Filed 4/30/15 P. v. Gallegos CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JUAN GALLEGOS, Defendant and Appellant.	H040357 (Santa Cruz County Super. Ct. No. F24421) ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on April 9, 2015, be modified in the following particulars:

On page 1, the heading “Santa Clara County” is deleted and replaced with “Santa Cruz County.”

There is no change in the judgment.

_____
BAMATTRE-MANOUKIAN, ACTING P.J.

_____
MIHARA, J.

_____

MÁRQUEZ, J.

Filed 4/9/15 (unmodified version)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JUAN GALLEGOS, Defendant and Appellant.	H040357 (Santa Clara County Super. Ct. No. F24421)

I. INTRODUCTION

Defendant Juan Gallegos[1] was convicted after jury trial of forcible sexual penetration by a foreign object (Pen. Code, § 289, subd. (a)(1)),[2] inflicting corporal injury on the mother of his child (§ 273.5, subd. (a)), and petty theft (§ 484, subd. (a)). The trial court sentenced defendant to six years in prison.

On appeal, defendant contends that the trial court abused its discretion and violated his rights to due process and equal protection when the court admitted evidence, pursuant to Evidence Code section 1109, that defendant committed prior acts of domestic violence more than 10 years before the charged offenses.

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

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[1] At trial, defendant testified that his full name is Juan Gallegos Nieto.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

II. FACTUAL AND PROCEDURAL BACKGROUND

In May 2013, defendant was charged by information with forcible sexual penetration by a foreign object (§ 289, subd. (a)(1); count 1), second degree robbery (§ 211; count 2), and inflicting corporal injury on the mother of his child (§ 273.5, subd. (a); count 3). The offenses allegedly occurred in March 2013.

Prior to trial, the prosecution filed a motion seeking to introduce evidence of three prior incidents of domestic violence involving defendant and a different victim than the victim in the charged offenses. Two of the incidents occurred in September and October 2000, and a third incident occurred in January 2002. Defendant filed a pretrial motion seeking to exclude evidence of the three incidents pursuant to Evidence Code sections 1109 and 352, and on the grounds that admission of the evidence would violate his constitutional rights to due process and a fair trial. After a hearing on the motions, the trial court ruled that the two incidents from 2000 were admissible, but not the incident from 2002.

During trial, after all the prosecution's witnesses had testified regarding the charged offenses, the court held an Evidence Code section 402 hearing, at which the victim from the prior three domestic violence incidents testified. After hearing the prior victim's testimony, the court ruled that all three incidents from 2000 and 2002 were admissible.

A. *The Prosecution's Case*

1. Background

M.G., the victim of the charged offenses, was 31 years old at the time of trial in August 2013. She worked in the fields picking berries and spoke very little English.

M.G. had met defendant eight years earlier. They lived together for about seven years but never married. Defendant was the father of M.G.'s two-year-old child. M.G. also had an eight-year-old child. Defendant was jealous during the relationship and would check M.G.'s phone to determine if someone was calling her. He also accused

M.G. of cheating on him. M.G. thought defendant could take her children away from her because she was "not from here, and he's here legally."

M.G. ended the relationship with defendant in August or October of 2012, although they still saw each other every once in a while thereafter. Defendant did not want the relationship to end. He tried to contact M.G. by phone and in person at her house or her sister's house. Defendant still had a key to M.G.'s residence and would come over whenever he wanted, including to see their child. M.G. and defendant would argue about their child or about defendant wanting to stay. Defendant still had belongings at M.G.'s residence after October 2012 although M.G. had asked him to take the items with him. The last time M.G. was intimate with defendant was about January or February 2013.

The incident between M.G. and defendant that gave rise to the charged offenses occurred in the early morning on March 16, 2013. After the incident, M.G. reported what had happened to her sister. M.G. then called 911 and was subsequently interviewed by the police and a nurse. She also testified about the incident at defendant's preliminary hearing. At trial in August 2013, M.G.'s testimony about the incident was inconsistent with these prior reports. M.G. testified at trial that she loved defendant, wanted to resume a relationship with him, and wanted to be a family again with him and their child.

