

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

THE PEOPLE,

Plaintiff and Respondent,

v.

SETH GARCIA,

Defendant and Appellant.

H040040

(Monterey County

Super. Ct. No. SS121371)

I. INTRODUCTION

Defendant Seth Garcia was convicted after jury trial of inflicting corporal injury on a spouse (Pen. Code, § 273.5, subd. (a)). The trial court suspended imposition of sentence and placed defendant on probation for three years with various terms and conditions.

On appeal, defendant contends that the trial court erred when it admitted evidence that he committed domestic violence against his former wife more than 10 years earlier pursuant to Evidence Code section 1109.¹ Second, defendant contends that the court erred when it admitted rebuttal testimony about his current wife's report of prior domestic violence. Third, defendant contends that the court erred by failing to instruct the jury that it had to unanimously agree on which act and injury constituted the infliction

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

of corporal injury. Lastly, defendant argues that the cumulative effect of the errors denied him due process.

For reasons that we will explain, we will affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged by first amended information with inflicting corporal injury on his spouse (Pen. Code, § 273.5, subd. (a); count 1) and assault with force likely to produce great bodily injury (*id.*, § 245, subd. (a)(4); count 2). The offenses allegedly occurred on or about July 16, 2012.

Prior to trial, defendant filed motions to exclude evidence of prior uncharged domestic violence against his former wife as unduly prejudicial and likely to cause juror confusion under section 352. Defendant also argued that a May/June 2002 incident, in which he allegedly pulled his former wife's hair and hit her head on a vehicle, should be excluded because it occurred more than 10 years from the date of the current offenses. The prosecution filed a motion seeking to introduce evidence of prior domestic violence by defendant, contending that the evidence was probative, would cause little consumption of time, was no more inflammatory than the charged offenses, and involved minimal danger of undue prejudice. The trial court ruled that the May/June 2002 incident was admissible.

Prior to trial, the prosecution expressed an intent to introduce testimony from a nurse who had treated defendant's wife in connection with the charged offense. The nurse had been told by defendant's wife that defendant had been physically violent with her several times in the past. The trial court ultimately ruled that the nurse could not testify during the prosecution's case-in-chief because the nurse had not been properly disclosed to the defense pursuant to Penal Code section 1054. Later, after defendant's wife testified during the prosecution's case-in-chief and defendant testified in his own defense that he had never been violent with her in the past, the court allowed the nurse to testify in rebuttal about the wife's statement.

A. The Prosecution's Case

1. The Charged Offenses

On July 16, 2012, around 2:30 a.m., defendant's wife, Jane Doe 1, called her father to pick her up from the apartment where she lived with defendant. When her father arrived, Jane Doe 1 was outside the apartment complex. She was crying and scared. Her father testified that she smelled of alcohol, had a little difficulty walking, and was slurring her speech a little bit. At some point, Jane Doe 1 told her father that she and defendant had gotten into an argument, that "things got out of control," and that defendant had hit her.

The father called 911 at 2:37 a.m. while driving back to his residence with Jane Doe 1. Defendant had called 911 five minutes earlier. A recording of the father's call was played for the jury. The father reported to the 911 operator that Jane Doe 1 had told him that defendant "almost choked her out completely," that defendant grabbed a phone and threw it out a window so she could not call anyone, and that she scratched defendant on the face and that was how she got away. During the 911 call, Jane Doe 1 can be heard in the background telling her father that defendant had choked her, that he had grabbed her neck, and that she scratched his face so he would let her go. At his residence after the call, Jane Doe 1's father observed that Jane Doe 1 was "bruised up."

Salinas Police Officer David Lyn Crabill, Jr. subsequently arrived at the father's residence. Jane Doe 1 appeared upset and as though she had been crying. Jane Doe 1 reported to the officer that she had gotten into an argument with defendant about her cell phone. She wanted the phone so she could call her mother to pick her up. When Jane Doe 1 eventually tried to leave, defendant threw her against the wall. After she hit the wall, she fell to the ground and lost consciousness for approximately three seconds. Defendant then threw alternating fists, with one punch hitting Jane Doe 1's jaw. The officer observed that Jane Doe 1's eye was swollen and her cheek or jaw area was bruised. She also had bruises on her legs and significant bruising on the upper inner side

of both arms. Jane Doe 1 further reported that she was “choked out” by defendant, that she could not breathe for approximately five seconds, and that she believed defendant was going to kill her. The officer observed that Jane Doe 1 had bruising around her neck. Jane Doe 1 eventually escaped to a neighbor’s residence.

Jane Doe 1 indicated that the incident had occurred within an hour of the police arriving. She also stated that she had had a lot to drink, but that it was not as much as defendant. She did not appear to be under the influence of alcohol to Officer Crabill. In response to the officer’s question, Jane Doe 1 indicated that she wanted an emergency protective order, which the officer ultimately obtained for her.

Officer Crabill subsequently contacted defendant at the residence he shared with Jane Doe 1. Defendant had scratches on his face, neck, chest, and back. He also had dried blood under his nose, around his lips, in his mouth, and a little on his chest. Defendant was eventually arrested.

