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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RANDY RALPH JIMENEZ, Defendant and Appellant.	F062270 (Super. Ct. No. F09902760) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Rosendo Peña, Jr., Judge.

Marilyn G. Burkhardt, 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, Catherine Chatman and Michael Dolida, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Randy Ralph Jimenez stands convicted, following jury determinations of guilt and sanity, of inflicting corporal injury resulting in a traumatic condition upon a spouse or cohabitant, during the commission of which he personally used a deadly weapon (Pen. Code, §§ 273.5, subd. (e)(1), 12022, subd. (b)(1); count 1), assault with a deadly weapon (*id*., § 245, subd. (a)(1); count 2), making criminal threats, during the commission of which he personally used a deadly weapon (*id*., §§ 422, 12022, subd. (b)(1); count 3), and false imprisonment by violence (*id*., § 236; count 4). Defendant admitted having suffered three prior "strike" convictions (*id*., §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and two prior serious felony convictions (*id*., § 667, subd. (a)(1)), and having served a prior prison term (*id*., § 667.5, subd. (b)).[1] The trial court denied his request to dismiss one or more strikes, sentenced him to a total unstayed term of 12 years plus 25 years to life in prison, and ordered him to pay restitution and various fees, fines, and assessments. On appeal, defendant contends the trial court erred by admitting evidence of prior acts of domestic violence. We affirm.

FACTS[2]

I

PROSECUTION EVIDENCE

The Current Charges

Sheila Armstrong and defendant moved in together in March 2006.[3] Their relationship was good until the last four to six months they were together; that was the period during which defendant started drinking.

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[1] With respect to count 1, defendant also admitted having suffered a prior Penal Code section 273.5 conviction within the preceding seven years.

[2] We summarize only the evidence adduced at the guilt phase of trial, since defendant raises no issues concerning the sanity phase.

[3] To avoid confusion, we refer to members of the Armstrong family by their first names. No disrespect is intended.

In 2008, defendant and Sheila's father, Gary, got into a fistfight over money that disappeared after Gary gave it to Sheila to hold for him. Defendant took out a restraining order against Gary. Sheila and Gary's relationship became distant as Gary was staying away because of the restraining order.

On Mother's Day, 2009, at around 10:00 a.m., defendant and his brother went to their mother's home, which was located about six blocks from defendant and Sheila's home. Sheila arrived at about noon with some food.[4] Defendant was drinking beer; Sheila saw him drink four to five 12-ounce cans of beer. She also saw defendant share a marijuana joint. Defendant appeared to be having a good time.

At 4:00 p.m., Sheila left for home. Defendant arrived home about 45 minutes later. He was intoxicated and angry. He mumbled something that Sheila could not understand. She told him she could not hear him and he yelled that he was "tired of [her] bullshit." She asked what she had done. He yelled that he wanted her to call her father; that he wanted to kill Gary.

When Sheila refused to call her father, defendant punched her in the face. She started crying. He again told her to call her father, she refused, and he punched her again. This went on for a while, and then defendant threw a cordless telephone at Sheila and told her to call her father. The telephone struck Sheila in the arm. Defendant said a number of times that he wanted to kill Gary to teach him a lesson. Sheila believed defendant would carry out the threat, and she refused to call Gary. Defendant threw the remote control at the television and broke the television. Sheila still refused to call Gary. Defendant went to the back of the house and returned with a sharp, fixed-blade knife. He put the knife to Sheila's chest and told her to call her father. Sheila felt the tip of the knife pressing through her T-shirt. Defendant said he was going to kill Gary, told Sheila to tell Gary to come over, bring $10,000 and a motorcycle, and they would "settle it like

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[4] Sheila traveled by means of her motorized wheelchair.

men." Defendant put the knife to Sheila's neck and slowly cut her. She agreed to call her father fearing defendant would kill her if she did not.

