kitchen floor. She did not see Chantal’s injury, and she did not see Chantal leave. At 5:30 or 6:00 p.m., everyone started looking for Chantal. Mary told defendant she was gone. Defendant told everyone not to look for her and said she would be back, so they did nothing.

Defendant was upset that Chantal left, and he asked Cheralyn to try to get Chantal to come home and take back everything she had said.

On February 11, Cheralyn spoke to Sharp. When Sharp asked her if defendant hit the children, Cheralyn said he never did. She said this because she thought it would protect her family and keep them from being separated. Later, Cheralyn testified at a hearing that defendant did not hit them and did not hit Chantal. Again, she lied because she thought she was protecting her family. It was her own decision to lie then and to tell the truth now. She believed telling the truth should help, not hurt. The reason she left home was so she could tell the truth now. If her siblings testified that defendant did not hit Chantal at the meeting, that Mary was not present at the meeting, or that there was no meeting at all, they would not be telling the truth.

No one told Cheralyn what to say to the social workers that day, but in the past, defendant and Mary had told her what to say to social workers.

Cheralyn explained that Chantal had run away one other time. On Halloween when she was in sixth grade, she was upset because defendant had called her a bitch. She left a letter suggesting she would be back, and she did return later that night.

At the time of trial, Cheralyn no longer lived at home. She had sent a text message from a friend's cell phone to Chantal's cell phone. In the message, she stated, "Don't come home. Come get me tomorrow." Cheralyn wanted to leave because she did not want to lie in criminal court as she had done in juvenile court. Cheralyn and Chantal had been planning to run away since November 2009 because of the way things were at home and how defendant treated them. Cheralyn did not run away in November 2009 because she could not leave her family. She was afraid that if she and Chantal left, something would happen that would prevent them from staying together. Cheralyn finally decided to leave because, although defendant had stopped hitting the children for a while, one day he hit some of her siblings.

On cross-examination, Cheralyn testified that she lied when she told Sharp there was no abuse in the home and she had never been harmed. Cheralyn had been harmed in the home, usually with the belt. She did not get hit often because she usually followed the rules. Chantal got in more trouble at home than Cheralyn. Chantal would get in trouble for fighting and lying. According to Cheralyn, Chantal lied frequently. Cheralyn estimated that Chantal got hit with the belt less than weekly.

On redirect, Cheralyn testified that Chantal lied quite a bit, even to her. Cheralyn was not taking Chantal's side now, she was just telling the truth about what she knew and what she had seen. She left home so she could tell the truth.

***Social Worker Sharp***

Sharp testified that she spoke to defendant on the telephone on February 11 and asked him about the allegations. He denied hitting Chantal. He said she was fighting at

school and was out of control. He said there was a family meeting, but it was about Chantal's use of an iPod, not about chastity. Chantal was unhappy because she had been grounded. He talked to the children about following the rules.

When Sharp spoke to the children, they told her defendant had told them that a social worker would be coming to school. They said, "Our dad told us to say that we don't get hit, we get grounded." All the children except for Cheralyn said this. Cheralyn did not want to talk about the family. Sharp asked the children if there was anything else they were supposed to tell her. They said, "That we get a bath every day." They would not respond to any other questions. Based on her years as a social worker and her training in forensic interviewing, Sharp opined that the children had been coached. When Sharp confronted defendant with her opinion on the telephone, he said if anybody had coached them, Sharp had. He said he knew how her department would manipulate children. He said he had been in law enforcement and he knew that law enforcement has the ability to manipulate.

According to Sharp, after Cheralyn left the home, defendant was more agitated. He told her Cheralyn was out of control. She had sneaked a boy into a friend's house and was upset because she had gotten into trouble. Defendant still maintained that he did not strike the children; he merely talked to them. At a social worker staffing meeting, defendant stated he was a master-level martial artist, and if he wanted to hit his children with a belt, he would be more precise in how he hit them. He explained that if the children were bruised, it was from their martial arts training at home.