An emergency room physician who treated Jane Doe 1 that same morning testified that Jane Doe 1 was tearful, anxious, and upset. She did not appear to be under the influence of alcohol. Jane Doe 1 reported to the physician that her husband had stomped on her and struck her in the eye, jaw, neck, and stomach. She also reported that she was briefly knocked unconscious after being struck in the head. The medical records further indicated that Jane Doe 1 had reported to a triage nurse that her husband tried to choke her. The physician found Jane Doe 1’s injuries to be consistent with her description of what had happened to her. Jane Doe 1 had a black eye, pain in her hand, and bruising and/or tenderness on her jaw, neck abdomen, and lower extremities. The physician testified that Jane Doe 1 had “somewhat minor injuries” and not any “major injuries,” such as a fracture or internal bleeding. At trial, the physician did not recall any “visible significant trauma” to the throat or neck.

Jane Doe 1 testified at trial in May 2013 that she was almost 25 years old, and that defendant was 35 years old. They got married when she was 21 years old. They were

still married and living together at the time of trial. Jane Doe 1 was not working and was dependent on defendant for “[e]verything,” including food and rent. She testified that the relationship was “going well,” and that she would not lie for defendant.

Jane Doe 1 testified that prior to the altercation, she and defendant were “completely drunk.” Around 2:00 or 2:30 a.m., defendant took her cell phone and went to bed with it. Jane Doe 1 testified that she had been using her phone to download music. However, defendant did not know whether she was talking to someone, and this “might have been an issue” because they shared their phones with each other. After Jane Doe 1 unsuccessfully tried to get her phone back, she took defendant’s laptop and threatened to break it. Defendant got out of bed and tried to retrieve the laptop. They were in a narrow space between the bed and the wall.

Jane Doe 1 testified that she pushed defendant away and they eventually wrestled on the floor. She testified that she was angry, that she “provoked a lot” of the situation, and that defendant was defending himself. According to Jane Doe 1, she attacked defendant and tried to hit him. Defendant pushed her to the ground and tried to keep her from hitting and scratching him, and he yelled for her to stop. She kept getting up to go after defendant, and he kept pushing her off and throwing her on the floor.

Jane Doe 1 testified that her injuries were mainly caused by her hitting different objects in the room while they were wrestling and pushing each other. For example, she testified that her eye was bruised because defendant had pushed her down while they were wrestling. She hit the corner edge of the bed and blacked out for a few seconds. Jane Doe 1 also had three marks on one side of her neck and another mark on the other side. She testified that the marks were from defendant pinning her to the floor with his hands on her shoulders.

Jane Doe 1 testified that she caused scratches on defendant’s face, neck, chest, and back. She testified that at some point she pushed defendant into a nightstand and there

was a dent in the wall along with bloodstains. She believed the bloodstains were from defendant's back being scratched when she pushed him against the wall.

Jane Doe 1 testified that the incident ended after defendant said he wanted to end the relationship and her to leave the residence. Jane Doe 1 testified that she packed her bags and called her father from a neighbor's phone. She was hurt and offended that defendant had insisted that she leave the residence.

A protective order was put in place after the incident. The order was later modified and then terminated at Jane Doe 1's request. Jane Doe 1 and defendant separately went to AA after the incident and eventually the two participated in joint marital counseling.

Jane Doe 1 testified that defendant had never been physically violent with her. She testified that she had attacked defendant during the first month of their marriage in January 2010 when they were living with her parents. She got mad and tried to hit defendant. Defendant left the room and "scream[ed]" for her father. Her father held her back while defendant went to another room.

Deborah Jacroux testified as an expert on domestic violence and intimate partner battering. She did not know the facts of defendant's case. According to Jacroux, one of the warning signs of domestic violence is an overly jealous person who, for example, checks the other person's cell phone and isolates that person from other relationships. The other person's cell phone might also be taken away to control who the person talks to. Victims of domestic violence tend to minimize the violence and commonly blame themselves. It is also common for the victim to return to the abusive relationship.

2. The Uncharged Incident of Domestic Violence

Jane Doe 2 testified that she married defendant when she was 19 years old and that they have three children. They separated in 2002 or 2003 after being married for about eight years, and they subsequently divorced.

In May or June of 2002, Jane Doe 2 was at her mother's house with the children when defendant unexpectedly showed up. Defendant, who was drunk, pounded on the door. He was acting irritated, angry, and frustrated. At some point, a man had made a comment which made defendant jealous. According to Jane Doe 2, this "made it worse," meaning the "arguing, the yelling, the name calling." Defendant pulled Jane Doe 2 by the shirt to the front yard by a van. Defendant grabbed her hair from the back, "pulled out a big chunk," and caused her head to hit the van. Jane Doe 2's head hurt for a few days thereafter. Jane Doe 2 testified that she did not remember whether she called the police after the incident. She testified that it still upset her to think about the incident, and that she still had not received an apology for it.

B. The Defense Case

Defendant testified in his own defense. He and his wife, Jane Doe 1, were still together, had been to counseling, and had attended AA meetings.

Regarding the July 16, 2012 incident, defendant testified that he and Jane Doe 1 had been drinking and had exchanged words about a male friend that Jane Doe 1 did not want defendant to communicate with. Defendant went to bed but he later got up and saw Jane Doe 1 "on her phone." He took her phone and told her to go to bed because it was late. Defendant went to bed with her phone underneath him. After she unsuccessfully tried to retrieve the phone, Jane Doe 1 grabbed defendant's laptop. Defendant got the laptop back and went to bed.