Defendant gave Sheila the phone, and she dialed her father's number. As soon as defendant heard someone answer, he took the phone. He directed that person to bring $10,000 and the motorcycle, and they would "settle it." When he hung up, Sheila told him she thought he had talked to her brother, Richard, and not her father. Defendant had her call back. She did and told her father that defendant had cut her neck and said he would kill her. Defendant took the phone from Sheila and told Gary to come over "[t]o settle things," and that he was going to kill Sheila.[5]

After defendant hung up, he said, "Let's go outside so we can watch when they come." As they walked out, Sheila grabbed another cordless phone. As defendant was putting a chair by the grass so he could "see to the front yard gate," Sheila dialed 911 and set the phone up on a shelf. Defendant had Sheila sit on the grass so he could watch her. She believed he still had the knife; she did not feel she could leave because she could not walk well and he would easily be able to get her and kill her.

Defendant paced around for a while, then, when Gary did not arrive, announced they would go inside and wait. Sheila managed to grab the phone off the shelf and hang it up. Inside, defendant had her sit down in her chair. He told her he was sorry he had to hurt her, but he had to teach her father a lesson. She said that all she did was love

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[5] Richard recalled defendant thinking he was talking to Gary, and saying he was going to kill Gary's daughter if Gary did not get down there. Defendant said they could "settle it in back in the alley," then hung up. Richard told Gary. When Sheila called back to speak to Gary, Richard jumped in the car and drove to Sheila's residence, which was about 10 to 15 minutes from where he and Gary lived.

Gary recalled defendant saying he had a present for Gary, who had one hour to bring $10,000 in cash and get to defendant's residence. Defendant said he was going to kill Sheila. Gary hung up and immediately called 911.

defendant. Defendant said he loved her too, but he had to "send a message" to her father by killing her.

Sheila saw police officers jump the fence surrounding the house. She started talking more to defendant to distract him. When defendant noticed the police, he put the knife under a chair cushion, opened the door, and asked if he could help them. The officers called defendant to come outside.

Officer Messick of the Fresno Police Department was dispatched to the residence at 5:34 p.m. He and his partner, Officer Hoagland, climbed the fence because the gates were locked. Defendant came out of the house onto the front porch and started yelling that they needed a search warrant to come onto the property. Defendant did not comply with the officers' directive to put his hands in the air and get on the ground. Defendant walked toward them with his left hand in his shorts' pocket. Concerned he might have a weapon, Hoagland took hold of him and "passed him" to Messick. Defendant tried to walk away, did not comply with Messick's commands, and so Messick took him to the ground. It took three officers to get defendant handcuffed.[6]

Defendant showed signs of intoxication, but was not armed; he was holding keys in his hand. Defendant said he had six tall cans of beer to drink, he was diabetic, and his blood sugar was high. The officers requested an ambulance.

The Prior Instances of Domestic Violence

Ruth Martinez first met defendant when she was attending Fresno City College. She had two daughters — Tori, who was four or five years old, and Vanessa, who was seven or eight years old. Martinez and defendant dated, then lived together for five or six years. The early part of their relationship was good.

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6 By the time Richard arrived at defendant's residence, defendant was on the ground, Sheila's neck was bleeding, and Sheila appeared distraught.

November 24, 1994, was Martinez's 30th birthday. They spent part of the day celebrating with her twin sister. When they got home that evening, defendant invited the father of Martinez's daughters, Gasper Quiroz, over to Martinez's apartment against Martinez's wishes. Defendant and Quiroz drank and talked, then went to the back room. When Quiroz came out looking scared, Martinez told him he needed to go home. Quiroz left.

Defendant was angry that Quiroz had left. He followed Martinez back to her bedroom and started hitting her.[7] Defendant, who had martial arts training and went to tournaments, slugged Martinez in her face with a closed fist. He struck her more than a dozen times, cutting and bruising her and breaking a number of her teeth.

One of Martinez's daughters came in, but Martinez told her to go back into the room and hide. Defendant then left the room. When he returned, he had a knife from the kitchen that was six to seven inches long and sharp. Martinez was standing by the bed. Defendant lunged at her with the knife. She landed on the bed with him on top of her. Defendant tried to stab her. She ended up with a large cut on her neck. She also cut her hand when she bent the knife blade back and took the knife away from him.

Sandra Mosley met defendant at City College in 2002. They were together for 10 months. Mosley's 10-year-old daughter lived with them in Mosley's house.