## **II. Defense Evidence**

### ***Houman Moayer***

Houman Moayer was a cultural advisor and a counterintelligence specialist in the military. He and defendant met in 1981 when defendant was working as a gunsmith. They became good friends and had a lot in common. Defendant did not smoke or drink, and he had good morals. In 1988, Moayer hired defendant as an employee. In 1995 or

1996, defendant moved to Colorado, but they stayed in touch. In 2004, defendant moved to Madera. Moayer had seen defendant with his children and his customers. In Moayer's opinion, defendant did not get violent. He testified that defendant was very educated, and he had learned "voice command." Moayer had seen him take charge of a situation using voice command, but he had never seen him violent.

On cross-examination, the prosecutor asked Moayer if he had heard that defendant previously struck Chantal on the back near the end of eighth grade. Moayer had not. He said it would change his opinion if he heard this from defendant, Mary, or one of the children. Defendant would not do such a thing, but if defendant told Moayer he had done it, Moayer's opinion of defendant would change. The prosecutor asked Moayer if he had heard that defendant previously struck Cheralyn with a belt across her chest and caused a bruise or mark. Moayer had not heard this either. If these three allegations against defendant were true, they would change Moayer's opinion of defendant.

### *Defendant*

Defendant testified on his own behalf. He remembered that the three older children arrived home around 4:00 p.m. on February 10. Cheralyn came to defendant and told him about chastity. Defendant already knew that Cheralyn and her boyfriend had been engaging in inappropriate behavior for some time. Defendant was not really concerned about it and had not said anything to Cheralyn because she was a young lady and she would speak to him about it if she wanted to. Defendant told her, "I already know what you've been doing. I don't need to talk to you about it. You know the proper procedures. That's between you and the Lord. And if you need to, go talk to the bishop." That was the end of that matter. There was no meeting in which defendant made Cheralyn talk about chastity.

Defendant then spoke to Chantal about the iPod. Chantal had been grounded for having a cell phone and an iPod without permission, and defendant noticed she had the iPod that day. Defendant did not mind his children having these items, but he believed

Chantal was misusing them. They were a distraction and Chantal's grades were dropping. When defendant got to the room, Moroni was cleaning. Cheralyn, Emerald, Mormon, and Chantal were also gathering in the room, but it was not a meeting. Defendant told Chantal she had to return the cell phone and iPod. Defendant did not ask Moroni for a belt or strike Chantal. She left the room with the iPod in her hand. Defendant assumed she was going to return the items. Defendant did not speak to her again. Mary and the younger children started entering the room for the family home meeting. When they started passing out hymn books, they realized Chantal was not there. One of the children told defendant she had seen Chantal leave and jump over the back wall. According to defendant, when Chantal climbed the wall, which was approximately six feet tall, she typically stood on a bucket, then rolled over onto her back. Defendant did not hit Chantal with a belt and cause the red mark on her back.

Defendant said he looked for Chantal for a while, but figured she probably went out with her friends. He did not think she was upset; she was a little bit upset, but not really. She was emotional and tended to get excited, and it was no big deal. She was a drama queen and one of the "most spoiled girls that [he] kn[e]w." After the family home meeting, defendant told Mary, "Don't even worry about it. She's done this before." He told her Chantal would come back sooner or later.

Defendant explained that during a visit with Chantal and Cheralyn in June or July, Chantal started to cry and said she was sorry for what she had said and done. She said she had lied. Emerald, Mormon, and Mary were also present when Chantal said this.

Defendant had not told his children what to say, and he had not told them that they might be talking to social workers. Defendant had not told his children or Mary what to say in court or to the social workers.

Defendant was trained in martial arts. He and Moayer participated in this training together. All of defendant's children participated in martial arts.

On cross-examination, defendant explained that he was not implying Chantal hurt herself when she rolled over the wall; he was just saying it was possible. It was also possible that she was bruised in the same way at the end of eighth grade; he had not done it.