Defendant testified that something then hit his face. He got out of bed and Jane Doe 1 started "taking swings" at him. He felt scratching and pounding. Defendant kept telling Jane Doe 1 to stop and kept pushing her away by the arms. Jane Doe 1 fell to the floor a few times but she continued getting up and going after defendant. At one point, after Jane Doe 1 had fallen, defendant straddled her hips, pushed her shoulders, and held her down on the floor. His hands were on her collarbone or shoulders and his thumbs were on the sides of her neck. As soon as defendant stopped holding her, she came at

him with her hands and ultimately scratched him. Defendant pushed her down by the shoulder three more times and told her to stop.

Defendant testified that he eventually got up. Jane Doe 1 followed him and hit him. She subsequently struck his face three or four times, causing his nose and mouth to bleed. Defendant pushed her away. At some point during the incident, defendant was pushed, his back hit the wall, and he fell into a lamp or nightstand. Blood from his back left a streak on the wall. During the incident, defendant repeatedly told Jane Doe 1 to leave. She eventually packed a couple of bags and left the residence without her keys or cell phone.

As a result of Jane Doe 1 hitting him, defendant sustained bloody cuts on his lip, a bloody nose, and scratches on his chest and back.

Defendant testified that he tried to defend himself without hurting Jane Doe 1, and that the injuries she suffered were from him trying to protect himself. He denied throwing Jane Doe 1's phone out the window, squeezing her throat, hitting her, or throwing her into a wall.

Defendant testified that after Jane Doe 1 left the residence, he called 911 "for some help." A recording of the call was played for the jury. In the call, defendant reported that he and his wife had been drinking, that they got in a physical fight, and that he was bleeding from the nose and lips. Defendant indicated that he did not need an ambulance. He also refused to give his address, stating in part, "I don't want to get kicked out of my apartment" and "I can't jeopardize that." When asked if his wife was still present, defendant indicated that she had left. He further stated, "I'm not trying to get anybody in trouble. I know how it works. Trust me, I know how it works." Defendant later stated that he would be "fine" and that he did not need help. He eventually ended the call.

Defendant testified that he called 911 for psychological help because he was emotionally hurt, having a breakdown, and wanted to talk to someone. Defendant

acknowledged that he hesitated giving his name and address to the 911 operator. Regarding his statement to the 911 operator, "Trust me, I know how it works," defendant testified that his former wife had accused him of domestic violence in the past, and that he knew that someone goes to jail when the police are involved in a domestic violence case. He denied calling 911 simply to be the first person to report the incident or to get his wife in trouble. Defendant acknowledged that he was "drunk" the night of the incident, and that he was still "intoxicated" when he called 911.

Defendant testified that he was asleep when the police arrived, and that he initially thought they were there to help him in response to his 911 call. Defendant "briefly" told the officers what had happened between Jane Doe 1 and him. He did not give a detailed accounting because he was "more afraid" of what could happen to Jane Doe 1 based on his "understanding of how domestic violence goes." He did not want to get her in trouble, did not want her to go to jail, and did not want to give much information regarding her attacking him. Defendant testified that he told the officer that he wanted to take the blame regardless of whether he was the aggressor. Defendant testified that he was very sad and emotional.

Regarding the prior January 2010 incident involving his wife, Jane Doe 1, defendant testified that she was angry and he tried to leave the room. Jane Doe 1 kept pulling him back because she did not want him to leave. Eventually he stormed out and "called out" for her father. While Jane Doe 1's father tried to get in between them, Jane Doe 1 tried to strike defendant.

Defendant testified that, other than this January 2010 incident and the July 16, 2012 incident, there was no other instance of violence between Jane Doe 1 and him. He also testified that he had never hit Jane Doe 1.

Regarding the testimony of Jane Doe 2, his former wife, about a May or June 2002 incident when the two were still married, defendant denied that the incident had occurred and denied pulling her hair or hitting her head against a van. He testified that he was not

questioned by the police, arrested, or criminally charged for the alleged incident. Jane Doe 2 previously alleged the incident in a request for a restraining order, which was granted. The restraining order, which Jane Doe 2 sought in approximately 2002 or 2003, had since been lifted or expired.

Defendant was convicted of felony vandalism in 2004.

Officer Crabill, who had interviewed Jane Doe 1 and defendant, testified that Jane Doe 1 did not report being punched in the stomach or stomped on by defendant. Officer Crabill also testified that defendant did not say anything about Jane Doe 1 hitting or scratching him until after he was arrested. Defendant began crying after he was put in the patrol car. At some point, defendant told the officer that he wanted to take the blame regardless of whether he was the aggressor. Defendant further told the officer that “an incident like this had happened before with his ex-wife,” and that he knew “how the system work[ed].”

C. The Prosecution’s Rebuttal Case

Alisha Wise was a registered nurse in the emergency department where Jane Doe 1 was treated after the July 16, 2012 incident. Jane Doe 1 reported that her injuries were sustained in an altercation with her husband. The nurse asked whether this was the first time that it had happened. Jane Doe 1 indicated that it had happened several times, but that this was the first time she had reported it.