2. M.G.'s Trial Testimony About the March 16, 2013 Incident

M.G. testified that on Friday, March 15, 2013, she was not in a relationship with defendant. She testified that she went to a dance around 9:00 or 10:00 p.m. that evening with a friend from work, Juan Vasquez, who had picked her up at the Watsonville residence of her sister. M.G.'s sister was going to babysit M.G.'s children. Outside the dance, M.G. saw defendant's truck. M.G. thought defendant "was going to get upset" because she was going to a dance with his friend and that defendant "was going to do something" to her, so she went to another dance instead. M.G. had four beers at the second dance and felt "[a]ll right."

M.G. left the second dance about 1:00 or 1:30 a.m. Vasquez dropped her off outside her sister's house, which was about an hour away from the dance.

At trial, M.G. testified that after Vasquez drove off, defendant approached her from the direction of her sister's house. M.G. was not expecting him and was frightened. Defendant was angry and yelling at her. He called her a "whore" for having gone to the dance and accused her of having sex with Vasquez. M.G. told him "it wasn't true."

Eventually the two started to struggle. M.G. testified at trial that she tried to hit defendant, and that he grabbed her shoulder and wrists to try to protect himself from being hit by her. M.G. testified that as she tried to throw her cell phone at defendant, he grabbed it and put it in his pocket. M.G. unsuccessfully tried to get her phone back while defendant continued to call her a "whore." Defendant also grabbed her identification. She later found her identification on the street.

At trial, M.G. testified that during the struggle, both of them fell on the ground. She stated that her high-heeled shoes got stuck and she fell backwards. She denied that defendant pushed her to the ground.

M.G. further testified at trial that defendant continued calling her a "whore" while they were fighting on the ground. She "got angry," removed her panties from under her skirt, and threw it at defendant. She was afraid because she had gone to the dance and she thought defendant was going take their son away. Defendant put the panties in his pocket.

According to M.G.'s testimony at trial, defendant continued accusing her of having sex and calling her a "whore." Defendant wanted to smell between her legs. M.G. testified that she opened her legs for defendant but that she hit him because he continued saying "whore" and other things to her. M.G. also testified at trial that defendant wanted to "check" her. She testified that she "invite[d] him to do it," that she opened her legs for him, and that he put his finger in her vagina twice. After the first time defendant said "it smelled like sex," and after the second time he said it "smelled

like a condom." M.G. testified that she wanted defendant to put his fingers inside her to "check and see that [she] hadn't had anything to do with his friend." She testified that it did not hurt when he put his fingers inside her.

M.G. testified that they continued arguing about her phone, which she wanted back from defendant. Defendant left in his vehicle after M.G. told him she was going to call the police. M.G. was upset that defendant left with her phone, and she was afraid he was going to try to take away their child because she had gone out that night, drank, and gotten home at 2:30 in the morning.

3. M.G.'s Report to Her Sister

M.G. went inside her sister's house after the incident. M.G. told her sister that she had fought with defendant, and that defendant had put his fingers inside her and taken her phone. M.G. initially testified at trial that she had told her sister that she "allowed" defendant to "check" her vagina. She later testified at trial that she had told her sister that defendant "assaulted" her and inserted his fingers in her against her will. She subsequently testified that these latter statements to her sister were not true.

M.G.'s sister, who was 33 years old at the time of trial, testified that when M.G. returned to the house, she was crying and appeared nervous and frightened. M.G. stated that she had struggled with defendant, that defendant took her cell phone and underwear, and that he put his fingers inside her vagina. M.G. never said that she voluntarily gave her underwear to defendant, or that she asked him to check her vagina. The sister told M.G. to call the police.

M.G.'s sister acknowledged that a month before the incident, defendant called 911 on her (the sister). As a result, she was escorted out of M.G.'s apartment on Jefferson Street, where defendant also used to live with M.G. Defendant fought with M.G. during this incident and said that he was angry that M.G. and her sister were drinking. Defendant was also told to leave the residence by the police.