Defendant said Chantal and Cheralyn told him, “Dad, we’re sorry we did this to you.” He responded, “Don’t worry about it. Whatever’s been done, I still love you. You guys can come back.” Chantal and Cheralyn were testifying at trial because they were being pressured by law enforcement. Sharp had coerced them because she wanted to break up their family.

Defendant denied telling his children that a social worker would be talking to them at school. He never coached his children. Social workers had been coming to his house constantly for four years, and his children did not need to be coached.

***Arturo Montuy***

Arturo Montuy, defendant’s uncle, was close in age to defendant. They had grown up together and were like brothers. Arturo was around defendant and his children frequently. He had seen defendant in situations where he had to discipline his children, but he had never seen him use physical force. In Arturo’s opinion, defendant was nonviolent. In fact, defendant’s nonviolent nature had set an example for Arturo, who tended to have a short temper.

On cross-examination, the prosecutor asked Arturo if he had heard that defendant hit Chantal with a belt at the end of eighth grade, or that defendant hit Cheralyn across the chest and caused marks the previous summer. Arturo had not heard these things. Hearing them would not necessarily affect his opinion of defendant. It would depend on who was saying them. It would be easier to decide if he had actually observed one of these incidents.

***Maria Rodriguez***

Maria Rodriguez was the administrative assistant at the local school for kindergarten through eighth grade. None of defendant's children had come in and complained about a physical injury, and she had never observed any injuries on the children.

**III. Rebuttal Evidence**

***Chantal***

Chantal testified that after she went to the police station and was picked up by a social worker, she was taken to the hospital where a doctor examined the injury on her back.

Chantal never told a family member or a social worker that she had lied and wanted to go home. She never said anything that could even have been interpreted that way.

Chantal did not get in trouble a lot at home for lying, although she had been accused of lying. When she got blamed for something and denied doing it, she was accused of lying. The other children would not take responsibility, so she would get in trouble. She would be whipped with a belt and grounded.

When Chantal left home, she went over a brick or cement wall that was about six feet tall. She climbed on the dirt mound with a basket on top, stepped on the basket, lifted herself up with her arms, and turned around so she was sitting on top of the wall. Then she brought her legs over, sat facing the other side, and jumped off. She did not slide down on her back. She did not get her injury from climbing over the wall.

On cross-examination, Chantal said she was exaggerating if she said she was struck on a daily basis. Every other day would be more accurate.

She explained that the wall was not covered with a smooth cap on top. The top was rough. She sat on the top, pushed away from the wall, and jumped down onto her feet.

***Officer Webb***

Webb testified that, in his opinion, Chantal's injury appeared to have been produced by a long, flat rectangular object. It did not look like a scrape.

***Chantal***

Chantal was recalled. She explained that she was not struck every other day. "It was more like it happened so often you could almost say it happened every other day." Sometimes two or three days would pass, and there were times she thought it had ended, and then it would start again suddenly. She said, "Pretty much my whole life it's been that way."

On cross-examination, Chantal explained that defendant usually would strike her a couple of times. Sometimes, he would base the number of strikes on the child's age in years. He would hit them hard enough to leave a mark and make them cry and want to fall down and not get back up. Over time, they got used to it. Sometimes defendant would yell. He was angry most of the time.

**DISCUSSION**

**I. Prior Uncharged Acts**

Defendant contends the trial court abused its discretion by allowing evidence that defendant struck Chantal with a belt at the end of eighth grade before a class trip to the beach, that he struck Chantal with a belt on a frequent and regular basis most of her life, and that he struck Cheralyn with a belt on the chest in the previous year. Defendant argues (1) the evidence should have been excluded under Evidence Code section 352; (2) the evidence that he had abused Chantal most of her life should have been excluded under Evidence Code section 1109, subdivision (e) because it was more than 10 years old; and (3) admission of the evidence violated his due process right to a fair trial.