D. Verdicts and Sentencing

The jury found defendant guilty of inflicting corporal injury on a spouse (Pen. Code, § 273.5, subd. (a)), but it found him not guilty of assault with force likely to produce great bodily injury (*id.*, § 245, subd. (a)(4)). The trial court suspended imposition of sentence and placed defendant on probation for three years with various terms and conditions, including 180 days in county jail with one actual day of credit. The court stated that defendant could serve the remainder of the jail term on home confinement.

III. DISCUSSION

A. Admission of Evidence of Uncharged Incident of Domestic Violence

1. Background

Prior to trial, the prosecution filed a motion seeking to introduce evidence of prior acts of domestic violence by defendant against his former wife, Jane Doe 2, pursuant to section 1109. Defendant filed motions to exclude the evidence as remote in time under section 1109, and unduly prejudicial and likely to cause juror confusion under section 352. Among other alleged incidents, defendant sought to exclude a May or June 2002 incident in which he allegedly pulled his former wife's hair and hit her head on a vehicle.

At a hearing on the motions, after conducting an analysis under sections 1109 and 352, the trial court ruled that the May/June 2002 incident was admissible. The court found that the incident was relevant, not too remote in time, would not involve an undue consumption of time, was not cumulative, would not involve the confusion of issues if "presented appropriately," and was not "necessarily prejudicial." The court also stated that admission of the incident, which occurred more than 10 years before the charged offenses, was in the interest of justice under section 1109. (See § 1109, subd. (e).) In this regard, the court stated that the May/June 2002 incident was probative, was "the type of evidence that the [L]egislature is directing the courts to have juries consider in domestic violence cases," and was "just outside the 10-year period" set forth in section 1109. Lastly, the court determined that an alleged July 2003 incident against Jane Doe 2 would also be admitted, while other alleged incidents were not admissible because they were too remote in time or not relevant, or the prosecution had not presented sufficient information about the incident.

During the prosecution's case-in-chief, before Jane Doe 2 testified, the trial court held an unreported conference in chambers with the parties. After Jane Doe 2 testified, and outside the presence of the jury, the court indicated that the in-chambers conference

had involved a discussion about defendant's alleged domestic violence against Jane Doe 2. The court explained that it had originally ruled during the pretrial hearing that the May 2002 incident and a July 2003 incident related to stalking would be admitted. When the court ruled, the court knew that the May 2002 incident was "outside the 10-year window" set forth in section 1109, but it had found that admission of the evidence was in the interest of justice pursuant to section 1109, subdivision (e) "for a number of reasons." The court explained that its "primary reason" for admitting the evidence was because case law indicated it would be a "disservice" to not include the evidence "where the defendant has a significant amount of domestic violence in his background."

The court explained that the prosecution had offered a "number of domestic violence incidents" involving defendant and Jane Doe 2, Specifically, the court referred to "an event from December of 2001 where the Defendant punched and hit and left teeth marks on Jane Doe [2]. That event . . . included that her . . . arm hurt and was a sexual assault. There was the May or June [2002] event . . . the victim, Jane Doe [2], just described where the Defendant pulled her hair and banged her head against the van. There were events from 2003 that involved a threat[] to kidnap and the defendant entering . . . Jane Doe[2]'s home and telling her that she was not protected, and she was not safe while she was sleeping in her home, and that was in violation of . . . a restraining order. So the Court had a number of different incidents before it, and it appeared to the Court that it would be inappropriate for this jury to not hear some of this evidence." The court explained that, after receiving additional legal authorities from the parties, the court ruled just prior to Jane Doe 2 testifying that only the May 2002 incident, and not a July 2003 incident, would be admitted into evidence.

2. The parties' contentions

Defendant contends that the trial court committed prejudicial error and also violated his federal right to due process by admitting evidence pursuant to sections 1109 and 352 that he committed domestic violence against his then-wife Jane Doe 2 in

May/June 2002. He argues that the evidence did not have substantial probative value and was so prejudicial that it rendered his trial fundamentally unfair. Regarding the lack of probative value, defendant contends that evidence the incident had occurred was “not entirely persuasive,” the prior incident was remote in time, and the prior incident was not similar to the charged offense. He further argues that the evidence was unduly prejudicial within the meaning of section 352 because the prior incident did not result in a conviction and the jury would thus have been “strongly motivated” to punish him in the current case. Defendant contends that, because the court abused its discretion in determining the probative value of the evidence outweighed any prejudicial effect, the court did not have a proper basis for finding that admission of the evidence was in the interest of justice under section 1109, subdivision (e).

The Attorney General contends that the trial court did not err in admitting the evidence of prior domestic violence. The Attorney General argues that the prior incident was similar to the charged offense, that the absence of a prior conviction for the incident did not warrant exclusion of the incident, and that the incident was not too remote in view of “interim incidents of domestic violence” by defendant against Jane Doe 2. The Attorney General also contends that, even if the evidence was erroneously admitted, the error was harmless.