February 12, 2003, was defendant's birthday, and Mosley thought they would celebrate it together. Defendant did not arrive home, however, until after 1:00 a.m. When he walked in, Mosley smelled alcohol on him; he appeared drunk.

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[7] Martinez had told her girls to go to their room and stay there. According to Vanessa, she and her sister heard a lot of arguing, so they hid under the bed in their room. The yelling changed to screaming, and Vanessa heard things hitting the wall and breaking. Vanessa heard her mother screaming for help, and that defendant was trying to kill her. At some point, Vanessa called 911.

Although Mosley had gone to bed around 10:00 p.m., she told defendant she had dinner on the stove and had baked a birthday cake for him. When she turned to show him the cake, he backhanded her, causing her to hit the living room floor. She became disoriented. Defendant walked around her, kicked her and spit on her. He grabbed her by the hair and took her into the kitchen. He demanded that she call a friend who was storing an antique car on the property. She started to comply, then turned to tell defendant she did not think she could reach the friend because it was almost 2:00 in the morning. As she turned, defendant stabbed her in the head with a pair of scissors. He also tried to stab her with some keys. He grabbed her by the hair, pushed her into the bedroom and onto the bed, and climbed on top of her. He said he was going to kill her, and she believed he meant it. He had her by the throat and had one hand up in a lethal karate move. She asked him why he was doing this, because she loved him. He rolled off of her and began to weep. Mosley told her daughter to run. Defendant told Mosley to go after her, so Mosley left and went next door. Her daughter called the police.

At approximately 2:30 a.m. on February 12, 2003, Fresno Police Officers Ruiz and Williams were dispatched to a disturbance call at an apartment complex near Marks and Clinton. They found the victim, Sandra Mosley, at another residence with her daughter. When Ruiz went to the residence at which the incident had occurred, he found blood in the kitchen and in a bedroom. On top of the blood on the bed was a two-inch piece of a blade. A pair of scissors was also found.

II

DEFENSE EVIDENCE

Defendant received martial arts training beginning when he was eight years old. He accumulated four black belts and competed internationally. By 1991, he was an undefeated kickboxing champion with three international belts. He suffered from concussions and blackouts as a result of head injuries incurred in martial arts competition.

Defendant testified that he was diagnosed with diabetes in 1999, as well as with diabetic psychosis. The condition caused him to experience manic-depressive mood swings and blackouts. He did not know what happened when he blacked out, although he had been told he would just fall down.

Prior to May 10, 2009, there were disagreements but no physical violence or yelling in his relationship with Sheila. Defendant, who had been sober for a while, started drinking again not long after his fight with Gary. He grew depressed and the incident weighed on his mind.

On May 10, 2009, Sheila was gone in the morning. When defendant's brother asked if defendant wanted to visit their mother, defendant agreed. Defendant and his brother arrived at their mother's house about 10:00 or 10:15 a.m. Defendant remained until about 4:30 or 5:00 p.m., as there was a barbecue. While there, defendant drank about a six-pack of beer and partook of a single marijuana joint that was passed around. He was "[s]lightly" feeling the effects of the alcohol and marijuana.

Sheila arrived about 3:30 or 4:00 p.m. She brought some food, said hello, and then left soon after. Everything was fine between them at that point, and defendant left his mother's house about half an hour to 45 minutes after Sheila. One of his brothers drove him home. Defendant opened the gate to the fence surrounding their property and then locked it back up, as was his and Sheila's habit after 5:00 p.m. due to the amount of traffic and crime in the area.

Defendant did not remember anything after that. He believed he went into diabetic psychosis, a form of blackout. He did not know when the blackouts would come, or what caused them. It sometimes depended on his sugar level and his moods. When he regained consciousness, two police officers had him on the ground and were yelling at him to quit resisting. The shock of the impact on the ground was what woke him up.

Defendant heard Martinez's and Mosley's testimony. He vaguely remembered those events occurring; they were "a while back." He remembered drinking alcohol before both of those incidents.

DISCUSSION

Defendant contends the trial court abused its discretion under Evidence Code sections 1109 and 352, and violated his due process right to a fair trial, by admitting evidence of prior acts of domestic violence.[8] The claim lacks merit.