**A. Evidence Code Section 352**

As a general rule, evidence of a defendant's other bad acts is not admissible to prove his propensity or disposition to commit bad acts. (Evid. Code, § 1101.) Evidence

Code section 1109, however, creates an exception in cases of domestic violence, allowing admission of evidence of the defendant's other acts of domestic violence to show he has a disposition to commit these acts and therefore committed the charged act. "The propensity inference is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases. Not only is there a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity. Without the propensity inference, the escalating nature of domestic violence is likewise masked." (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027-1028.)

Admission of this propensity evidence remains subject to an Evidence Code section 352 analysis, which permits the trial court, in its discretion, to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.) "The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." (*People v. Karis* (1988) 46 Cal.3d 612, 638; *People v. Yu* (1983) 143 Cal.App.3d 358, 377.) "Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors. [Citation.]" (*People v. Farmer* (1989) 47 Cal.3d 888, 912, overruled on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) It is the prejudice caused by evidence that "uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Karis, supra*, at p. 638.) Prejudicial is not synonymous with damaging. (*Ibid.*)

In determining whether to admit prior acts of domestic violence, the trial court considers such factors as whether the prior acts are more inflammatory than the charged conduct, the possibility that the jury might confuse the prior acts with the charged acts,

the remoteness of the prior acts, and whether the defendant has already been convicted and punished for the prior acts. (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119; *People v. Harris* (1998) 60 Cal.App.4th 727, 737-741 [inflammatory nature of the evidence, probability of confusion, remoteness, and consumption of time are factors to be weighed against probative value of evidence].)

The trial court's exercise of discretion under Evidence Code section 352 will not be disturbed on appeal unless the court clearly abused its discretion, that is, unless the prejudicial effect of the evidence clearly outweighed its probative value. (*People v. Lucas* (1995) 12 Cal.4th 415, 449.)

We see no abuse here. The probative value of defendant's prior acts of violence against Chantal was compelling. The evidence was strongly indicative of, and tended logically to establish, defendant's propensity to commit violent acts against her. (See *People v. Hoover, supra*, 77 Cal.App.4th at p. 1029 [similar conduct against the same victim is highly relevant]; *People v. Harris, supra*, 60 Cal.App.4th at pp. 739-740 [other crimes evidence must tend to prove logically and by reasonable inference the issue upon which it is offered, must be offered on an issue material to the prosecution's case, and must not be merely cumulative].) Furthermore, the evidence that defendant had committed a similar act against his other teenaged daughter tended to prove he had the propensity to treat his daughters in a violent manner.<sup>5</sup>

Furthermore, the prejudicial factors in this case clearly did not outweigh the compelling probative value of the evidence. The prior acts were no more inflammatory or shocking than the charged act. The prior acts and the charged act all involved striking Chantal or Cheralyn with a belt. The testimony did not require an undue consumption of time, and there is nothing in the record to indicate that the evidence so distracted the

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<sup>5</sup> Defendant's concern that the probative value of the evidence was "slight due to its uncorroborated nature" was for defense counsel to address on cross-examination.

jurors that they were unable to focus on the fact that the question before them was whether defendant committed the charged offense. Finally, we are not persuaded that the jurors convicted defendant of the charged act to punish him for the prior acts. The jurors were instructed that if they concluded defendant committed the uncharged acts, that conclusion was only one factor to consider along with all of the other evidence, and it was not sufficient by itself to prove that defendant was guilty of the charged crime because the People still had to prove that charge beyond a reasonable doubt. We presume the jurors comprehended and followed the court's directions (*People v. Smith* (2007) 40 Cal.4th 483, 517), and defendant has given us no reason to conclude otherwise.

***B. Remoteness of Prior Acts***

Defendant argues that the trial court abused its discretion under subdivision (e) of Evidence Code section 1109 because the record contains no evidence that the court conducted the separate analysis of weighing the probative value of prior acts that were more than 10 years old. We conclude any error was harmless.