3. Analysis

“ ‘Evidence of prior criminal acts is ordinarily inadmissible to show a defendant’s disposition to commit such acts. (Evid. Code, § 1101.) However, the Legislature has created exceptions to this rule in cases involving sexual offenses (Evid. Code, § 1108) and domestic violence (Evid. Code, § 1109).’ [Citation.] ‘[T]he California Legislature has determined the policy considerations favoring the exclusion of evidence of uncharged domestic violence offenses are outweighed in criminal domestic violence cases by the policy considerations favoring the admission of such evidence.’ [Citation.] Section 1109, in effect, ‘permits the admission of defendant’s other acts of domestic

violence for the purpose of showing a propensity to commit such crimes. [Citation.]’ [Citations.] ‘[I]t is apparent that the Legislature considered the difficulties of proof unique to the prosecution of these crimes when compared with other crimes where propensity evidence may be probative but has been historically prohibited.’ [Citation.]’ (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1232-1233 (*Brown*).)

Section 1109, subdivision (a)(1) states in pertinent part: “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.” Thus, “[e]ven if the evidence is admissible under section 1109, the trial court must still determine, pursuant to section 352, whether the probative value of the evidence is substantially outweighed by the probability the evidence will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. [Citation.] The court enjoys broad discretion in making this determination, and the court’s exercise of discretion will not be disturbed on appeal except upon a showing that it was exercised in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]” (*Brown, supra*, 192 Cal.App.4th at p. 1233, fn. omitted.)

Section 1109 also contains a provision addressing the remoteness of an uncharged prior act. Subdivision (e) of section 1109 states: “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.” “Thus, while evidence of past domestic violence is presumptively admissible under 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 (*Johnson*).) Nevertheless, subdivision (e) “sets a threshold of presumed inadmissibility, not the outer limit of admissibility. It clearly anticipates that some remote prior incidents

will be deemed admissible” (*Johnson, supra*, at p. 539.) The “interest of justice” exception under subdivision (e) may be “met where the trial court engages in a balancing of factors for and against admission under section 352 and concludes . . . that the evidence was ‘more probative than prejudicial.’ ” (*Johnson, supra*, at pp. 539-540.) This determination is reviewed for an abuse of discretion. (*Id.* at p. 539.)

The trial court in this case properly found that evidence of defendant’s prior conduct in May/June 2002 against Jane Doe 2, his then-wife, was probative of his propensity to engage in domestic violence. (§ 352.) “ ‘ “The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense.” ’ [Citation.]” (*Johnson, supra*, 185 Cal.App.4th at pp. 531-532.) In this case, the prior incident and the charged offenses involved defendant’s wives. In each instance defendant was intoxicated, engaged in an argument, and violently attacked his wife, causing at least head injuries. In view of the substantial similarities between the uncharged incident against his then-wife and the charged offenses involving his current wife, the prior incident was highly probative of defendant’s propensity to engage in domestic violence. The prior incident was thus relevant to the issue of whether defendant committed the charged offenses against his current wife, Jane Doe 1.

The prior May/June 2002 incident was also not too remote in time from the charged offenses of July 2012. “Remote prior conduct is, at least theoretically, less probative of propensity than more recent misconduct. [Citation.] This is especially true if the defendant has led a substantially blameless life in the interim” (*Johnson, supra*, 185 Cal.App.4th at p. 534.) In this case, the trial court referred to evidence offered by the prosecution at the pretrial hearing that defendant had continued to engage in misconduct toward Jane Doe 2 in 2003, including a stalking conviction and violation of a restraining order. Defendant nevertheless argues on appeal that he led a “substantially blameless life” because he had no criminal convictions since August 2004. In support of this assertion, defendant cites a document from the record that reflects his 2004

conviction for felony vandalism in which the victim was Jane Doe 2. It thus appears that defendant continued to engage in misconduct towards his former wife into at least 2004.

Moreover, “[i]n assessing remote priors, the cases have examined the details of the past misconduct, comparing them to the details of the currently charged offense, to determine whether the similarities in the two incidents ‘balance out the remoteness’ of the prior offense. [Citation.]” (*Johnson, supra*, 185 Cal.App.4th at pp. 535-536.) As we have explained, there were substantial similarities between the prior incident involving Jane Doe 2 in 2002 and the charged offenses involving Jane Doe 1 in 2012, where in each instance defendant was intoxicated, engaged in an argument, and violently attacked his wife, causing head injuries.

Regarding undue prejudice (§ 352), the prejudicial effect of a prior offense is increased if it did not result in a criminal conviction. (*People v. Tran* (2011) 51 Cal.4th 1040, 1047 (*Tran*) [discussing *People v. Ewoldt* (1994) 7 Cal.4th 380 & § 1101].) “This is because the jury might be inclined to punish the defendant for the uncharged acts regardless of whether it considers the defendant guilty of the charged offense and because the absence of a conviction increases the likelihood of confusing the issues, in that the jury will have to determine whether the uncharged acts occurred. [Citation.] The potential for prejudice is decreased, however, when testimony describing the defendant’s uncharged acts is no stronger or more inflammatory than the testimony concerning the charged offense. [Citation.]” (*Tran, supra*, at p. 1047.)