Background

Defendant moved, in limine, for exclusion of evidence of prior acts of domestic violence, while the People moved for admission of said evidence. A section 402 hearing was held.

At the hearing, Connie Heredia testified she and defendant were involved for several years in a relationship that produced a daughter. In 1984, she was in the process of separating from defendant and was pregnant. She went in her sister's car to the house at which defendant was staying. Defendant came up to the passenger side window, pulled a knife with about a six-inch-long blade on Heredia, poked her in the face, and pulled her out of the car through the window. He then took her inside, beat her, and said he was going to kill her. When she told him she thought she was pregnant, he stopped hitting her. Heredia received stitches to her face from where defendant had put the knife. Defendant was prosecuted for this incident.

When the couple's daughter was about three months old, defendant came home from a neighbor's house. He was under the influence of PCP. He came into the room where Heredia was asleep with the baby, said Heredia had to play Russian roulette with him, and pulled out a .357 magnum. He loaded the gun and had Heredia pull the trigger

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8 Further statutory references are to the Evidence Code.

with the gun pointed at her head. When she handed the gun back so defendant could take his turn, he threw the gun in the closet.

In 1989, Heredia and defendant went to the fair. On the way home, defendant purchased crack cocaine. Once back at the couple's house, he smoked it and asked Heredia if she wanted some. She said no and went to the table. He walked into the dining room and said he needed to see all the bills, which he had been paying. She opened the cabinet and, when she turned around, he kicked her in the face and started beating her. He then locked her in the pantry and said he was going to take her life. When the police arrived and asked where Heredia was, defendant acted like he did not know what they were talking about. He had a knife on him, although he did not display it to Heredia on this occasion. The police ultimately located her; her eye was crushed and her nose was injured. She did not know if defendant was prosecuted for this incident.

Ruth Martinez testified consistently with her trial testimony. She also said defendant was angry she told the girls' father to go home; her children came into her bedroom while defendant was hitting her in the face and she told them to go hide in their bedrooms; and defendant tried to slit her throat and that was when she bent the knife blade back and cut her fingers. As a result of the incident, she suffered a lot of bruising, a black eye, a cut over one eyebrow, a cut on her throat, and broken teeth. While Martinez's daughter was in the kitchen using the phone to call 911, defendant dragged her by the hair. Martinez was able to get him off of the girl, and then she told the children to run. When she knew they were out of the house, she ran to her sister's apartment. Defendant was prosecuted and pled guilty as a result of this incident.

Martinez's daughter, Vanessa, testified that when she was on the phone to 911, she could hear her mother on the phone in her room, yelling that defendant was trying to kill her. Vanessa was able to tell the 911 operator their location, then defendant came out of her mother's room and found Vanessa hiding under the microwave stand in the kitchen. Defendant grabbed her by the hair at the back of her head, pulled her out, and hit her with

a closed fist. He asked why she caused it and said she and her sister had caused it. He also told her that after he got her mother, she was going to be next.

Mosley's testimony was also consistent with what she gave at trial. She also testified that when she went to show defendant his birthday cake, he struck her behind the ear. After she fell, he kicked and spit at her, then dragged her by the hair into the kitchen. He tried to get her to call the person who was storing his car on her property. When she refused because it was almost 2:00 a.m., defendant stabbed her in the head with a pair of scissors. The scissors went from the back of her skull to above her left ear. She had surgery to treat the injury. Defendant also tried to stab her in the belly with a key.

After stabbing her in the kitchen, defendant dragged Mosley into the bedroom by her hair and said now he was really going to hurt her. He threw her on the bed and climbed on top of her. He had her throat with his left hand and had his right hand prepared to deliver a lethal karate blow. He said he might as well kill her now. He also said he was going to kill her daughter slowly and horribly before he killed Mosley.

The prosecutor argued the evidence was admissible, under section 1101, subdivision (b), to show intent, knowledge, common plan, and lack of mistake, and that it was also admissible under section 1109. Defense counsel responded that the proffered evidence would be much more prejudicial than probative, and emphasized the remoteness of some of the incidents, the fact young children were involved, and the perceived dissimilarities between the past events and present matter. Defense counsel requested that if the court was inclined to permit the evidence, it simply allow the People to produce evidence of defendant's convictions rather than the witnesses' live testimony.