Under subdivision (e) of Evidence Code section 1109, evidence of prior acts that are over 10 years old is inadmissible “unless the court determines that the admission of this evidence is in the interest of justice.” (Evid. Code, § 1109, subd. (e).) “Thus, while evidence of past domestic violence is presumptively admissible under [Evidence Code section 1109,] subdivision (a)(1), subdivision (e) establishes the opposite presumption with respect to acts more than 10 years past.” (*People v. Johnson* (2010) 185 Cal.App.4th 520, 537, fn. omitted.) But it also “clearly anticipates that some remote prior incidents will be deemed admissible and vests the courts with substantial discretion in setting an ‘interest of justice’ standard.” (*Id.* at p. 539 [§ 1109, subd. (e) “sets a threshold of presumed inadmissibility, not the outer limit of admissibility”].) The “more rigorous standard of admissibility for remote priors” does not “necessitate[] an inquiry different in kind from that involved in a determination under section 352.” (*People v. Johnson, supra*, at p. 539.)

In this case, the remote evidence to which defendant refers was Chantal's testimony that he had been hitting her regularly with a belt most of her life (which was only 15 years long). This argument fails for obvious reasons. Evidence that defendant hit Chantal regularly with a belt for *the previous 10 years* (which would have started when she was only five years old) was not remote and presumptively inadmissible under subdivision (e) of Evidence Code section 1109. In light of this powerful evidence, admission of evidence that defendant struck Chantal regularly *for some time before that* was entirely harmless. Furthermore, the jurors surely understood that Chantal was using an idiomatic expression when she said "[p]retty much my whole life" and did not necessarily mean every day since her birth. Any error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

### **C. Due Process**

Defendant also claims admission of evidence of his prior domestic violence violated his right to due process. The appellate courts have consistently rejected due process challenges to Evidence Code section 1109. (E.g., *People v. Cabrera* (2007) 152 Cal.App.4th 695, 704; *People v. Price* (2004) 120 Cal.App.4th 224, 240; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1096; *People v. James* (2000) 81 Cal.App.4th 1343, 1353; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310-1313; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334; *People v. Hoover, supra*, 77 Cal.App.4th at pp. 1028-1029; *People v. Johnson* (2000) 77 Cal.App.4th 410, 417-420.) These cases relied on *People v. Falsetta* (1999) 21 Cal.4th 903, in which the Supreme Court concluded that a similar statute, Evidence Code section 1108, does not violate due process because the trial court's discretion to exclude evidence under Evidence Code section 352 provides a procedural safeguard against prejudice. For the reasons explained in these cases, we reject defendant's due process challenge to the statute.

## II. Social Worker's Opinion

Defendant asserts that defense counsel was ineffective for failing to object to Sharp's testimony that defendant coached his children. We find any error harmless.

A witness's opinion about whether another witness is telling the truth is generally inadmissible. "Our state Supreme Court [in *People v. Melton* (1988) 44 Cal.3d 713, 744-745] has recognized that a lay witness's opinion about the veracity of another person's particular statements is *inadmissible* and *irrelevant* on the issue of the statements' credibility. [Citation.] The high court reasoned that such lay opinion testimony invades the province of the jury as the ultimate fact finder, is generally not helpful to a clear understanding of the lay witness's testimony, is not 'properly founded character or reputation evidence,' and does not bear on 'any of the other matters listed by statute as most commonly affecting credibility' in Evidence Code section 780, subdivisions (a) through (k). [Citation.]" (*People v. Zambrano* (2004) 124 Cal.App.4th 228, 239-240.) Similarly, "[t]he general rule is that an expert may not give an opinion whether a witness is telling the truth, for the determination of credibility is not a subject sufficiently beyond common experience that the expert's opinion would assist the trier of fact; in other words, the jury generally is as well equipped as the expert to discern whether a witness is being truthful." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82.)