In this case, there was no evidence that defendant was convicted for the May/June 2002 incident, although defendant’s former wife did disclose the incident when she successfully sought a restraining order. The potential for prejudice due to the lack of a conviction was nevertheless decreased because the testimony concerning defendant’s uncharged prior conduct was no stronger or more inflammatory than the evidence concerning the charged offenses. Regarding the prior incident, the prosecution presented only brief testimony from defendant’s former wife. She testified that defendant pulled

her hair and caused her head to hit a vehicle, and that she had head pain for a few days. Regarding the charged offenses, the prosecution presented testimony from several witnesses, including defendant's current wife, her father, and the responding police officer. The charged offenses involved choking, throwing against a wall, and punching, and resulted in defendant's wife suffering a brief loss of consciousness and numerous bruises, including a black eye. In view of this record, where the testimony of defendant's uncharged prior conduct was no stronger and no more inflammatory than the evidence concerning the charged offenses, the potential for prejudice was decreased.

For the same reasons, although the prior incident involving Jane Doe 2 occurred approximately 10 years two months before the charged offenses involving Jane Doe 1, the prior incident was not rendered inadmissible under section 1109, subdivision (e). In view of the substantial similarities between the prior incident and the charged offenses, including defendant's intoxication, his physical violence during an argument, and the head injuries suffered by his wives, the trial court reasonably determined that evidence of the prior incident was more probative than prejudicial, and that admission of the evidence was therefore "in the interest of justice" (§ 1109, subd. (e)). (See *Johnson, supra*, 185 Cal.App.4th at pp. 524-526, 537-540 [no error in admitting prior incidents from 1988 and 1992, where similarities to charged offense more than 14 years later made prior incidents more probative than prejudicial].)

Accordingly, we conclude that the trial court did not abuse its discretion under section 352 in admitting evidence of defendant's May/June 2002 conduct as propensity evidence under section 1109. Defendant has not shown a violation of his right to due process. (See *People v. Contreras* (2013) 58 Cal.4th 123, 139, fn. 17.)

B. Rebuttal Evidence

1. Background

Prior to trial, defendant filed a motion seeking to exclude the testimony of any prosecution witness whose identity, statements, and/or prior criminal history had not been

previously disclosed to defense counsel in accordance with Penal Code sections 1054.1 and 1054.7. Defendant did not specifically mention nurse Wise, who had treated his wife Jane Doe 1 after the July 16, 2012 incident. The court granted the motion “pursuant to the confines of [Penal Code section] 1054.”

Later that day, the prosecution informed the trial court that nurse Wise, who was previously unavailable, had become available. The prosecution sought to introduce testimony from the nurse that Jane Doe 1 had disclosed that defendant abused her several times before, but that July 2012 was the first time she had reported it. Defense counsel responded that he “had notice of [Jane Doe 1’s] statement to the hospital” that she had been abused in the past. Counsel also indicated that he did not have an objection to the prosecution impeaching Jane Doe 1 if she denied there was prior abuse. Defense counsel reiterated, “I do have notice of, at least, this generalized prior domestic violence.” He objected, however, to the prosecution “go[ing] into detail” about the prior incident of domestic violence against Jane Doe 1. The court indicated that the prosecution could present further information about the issue at a later point, that prospective jurors were waiting, and that the issue was not something that needed to be resolved immediately.

The next day, defense counsel informed the trial court that he had spoken with Jane Doe 1, who denied making the statement to the nurse about being abused by defendant in the past. The prosecution indicated that if Jane Doe 1 denied the statement when testifying, the prosecution would seek to introduce testimony from the nurse. The court stated that it had ruled the previous day that the nurse would not be allowed to testify during the prosecution’s case-in-chief because the nurse “was not disclosed, pursuant to [Penal Code section] 1054.” The court stated that it “presume[d]” this was the basis for the objection from the defense, and defense counsel responded affirmatively. The court indicated that the nurse might be permitted to testify in rebuttal to defendant’s testimony, depending on the evidence presented at trial.

During the prosecution's case-in-chief, Jane Doe 1 testified that defendant had never been physically violent with her before, and that she had never told anyone that he had been physically violent with her before. During the defense case, defendant similarly testified that he had never previously been violent towards Jane Doe 1, and that he had never hit her.

Later, outside the presence of the jury, the prosecution indicated that it wanted nurse Wise to testify in rebuttal that Jane Doe 1 had reported being a victim of domestic violence by her husband and this was the first time she had reported it to the police. Defense counsel objected to rebuttal testimony from nurse Wise, arguing that the nurse's testimony should have been introduced during the prosecution's case-in-chief when Jane Doe 1 denied that defendant had ever abused her. Defense counsel acknowledged that he had successfully sought an order preventing nurse Wise from testifying during the prosecution's case-in-chief, based on the prosecution's failure to list the nurse as a trial witness, even though the defense knew about the witness from medical records. Defense counsel argued that the prosecution had failed to comply with the discovery rules and therefore nurse Wise should not be allowed to testify at all in the trial.

The trial court ruled that the nurse would be allowed to testify in rebuttal. The court stated that it did not allow the nurse to testify during the prosecution's case-in-chief due to a "technical reason," specifically Penal Code section 1054. The court further stated: "If there had not been further evidence during the Defense case regarding whether or not there had been a previous incident of violence between the Defendant and [Jane Doe 1], this witness would not be a . . . relevant witness in rebuttal. But since the Defendant did testify that there was not prior violence between the Defendant and [Jane Doe 1], . . . the Court finds that the evidence is now relevant and admissible"

In rebuttal, nurse Wise testified that Jane Doe 1 had reported to another nurse that she had sustained her injuries in a domestic altercation with her husband. Nurse Wise was then asked at trial if Jane Doe 1 stated whether "something like this had ever

happened before.” Wise responded, “Yes, I did ask her if this was the first time it had happened, and she told me no, this is just the first time she had reported it. It had happened several times before.”