The trial court excluded Heredia's testimony, finding the dissimilarities, remoteness, and possible inflammatory effect of testimony concerning Russian roulette and the fact the witness picked defendant up from prison such that prejudice was not outweighed by probative value. With respect to Mosley's testimony, the court found the evidence probative of intent, common plan and scheme, and common instrumentality,

and any prejudice substantially outweighed by probative value. The court noted that although the incident did not involve a knife, it involved a sharp instrument, and that defendant used that instrument to threaten Mosley and cut her face. The court excluded, as inflammatory, the statement defendant would kill the daughter before killing Mosley. The court also excluded a photograph showing the injuries to Mosley's face.

With respect to Martinez's testimony, the court noted the incident was outside the 10-year period referenced in subdivision (e) of section 1109, but, because defendant did not live a blameless life in the interim, the remoteness in time did not diminish the probative value. The court also found greater similarity between the Martinez incident and the present case, and concluded its probative value outweighed the presumption of prejudice stated in section 1109, subdivision (e). The court further found it would serve the interests of justice for the Martinez event to be made known to the jury. However, the court found the evidence of defendant's conduct with Martinez's daughter to be inflammatory. The court ruled Vanessa could testify concerning the event itself, but not concerning defendant's conduct toward Vanessa. The court stated:

> "Again, the evidence relating to the daughters -- we don't have anything like that here. And we're talking about approximately 10-year-old girls. I can see that the jury would place way too much weight or might become inflamed because of that evidence, and I want to eliminate that as a possibility in this case without at the same time disallowing testimony that is very probative and not substantially prejudicial in light of the fact that … none of these two events the Court is going to allow appears to be of any greater violence necessarily than the instant offense. Neither of those appear to be worse conduct on the part of the defendant. It's not a situation where those events are any different from the instant event. [¶] … [¶]
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> "In addition, … if I understand correctly, both of these resulted in convictions of the defendant. And so that additional circumstance is that the defendant will not be required to testify against charges that were never previously brought."

The court denied the defense request that the incidents be proven merely by having the convictions introduced. It stated: "The value … of these incidences and the

similarity of the offenses, the fact of conviction, simply would go to the propensity, but I think … here there is more. While 1109 does admit propensity evidence, there is the issue of the defendant's intent. [¶] I'm not positive of what the defendant intends as a defense, … but I think there may be a defense with regard to his state of mind, his intoxication, whether he had the intent. And in light of that, the Court believes that the actual event, the testimony regarding the events and similarity of events is where the probative value outweighs the prejudicial impact." Finally, in addition to finding the evidence admissible, pursuant to section 1101, to establish intent, common scheme, and plan, the court rejected defendant's due process objection.

Defendant unsuccessfully reiterated his objection to the evidence when it was presented at trial.

Analysis

"Character evidence, sometimes described as evidence of a propensity or disposition to engage in a type of conduct, is generally inadmissible to prove a person's conduct on a specified occasion. (§ 1101, subd. (a) …; [citations].) This ban against admitting character evidence to prove conduct, however, does not prohibit admission of specific acts of misconduct to establish a material fact like intent, common design or plan, or identity (§ 1101, subd. (b)), and does not affect the admissibility of evidence regarding the credibility of a witness (*id*., subd. (c)). [Citation.] The Legislature has also created specific exceptions to the rule against admitting character evidence in cases involving sexual offenses (§ 1108, subd. (a)), and domestic violence, elder or dependent abuse, or child abuse (§ 1109, subd. (a)(1)-(3)). (See § 1101[, subd.] (a).)" (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1159.)[9]

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[9] As this court has explained, "[s]ections 1108 and 1109 are 'complementary portions of the same statutory scheme.' [Citation.] Section 1108, which allows admission of evidence of uncharged sexual offenses, and section 1109, allowing admission of evidence of uncharged domestic violence, are 'virtually identical,' and cases

Insofar as is applicable to this case, section 1109 provides:

> "(a)(1) Except as provided in subdivision (e) …, in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352. [¶] … [¶]
>
> "(e) Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice."