4. M.G.'s Calls to Defendant

After talking to her sister, M.G. called defendant four or five times to try to get her phone back. When defendant finally answered, M.G. told him to bring the phone back or she was going to call the police. Defendant told her that he would give it to her the next day.

5. M.G.'s 911 Call

After calling defendant, M.G. called 911. In the call, M.G. reported that her child's father had taken her phone and assaulted her. She stated that he had pushed her onto the ground, taken her panties off and kept the panties, and put his fingers in her. M.G. also reported that she had stayed away from him for quite a while, but "he doesn't leave [her] alone and he bothers [her]."

At trial, M.G. testified that she did not tell the truth to the 911 operator because she was upset that defendant called her a "whore" and took her phone, and she was scared that defendant would take her children away from her. She never told the 911 dispatcher that she threw her underwear at defendant or that she allowed defendant to check her vagina.

6. M.G.'s Interview by the Police

Watsonville Police Officer Juan Sanchez was dispatched to M.G.'s sister's residence on March 16, 2013, about 3:25 a.m. M.G. had "red, watery eyes," which the officer believed was from crying, and a "mild odor of alcohol on her person." Officer Sanchez characterized M.G.'s level of intoxication as "mild" and concluded that she was "definitely not drunk." M.G. was quiet and she did not appear to be angry.

M.G. told Officer Sanchez that after she had exited a friend's car, defendant came running and unsuccessfully tried to hit the person driving the car. She also reported that defendant grabbed and held her wrists, and took her phone and identification card. They struggled and defendant took her to a grassy area near the driveway by force.

M.G. indicated to Officer Sanchez that defendant threw or knocked her to the ground, and that she landed on her back. Defendant spread her legs apart by force, put his fingers in her vagina twice, and took her underwear off at some point. She indicated to the officer that it hurt when defendant put his fingers in her. She also indicated that her legs hurt after the incident, and that she had a cut on her finger. She never reported that she threw her underwear at defendant, or that she wanted him to check her vagina.

Officer Sanchez observed redness on M.G.'s arm and behind her shoulder, as well as a cut on her finger. M.G. reported that when defendant grabbed her, she felt like he cut her.

At trial, M.G. testified that she lied to Officer Sanchez about defendant taking her cell phone and putting his fingers in her vagina against her will. She also denied telling the officer that it hurt when defendant put his finger inside her. M.G. testified that she said these things to the officer because she was "afraid" defendant would take her child away and she told the officer she "just wanted a restraining order." She "didn't think that all of this was going to happen." She testified that she wanted a restraining order because the two of them were having "problems" after she left him in 2012. M.G. also testified at trial that she had redness on her arm as a result of defendant grabbing her arms to calm her down during the struggle. She denied telling the officer that she got a cut on her finger when defendant grabbed the cell phone from her hand. At trial, she testified that she got the cut "[m]aybe when [she] fell."

M.G. testified at trial that she had called the police on two prior occasions. On one occasion defendant was bothering her at work. On another occasion defendant had taken her phone. The police came to her home but defendant had already left.

7. M.G.'s Interview and Examination by a Nurse

About three and a half hours after the incident, M.G. was interviewed by a nurse, who was a sexual assault forensic examiner for the county, and a detective sergeant from

the Watsonville police department. After the interview, the nurse conducted a physical examination of M.G. The nurse testified as an expert in sexual assault examinations.

The nurse found M.G. to be sincere and straightforward. M.G. did not waiver and did not show any anger. M.G. reported that defendant had grabbed her cell phone and put it in his pocket. She also stated that they had struggled and he threw or pushed her down on the ground. M.G. further reported that defendant forced her thighs apart with his hands, pulled off her panties and kept them, and twice put his fingers in her vagina and smelled his fingers. She did not tell the nurse that she allowed defendant to do it. According to the nurse, M.G. also stated that defendant put his face in her vaginal area "to smell if [she] was with someone else."