Here, Sharp testified that the children told her defendant informed them they would be speaking to a social worker at school. The children then told her, "Our dad told us to say that we don't get hit, we get grounded" and "[t]hat we get a bath every day." They would not answer any other questions. Based on her experience and training, Sharp concluded from this conversation that the children had been coached.

Sharp's conclusion that the children had been coached to make those statements did at least suggest that she believed defendant told the children what to say because he was covering the truth, and thus it supported the implication that the children were lying. But even if we assume Sharp's statement improperly invaded the jury's province of

assessing the credibility of witnesses, we nevertheless find any error harmless in light of the children's statements that defendant told them what to say. Sharp's conclusion that defendant had coached them was little more than a paraphrasing of the children's own statements to her. We see no significant difference between defendant's telling them what to say and his coaching them. Any reasonable juror would come to the same conclusion in the absence of Sharp's conclusion that the children were coached. Thus, any error was harmless. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

### **III. Cumulative Error**

Defendant asserts that the cumulative effect of the errors rendered his trial unfair. Because we have found either no error or harmless error in each instance, defendant's contention that he prejudicially suffered from the cumulative effect of errors must fail.

### **IV. Imposition of Fees**

#### ***A. Restitution Fine***

Defendant argues, and the People agree, that the trial court actually imposed a \$760 restitution fine and misspoke when it orally pronounced a \$70 fine. The People also agree that the \$760 amount was improper because it included penalty assessments and surcharges that cannot be applied to restitution fines. We accept the People's concession that the amount should be reduced to \$200, which was the original amount of the restitution fine imposed pursuant to section 294, subdivision (a). (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1372.)

#### ***B. Medical Examination Reimbursement***

Defendant also argues, and again the People concede, that the reimbursement fee pursuant to section 1203.1h for any medical exam conducted on Chantal must be stricken because the trial court failed to determine the amount of the fee. (*People v. Wardlow* (1991) 227 Cal.App.3d 360, 372.)

### ***C. Probation Report Fee***

Defendant asserts that the trial court erred in ordering that he pay \$750 for the preparation of the probation report pursuant to section 1203.1b. He contends there was insufficient evidence of his ability to pay. We will remand.

Section 1203.1b, subdivision (b) states in pertinent part: “The court shall order the defendant to pay the reasonable costs [of a presentence report] if it determines that the defendant has the ability to pay those costs based on the report of the probation officer, or his or her authorized representative.” The statute describes the procedure the trial court must follow before making such an order. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1400-1401 (*Pacheco*)). The court shall first order the defendant to appear before “the probation officer, or his or her authorized representative” so that the officer may ascertain the defendant’s ability to pay any part of these costs, and to propose a payment schedule. (§ 1203.1b, subd. (a).) Unless the defendant waives the right, he is entitled to a court hearing on his or her ability to pay them. (*Id.*, subds. (a) & (b).)

“The term ‘ability to pay’ means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of conducting the presentence investigation, preparing the ... presentence report, ... and probation supervision ..., and shall include, but shall not be limited to, the defendant’s: [¶] (1) Present financial position. [¶] (2) Reasonably discernible future financial position [within the one-year period from the date of the hearing] .... [¶] (3) Likelihood that the defendant shall be able to obtain employment within the one-year period from the date of the hearing. [¶] (4) Any other factor or factors that may bear upon the defendant’s financial capability to reimburse the county for the costs.” (§ 1203.1b, subd. (e).) Where the record does not indicate that the probation officer or the trial court made a determination of the defendant’s ability to pay probation supervision costs or that the defendant was informed of the right to a court hearing on the ability to pay, it has been held that a remand for the purpose of compliance

with section 1203.1b is warranted. (*People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1067-1068; see also *Pacheco, supra*, 187 Cal.App.4th at pp. 1401, 1404.)