Defendant implicitly concedes his conduct with respect to Mosley and Martinez constituted domestic violence within the meaning of section 1109. Accordingly, leaving aside for the moment the effect of subdivision (e) of the statute on the Martinez evidence, the evidence was properly admitted unless exclusion was compelled by section 352.[10]

Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "[T]he trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its

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which have interpreted section 1108 have been relied upon to resolve similar issues involving section 1109. [Citations.]" (*People v. James* (2010) 191 Cal.App.4th 478, 482, fn. 2.)

10 "By removing the restrictions imposed by section 1101, sections 1108 and 1109 permit the jury in sex offense and domestic violence cases to consider evidence of prior offenses for any relevant purpose. [Citation.]" (*People v. James* (2000) 81 Cal.App.4th 1343, 1353, fn. 7; see also *People v. Britt* (2002) 104 Cal.App.4th 500, 505-506.) This being the case, if the challenged evidence was properly admitted under section 1109, we need not determine whether the trial court also properly found it admissible for more limited purposes under section 1101, subdivision (b). (See *People v. Jones* (2012) 54 Cal.4th 1, 50; *People v. Johnson* (2010) 185 Cal.App.4th 520, 542.)

exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

"In exercising [section 352] discretion as to a sexual offense [and, by parity of reasoning, an offense involving domestic violence], 'trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.' [Citation.]" (*People v. Loy* (2011) 52 Cal.4th 46, 61; see also *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119; *People v. Branch* (2001) 91 Cal.App.4th 274, 282; *People v. Harris* (1998) 60 Cal.App.4th 727, 737.)

We find no abuse of discretion here. The record affirmatively reflects the trial court carefully considered defendant's prior conduct, including its nature and similarity to the charged offenses, whether it resulted in a conviction, and its remoteness in time. The court weighed prejudice against probative value, and excluded evidence it believed would be inflammatory or was not sufficiently probative because it was too dissimilar or remote. (See *People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1105.) The court's decision in this regard fell well within "the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

"'"The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense."' [Citation.]" (*People v. Johnson, supra,* 185 Cal.App.4th at pp. 531-532.) The probative value here was great. In the Martinez,

Mosley, and charged incidents, defendant and the victim were in an established relationship at the time of the event. Each incident occurred on a special occasion after defendant had been drinking. In each case, defendant's attack on his victim was unprovoked, and escalated from use of his fists to use of a weapon. Each time, the weapon involved was a sharp instrument that defendant used to attack his victim's head or neck.

Defendant argues the prior incidents were more egregious and inflammatory than the charged offenses, because defendant's abuse was "far more brutal and repulsive" than in the current incident, the victims' injuries were "far worse" than those suffered by Sheila, and children were involved. Given the trial court's consideration of the pertinent factors and its careful striking of a balance between exclusion of evidence likely to inflame the jury while allowing evidence it found highly probative, however, we cannot fault its reasoning in concluding the uncharged incidents were not substantially different from the charged event. Moreover, defendant was convicted as a result of both prior incidents — a fact the jury learned — "which strongly supports their admission. His commission of those crimes had already been established and was thus certain, and [defendant] bore no new burden of defending against the charges. The jury would not be tempted to convict him of the charged crime to punish him for the earlier crimes. [Citation.] Additionally, the convictions meant there was little danger of confusing the issues or requiring an inefficient minitrial to determine defendant's guilt of the previous crimes. [Citation.]" (*People v. Loy, supra,* 52 Cal.4th at p. 61.)

At trial, the evidence was presented quickly and without irrelevant detail, and the Mosley incident was not unduly remote. (See *People v. Loy, supra,* 52 Cal.4th at p. 62; *People v. Wilson* (2008) 44 Cal.4th 758, 797-798.)[11] Significantly, the evidence "did not

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[11] That the prosecution presented almost as many witnesses with respect to the prior incidents as with respect to the current charges does not mean evidence of the uncharged offenses was prejudicial within the meaning of section 352, or that the trial court was

encourage the jury to prejudge defendant's case based upon extraneous or irrelevant considerations. [Citation.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 853.) Although children were involved in the uncharged incidents, Vanessa was no longer a child when she testified. (See *People v. Morton* (2008) 159 Cal.App.4th 239, 248.)