M.G. indicated that defendant always threatened to hit her and anyone else that he saw her with. He had also threatened to take their child if she was with someone else or if she tried to report him. M.G. was fearful that defendant would take their child from her because she was "undocumented." The sergeant who was present during the nurse's initial interview of M.G. told M.G. not to worry, that she could report matters to the police, and that her baby's father would not be able to take the baby away from her because she was undocumented.

M.G. told the sergeant that she had reported defendant to the police several times because he was always taking her phone and he would follow her to work and cause her trouble at her job. The sergeant testified that M.G. also told him that defendant had hit her in October, but she did not call the police because he was the father of her child. She also stated that she reported the current incident because defendant was getting more aggressive or violent.

At trial, M.G. testified that defendant had never hit her. She also denied telling the sergeant that defendant had hit her when she left him in October.

M.G. reported to the nurse that she had pain on her inner thighs and pointed to areas that might have injuries from the force that defendant used to push her legs open. M.G. denied having any physical injuries prior to the incident.

The nurse found bruises on M.G.'s inner thighs and one bruise on her right inner calf. The bruises were tender and most were about "fingerprint size." There was one area with "five different areas of bruising" that was about four by three centimeters. Photographs of the bruises were admitted into evidence.

The nurse found the nature and location of the bruises to be consistent with M.G.'s report that defendant had forced her thighs apart. In the nurse's opinion, the "injuries correlate[d] with someone attempting to separate the thighs with violent force." The nurse testified that, although bruises cannot be dated with 100 percent accuracy, M.G.'s bruises "look[ed] like fresh bruises" because they did not have any yellow color, which appears in a bruise about five days later. Further, the bruises were tender to touch, which "show[ed] that they were fresh."

At trial, M.G. denied that she had any marks on her thighs after the incident. She also testified that any redness or bruises on her thighs were from her falling.

The nurse determined that M.G. had "no other bruises or issues on her skin," including on the arms, wrists, and back. The results of the genital examination were "normal." The nurse explained that no conclusions may be drawn regarding whether acts were consensual or forced based on the presence or absence of injuries in the genital area.

8. Arrest and Interview of Defendant

Subsequent to the incident on March 16, 2013, sometime after 3:25 a.m., Watsonville police saw defendant's vehicle drive by the street where M.G.'s sister lived. Police initiated a traffic stop. Black underwear was found in defendant's vehicle. Defendant also had a cell phone that police initially believed was M.G.'s phone. Defendant was arrested.

Police later determined that the cell phone actually belonged to defendant and not to M.G. M.G.'s cell phone was never recovered by police. M.G. later identified the underwear from defendant's truck as the underwear he had taken from her.

Defendant was interviewed at the police department. Officer Sanchez advised defendant of his Miranda rights,[3] and defendant stated that he understood his rights and agreed to speak to the officer. Defendant stated that he and M.G. had "separated" and that he had "left" the apartment, which was in his name. Defendant also indicated that he and M.G. were a couple because he "go[es] to the house and talk[s] with her."

Defendant stated that he drove by M.G.'s sister's residence because M.G.'s car was not at his apartment. He saw M.G. exit another man's vehicle. Defendant became angry and went into a "panic." He asked M.G., "what's up" and why she was with the man. M.G. stated that she went to "spy" on him at the dance, and that she had seen him with another girl.

Defendant claimed that M.G. sat down on the grassy area on her own. He denied pushing or throwing her to the ground. Defendant called her a "whore," and M.G. slapped him once on the face. Defendant tried to check M.G.'s phone to find out the identity of the man who had dropped her off. M.G. wanted the phone back, but defendant put it in his pocket. At some point, M.G. told defendant, "if you want we can get married."

Defendant also told Officer Sanchez that he did not touch M.G. or assault her. He denied that there was a physical struggle and he denied grabbing her. Defendant repeatedly told the officer that M.G. was drunk.