2. The parties’ contentions

Defendant contends that the trial court abused its discretion by allowing nurse Wise to testify in rebuttal. Defendant argues that the nurse’s testimony should have been introduced during the prosecution’s case-in-chief when Jane Doe 1 denied any prior violence by defendant. According to defendant, “[t]he fact that the prosecutor was prevented from doing so because of a discovery violation does not make the testimony proper rebuttal evidence.” Defendant contends that the nurse’s testimony was unduly magnified by its dramatic introduction late in the trial, and that the jury could have been confused by the evidence coming in so late. Defendant argues that the error was prejudicial.

The Attorney General contends that the nurse’s testimony was proper rebuttal evidence, and that any error in admitting the evidence was harmless.

3. Analysis

“The decision to admit rebuttal evidence rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of demonstrated abuse of that discretion. [Citations.] . . . ‘[P]roper rebuttal evidence does not include a material part of the case in the prosecution’s possession that tends to establish the defendant’s commission of the crime. It is restricted to evidence made necessary by the defendant’s case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt.’ Restrictions are imposed on rebuttal evidence (1) to ensure the presentation of evidence is orderly and avoids confusion of the jury; (2) to prevent the prosecution from unduly emphasizing the importance of certain evidence by introducing it at the end of the trial; and (3) to avoid ‘unfair surprise’ to the defendant

from confrontation with crucial evidence late in the trial. [Citations.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1199.)

In this case, assuming without deciding that it was error for the trial court to allow the rebuttal testimony by nurse Wise, we do not believe it is reasonably probable that the jury would have reached a verdict more favorable to defendant without the testimony of Wise. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); *People v. Daniels* (1991) 52 Cal.3d 815, 860; *People v. Crew* (2003) 31 Cal.4th 822, 854.) The main issue in this case was whether Jane Doe 1 was the aggressor and defendant acted in self-defense. The evidence included Jane Doe 1’s reports about the incident to her father, to the police, and to hospital personnel, as well as those individuals’ observations of Jane Doe 1 and/or defendant shortly after the incident. The jury also heard audio recordings of 911 calls made by defendant and by Jane Doe 1’s father with Jane Doe 1 talking in the background. In addition, the jury was able to evaluate the credibility of Jane Doe 1 and defendant at trial, including regarding their account of what happened during the incident. In contrast, the few sentences of nurse Wise’s testimony at issue – that Jane Doe 1 had reported that something similar to the incident had happened several times before – was extremely brief, very general in nature, and not corroborated by any other evidence. In view of the varied sources of evidence regarding the July 16, 2012 incident between defendant and Jane Doe 1, and the compelling case presented by that evidence that defendant had inflicted physical injuries on Jane Doe 1 and was not acting in self-defense, we do not believe the jury relied on Wise’s extremely limited testimony about Jane Doe 1’s uncorroborated report of prior domestic violence to such an extent that, without Wise’s testimony, the jury would have reached a more favorable verdict to defendant.

C. Unanimity Instruction

Defendant contends that the trial court should have given a unanimity instruction regarding the count for inflicting corporal injury on Jane Doe 1. (See CALCRIM

No. 3500.²) He argues that his conviction could have been based on any number of acts, and that there was evidence Jane Doe 1 suffered multiple injuries, including a black eye, marks on her neck, and bruises on her jaw, arms, and legs. Defendant contends that the prosecutor failed to rely on only one injury as the basis for the count, and that therefore the court had a sua sponte duty to give a unanimity instruction. He argues that the error violated his federal right to due process and was prejudicial.

The Attorney General contends that no unanimity instruction was required because defendant's acts with respect to Jane Doe 1 were part of a continuous course of conduct. The Attorney General also argues that, even assuming error occurred, it was harmless.

“In a criminal case, a jury verdict must be unanimous. [Citations.] . . . Additionally, the jury must agree unanimously the defendant is guilty of a specific crime. [Citation.]” (*People v. Russo* (2001) 25 Cal.4th 1124, 1132, italics omitted (*Russo*)). “As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty. [Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 679 (*Jennings*)). “This requirement of unanimity as to the criminal act ‘is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.’ [Citation.]” (*Russo, supra*, at p. 1132.)

² CALCRIM No. 3500 provides: “The defendant is charged with _____ <insert description of alleged offense> [in Count __] [sometime during the period of __ to __]. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed.”

“[N]o unanimity instruction is required if the case falls within the continuous-course-of-conduct exception.” (*Jennings, supra*, 50 Cal.4th at p. 679.) This exception may arise “ ‘when ... the statute contemplates a continuous course of conduct of a series of acts over a period of time’ [citation].” (*Ibid.*) However, an appellate court has observed that “the case law does not clearly or consistently define the unit of prosecution under Penal Code section 273.5” for inflicting corporal injury on a spouse or cohabitant. (*People v. Lueth* (2012) 206 Cal.App.4th 189, 192 (*Lueth*)). For example, one appellate court has concluded that Penal Code section 273.5 is an offense of continuous conduct for purposes of a unanimity instruction. (*People v. Thompson* (1984) 160 Cal.App.3d 220, 224-226.) At the same time, other appellate courts have concluded that a defendant may be charged or convicted of multiple counts under Penal Code section 273.5, where the defendant inflicted multiple batteries against a victim over time (*People v. Healy* (1993) 14 Cal.App.4th 1137, 1139-1140), or “where multiple applications of physical force result in separate injuries” to the victim during a single incident (*People v. Johnson* (2007) 150 Cal.App.4th 1467, 1477).