Defendant complains, however, that the trial court abused its discretion under section 1109, subdivision (e) in admitting evidence of the Martinez incident. In *People v. Johnson*, *supra*, 185 Cal.App.4th 520, the charged offenses were committed in late 2006 or early 2007. (*Id*. at pp. 524-526.) At trial, the court admitted incidents occurring in 1988 and 1992, well beyond the 10-year limit at which acts become presumptively inadmissible under that provision. (*Id.* at p. 538.) The appellate court upheld the trial court's ruling, stating:

> "[D]efendant argues the court erred in admitting the prior shooting incidents because subdivision (e) [of section 1109] requires an even 'higher level of scrutiny' than does section 352. The Attorney General takes the position that subdivision (e) adds little substantively to the analysis under section 352. We agree with defendant in principle that a more stringent standard of admissibility applies, but we side with the Attorney General regarding the adequacy of the inquiry in this case.
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> "Subdivision (e) establishes a presumption that conduct more than 10 years prior to the current offense is inadmissible. But, contrary to defendant's insinuations, it sets a threshold of presumed inadmissibility, not the outer limit of admissibility. It 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. We therefore review that determination for abuse of discretion. [Citations.]
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> "… We do agree with defendant … that some greater justification for admissibility is necessary under subdivision (e) than under section 352. Balancing under section 352 is required even under [section 1109,]

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compelled to exclude it as an undue consumption of time. The testimony concerning defendant's prior acts consumed considerably fewer pages of reporter's transcript than the testimony about the charged events. (See *People v. Escudero* (2010) 183 Cal.App.4th 302, 312; *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139.)

> subdivision (a), where the presumption runs in favor of admission. By including a specific 'interest of justice' requirement under subdivision (e), the Legislature must have intended to require a more rigorous standard of admissibility for remote priors.
>
> "That having been said, the 'interest of justice' requirement obviously was not intended to present an insurmountable obstacle to admission of more remote prior conduct. Nor do we think subdivision (e) necessitates an inquiry different in kind from that involved in a determination under section 352. The section 352 balancing approach gives consideration to both the state's interest in a fair prosecution and the individual's constitutional rights. We believe this same type of analysis is appropriate for the 'interest of justice' exception under subdivision (e).
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> "To the extent a higher degree of scrutiny is called for, it is the conclusion drawn from the balancing test, not the process itself, that must change under subdivision (e). Under [section 1109,] subdivision (a)(1) and section 352, evidence may be excluded only where its probative value is 'substantially outweighed' by its prejudicial effect. Though it reversed the presumption in subdivision (e), we believe the Legislature intended to allow admission of evidence whose probative value weighs more heavily on those same scales.
>
> "Thus, the 'interest of justice' exception is met where the trial court engages in a balancing of factors for and against admission under section 352 and concludes, as the trial court did here, that the evidence was 'more probative than prejudicial.' While we need not and do not hold this is the only means by which the 'interest of justice' finding may be justified, we certainly find the statutory prerequisite for admissibility was met in this case." (*People v. Johnson*, *supra*, at pp. 538-540.)

So too was the statutory prerequisite for admissibility met here. The trial court found that, because defendant did not live a blameless life between the time of the Martinez incident and the charged offenses, the remoteness of that event did not lessen its probative value. (See *People v. Branch*, *supra*, 91 Cal.App.4th at pp. 284-285.) The court also found a greater similarity between the Martinez incident and the charged offenses than with respect to the Mosley incident. It carefully considered the pertinent factors, and concluded the probative value of the Martinez incident outweighed the

presumption of prejudice contained in section 1109, subdivision (e), and that it would serve the interests of justice for that incident to be made known to the jury.

The trial court acted well within its discretion in admitting the challenged evidence. Since the evidence was admitted for a permissible purpose and its exclusion was not compelled by section 352, defendant's due process rights were not violated. (See, e.g., *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *People v. Falsetta* (1999) 21 Cal.4th 903, 912-913; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1096; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384.)

DISPOSITION

The judgment is affirmed.

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DETJEN, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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CORNELL, J.