Officer Sanchez asked defendant about the underwear. Defendant indicated that it belonged to a girl that he met at a dance, and that he had had the underwear for about a month. Defendant gave the name of a girl but stated that he did not know her address or

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

phone number. When Officer Sanchez raised the issue of testing the underwear, defendant admitted that it belonged to M.G. Defendant claimed that M.G. denied being with another man, showed defendant her underwear, and said to defendant, "I don't have anything," and "He didn't do anything to me." Defendant also stated that he and M.G. hugged.

Officer Sanchez asked defendant whether M.G.'s DNA would be found on his fingers. Defendant responded that they had been intimate a few days earlier. He also stated that he had held her underwear in his hands so there may be something on his fingers. Defendant denied penetrating M.G. with his fingers.

9. M.G.'s Testimony at the April 2013 Preliminary Examination

M.G. testified at defendant's preliminary examination on April 30, 2013. Her testimony was read to the jury, and a transcript of the testimony was given to the jury. At the preliminary examination, M.G. testified that defendant grabbed the cell phone from her hand and took it against her will. She also initially testified that defendant threw her onto the lawn, but she subsequently testified that they were struggling when they both fell on the lawn. M.G. stated that defendant wanted to "smell [her] to see if [she] had been with a boy." He tried to put his head between her legs but she hit him. She also testified that defendant separated her legs by force, that he put his fingers inside her vagina against her will before and after he took her underwear off, that he used his other hand to forcibly hold her legs open, and that he left bruises on her inner thighs. She further testified that she unsuccessfully tried to push him off of her.

At trial, M.G. stated that she had told the prosecutor on the date of defendant's preliminary examination that she wanted to "withdraw the charges" against defendant but was told that "it couldn't be done." She also testified that her preliminary examination testimony that defendant had taken her cell phone and touched her against her will was a lie. When asked at trial why she lied, M.G. stated she was afraid to have her children taken away, and that she "didn't think it was all going to turn out like this." M.G. further

testified at trial that she loved defendant and was concerned about what would happen to him.

10. Defendant's Prior Acts of Domestic Violence Against V.F.

V.F. is defendant's former wife. They began dating when V.F. was 14 years old. Defendant is four years older than V.F. V.F. and defendant had a child together, and they married when V.F. turned 18 years old. They were married for several years before their relationship ended and they divorced a few years later. V.F. was 31 years old at the time of trial in 2013, and her child with defendant was 16 years old.

Defendant was verbally and physically abusive during their marriage. At trial, V.F. testified that she remembered only "tiny bits" of certain incidents but that she had been truthful at the time when reporting the incidents to the police.

a. September 2000 incident

V.F. testified that in one incident in September 2000, when she was 18 years old and married to defendant, he accused her of cheating or being with another man. The prior evening V.F. had stayed at her mother's house. When she told this to defendant, he did not believe her. Defendant grabbed her hard by the chin with both hands. V.F. was afraid, called the police, and asked for a restraining order.

Zane Ota, who was a Watsonville police officer dispatched to the scene, testified that V.F. was crying and upset upon being contacted. According to the officer, V.F. stated that she had been in an argument with defendant. V.F. reported that defendant had grabbed her chin, pushed her several times, and broken a mirror over his own head. The officer observed broken glass on the floor and on a bed. V.F. further reported that she tried to defend herself with a cordless phone and a toy piano but defendant took the items away from her. Defendant also threatened to kill her if she was seeing somebody else. V.F. reported that her three-year-old child and a young relative were present when the altercation took place. V.F. obtained an emergency protective order.

Officer Ota subsequently contacted defendant by phone. Watsonville Police Officer David Lopez testified that he acted as a Spanish/English translator for Officer Ota during the phone call. Defendant indicated that he and V.F. had been in argument, that both of them had engaged in pushing, and that he broke a mirror. Defendant also stated that he had put his hand on V.F.'s throat twice but not to choke her. Defendant acknowledged that V.F. wanted him to leave the house because she wanted to be separated from him.