Failure to object to the imposition of the fee forfeits the issue. (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072 [“failure to object in the trial court to statutory error in the imposition of a probation fee under section 1203.1b waives the matter for purposes of appeal”].) Here, defense counsel concurred with the report’s recommendation and stated that defendant was more than willing to comply with the terms of probation. Defendant, however, asked the court: “How much—how am I suppose[d] to pay it when I’m not working?” The court responded: “That will be up to—again, you’re on probation for a period of five years. Hopefully, between now and the end of five years you’ll be able to find employment and pay those fines. Those fines are due and payable and will be worked out between you and the probation officer. If you don’t have the financial means to pay those fines, you cannot be held for violating probation if you’ve gone out and made efforts and good faith effort to find employment and pay those fines.” We conclude defendant’s inquiry amounted to an objection that he did not have the ability to pay. Thus, we do not conclude defendant forfeited the claim.

The probation report stated that defendant had graduated from high school, but had not attended any trade schools or colleges. Nor had he served in the military. He was currently unemployed, but in good health. Nine of his children lived with him and his wife, and the family received \$1,100 in food stamp assistance. The probation officer recommended, among other things, that defendant seek and maintain gainful employment, and that he be found eligible to apply for work furlough.

Although the trial court told defendant that the plan was for him to find gainful employment within the next five years, nothing in the record suggests that either the probation officer or the trial court made a determination of defendant’s ability to pay the \$750 costs for preparation of the probation report. There is also no evidence that the probation officer advised defendant of his right to have the trial court make this

determination or that defendant waived this right. Consequently, it appears that a remand to the trial court for the purpose of determining defendant's ability to pay the cost of the probation report, as provided by section 1203.1b, is appropriate in this case.

***D. Jail Incarceration Fee***

Defendant raises a similar challenge to the trial court's imposition of a \$73 per day jail incarceration fee pursuant to section 1203.1c, arguing the evidence of his ability to pay was insufficient and the court failed to hold a required hearing.

Section 1203.1c, subdivision (a) provides: "In any case in which a defendant is convicted of an offense and is ordered to serve a period of confinement in a county jail, city jail, or other local detention facility as a term of probation or a conditional sentence, the court may, after a hearing, make a determination of the ability of the defendant to pay all or a portion of the reasonable costs of such incarceration, including incarceration pending disposition of the case." Reminiscent of section 1203.1b, this section also states: "'Ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of incarceration and includes, but is not limited to, the defendant's: [¶] (1) Present financial obligations, including family support obligations, and fines, penalties and other obligations to the court. [¶] (2) Reasonably discernible future financial position. In no event shall the court consider a period of more than one year from the date of the hearing for purposes of determining reasonable discernible future position. [¶] (3) Likelihood that the defendant shall be able to obtain employment within the one-year period from the date of the hearing. [¶] (4) Any other factor or factors which may bear upon the defendant's financial ability to reimburse the county or city for the costs." (§ 1203.1c, subd. (b)(1)-(4).)

Our analysis under section 1203.1b applies here as well, and on remand, the trial court shall determine whether defendant has the ability to pay the jail incarceration costs.

**DISPOSITION**

The trial court's orders imposing (1) the \$760 restitution fine under section 294, subdivision (a), (2) the medical examination reimbursement fee under section 1203.1h, (3) the \$750 felony presentence report (probation report) fee under section 1203.1b, and (4) the \$73 per day incarceration fee under section 1203.1c are vacated. The matter is remanded to the trial court with instructions to hold a hearing on defendant's ability to pay the fees under sections 1203.1b and 1203.1c. The trial court is directed to amend its minute order of the sentencing hearing to reflect the changes, including imposition of a \$200 restitution fine (in place of the stricken \$760 fine) under section 294, subdivision (a). The judgment is affirmed in all other respects.

\_\_\_\_\_  
Kane, J.

WE CONCUR:

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Dawson, Acting P.J.

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Franson, J.