In this case, we need not decide whether Penal Code section 273.5 is a crime of continuous conduct for purposes of a unanimity instruction, because the continuous-course-of-conduct exception may also arise “ ‘when the acts alleged are so closely connected as to form part of one transaction’ ” and “ ‘the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them.’ ” (*People v. Williams* (2013) 56 Cal.4th 630, 682.) “ ‘This exception “ ‘is meant to apply not to all crimes occurring during a single transaction but only to those “where the acts testified to are so closely related in time and place that the jurors reasonably must either accept or reject the victim’s testimony in toto.” [Citation.]’ [Citation.]” [Citation.]’ [Citation.]” (*Lueth, supra*, 206 Cal.App.4th at p. 196.)

In this case, defendant’s acts against Jane Doe 1 during the incident in their apartment were closely connected in time and location so as to form part of one

transaction. The prosecution in argument to the jury did not distinguish between particular injuries suffered by Jane Doe 1 to support the count for inflicting corporal injury, and defendant offered the same defense, that is, self-defense, with respect to his acts during the incident. Specifically, defendant argued to the jury that Jane Doe 1 attacked him, and that he used reasonable and necessary force in trying to defend himself. Defendant essentially blamed Jane Doe 1 for all her injuries without making a distinction as to particular acts that he engaged in. The jury thus had to determine whether defendant acted in self-defense during the incident and accept or reject that scenario in its entirety.

Defendant argues that some jurors could have believed a portion of Jane Doe 1's trial testimony that she was the aggressor and that she sustained bruises on her arms and legs as a result, but that they could have decided that Jane Doe 1 would not have suffered a black eye in response to self-defense. At the same time, according to defendant, a "different configuration of jurors could have found" Jane Doe 1's bruised jaw "particularly problematic" to defendant's claim of self-defense.

We are not persuaded by defendant's argument or his citations to Jane Doe 1's testimony. Defendant does not explain why some jurors might have found Jane Doe 1's black eye but not her bruised jaw, or her bruised jaw but not her black eye, as indicative that he did not engage in self-defense. Defendant fails to establish that there was a reasonable basis for the jury to distinguish between these injuries. We therefore conclude that the continuous-course-of-conduct exception applies and that the court was not required to give a unanimity instruction.

For similar reasons we determine that, even assuming the trial court should have given a unanimity instruction, any error was harmless under the circumstances, whether assessed under the standard for constitutional violations (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*)) or the standard for state law error (*Watson, supra*, 46 Cal.2d at p. 836). (See *People v. Hernandez* (2013) 217 Cal.App.4th 559, 576 (*Hernandez*))

[noting split in authority].) “Under *Chapman*, ‘[w]here the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that [the] defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless.’ [Citation.] For example, where the defendant offered the same defense to all criminal acts and ‘the jury’s verdict implies that it did not believe the only defense offered,’ failure to give a unanimity instruction is harmless error. [Citation.] But if the defendant offered separate defenses to each criminal act, reversal is required. [Citations.] The error is also harmless ‘[w]here the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence’ [Citation.]” (*Hernandez, supra*, at p. 577.)

In this case, defendant offered the same defense, that is, self-defense, with respect to his acts and Jane Doe 1’s injuries. Further, the jury obviously did not believe the trial testimony of either Jane Doe 1 or defendant that she was the aggressor and that he acted in self-defense. On appeal, defendant does not offer a persuasive reason for us to conclude that the jury had a rational basis, by way of argument or evidence during trial, to distinguish between the various acts committed by him against Jane Doe 1 and the injuries she suffered. Accordingly, we conclude that it is not reasonably probable that a different result would have been reached if the jury had been given a unanimity instruction (*Watson, supra*, 46 Cal.2d at p. 836), and that any error in the trial court’s failure to give such an instruction was harmless beyond a reasonable doubt (*Chapman, supra*, 386 U.S. at p. 24).

D. Cumulative Error

Defendant contends that the cumulative effect of the errors he has raised on appeal violated his federal right to due process. We are not persuaded by defendant’s claim. In *People v. Hill* (1998) 17 Cal.4th 800, at pages 846-847, the California Supreme Court

reversed a conviction after finding several instances of prosecutorial misconduct and several other errors in the trial. In the instant case, we have determined that, assuming it was error to admit nurse Wise's rebuttal testimony, the admission of the testimony was not prejudicial. We have also determined that a unanimity instruction to the jury was not required, and that even if the instruction should have been given, the failure to do so was not prejudicial. In sum, if there were any errors at trial, they were few in number and harmless. Whether considered individually or for their cumulative effect, any errors could not have affected the process or resulted in detriment to defendant. (See *People v. Sanders* (1995) 11 Cal.4th 475, 565.)

IV. DISPOSITION

The judgment (order of probation) is affirmed.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

MÁRQUEZ, J.