As a result of the incident, defendant was convicted of misdemeanor battery on a cohabitant.

b. October 2000 incident

In another incident in October 2000, V.F. arrived home from an evening class when defendant began questioning her about where she had been. V.F. testified that defendant accused her of being with another man and lying about being in school. Defendant grabbed V.F.'s jaw, threatened to kill her if she was seeing another man, and pushed her. V.F. tried to leave in a car with their three-year-old child. Defendant told her to open the car door and that she was not going to be leaving. As V.F. drove away, defendant threw a stick or a cordless phone which hit the rear window.

V.F. drove to her sister's house, which was about five minutes away. When the sister failed to answer the door, V.F. returned to her car. Before she could leave in the car, defendant arrived and blocked her car with his car. Eventually V.F. was able to get inside her sister's house and the police were called that day. V.F. asked for a restraining order against defendant.

Luis Enrique Espejo, who was a Watsonville police officer dispatched to the scene, testified that V.F. was crying when he contacted her. V.F. reported that defendant had accused her of lying about being at school. Defendant grabbed her by the jaw and threatened to kill her if she was seeing another man. He then pushed her on the bed. As she left in a vehicle with their child, she saw defendant pick up a stick and throw it at her

vehicle. V.F. went to her sister's house, but her sister was not home. As she got in her vehicle to leave, defendant blocked it with his own vehicle. Defendant refused to move his vehicle and told V.F. they needed to talk. V.F. locked her car doors, but defendant reached in through an open window and unlocked and opened a door. V.F. then grabbed their child and went inside her sister's house. V.F. obtained an emergency protective order.

When defendant was subsequently interviewed by Officer Espejo, defendant stated that he had had a verbal argument with V.F. and that he had accused her of seeing another man. Defendant also stated that V.F. had slapped him across the face twice and then left. He denied threatening her or pushing her. Defendant stated that he had followed her to her sister's home because he wanted to talk to her. He admitted blocking V.F.'s vehicle.

As a result of the incident, defendant was convicted of misdemeanor assault.

c. January 2002 incident

In another incident in January 2002, when V.F. was 20 years old and still living with defendant, the couple had an argument. Defendant grabbed V.F. by the front of her sweatshirt, cursed at her, and indicated that he "want[ed] to be free from [her]." V.F. tried to get away from defendant. He followed her and then slapped her. Defendant eventually left when he saw that V.F. was going to call the police. In reporting the incident to the police, V.F. also stated that defendant had grabbed her by the hair and pushed her down to the floor. V.F. asked the police for a restraining order.

V.F. and defendant separated in 2005, and they never lived together again. They have been cordial with each other since that time. V.F. testified that two months after defendant moved out of their residence, he moved in with M.G.

B. *The Defense Case*

Defendant testified in his own defense.[4] Regarding the September 2000 incident involving V.F., defendant's wife at the time, defendant testified that he did not believe V.F. had been at her mother's because the mother had told him otherwise. Defendant acknowledged that he was upset at the time, and that it was "bad" that he had grabbed V.F. by her chin. He testified that he "was trying to get her to calm down, because she was wanting to attack" him. Defendant denied pushing her in the chest, breaking a mirror on his head, or threatening to kill her if she was with someone else. He testified that they "were a couple who had beautiful communication."

Regarding the October 2000 incident, defendant testified that he and V.F. had had an argument, but he denied that the incident had occurred as V.F. had described. He also indicated that he had followed V.F., who had driven to her sister's house after the incident, because he was "worried" about their child and V.F. Defendant explained that V.F. had been learning to drive for only two or three weeks and he "wanted to make sure nothing had happened."

In 2000, defendant pleaded guilty to two charges arising out of the September and October 2000 incidents involving V.F. Defendant was placed on probation and completed one year of anger management classes. There was a protective order in place because of the incidents, and at some point defendant was allowed to have peaceful contact with V.F.

Regarding the 2002 incident, defendant denied V.F.'s description of what had happened. He claimed that V.F. was "very angry" during the incident, and that the two of them had "family problems." Defendant and V.F. broke up in 2007.

Defendant testified that in 2007, he started a relationship with M.G. and they moved in together. In 2012, they began living at an apartment on Jefferson Street with

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[4] Defendant testified in Spanish with an interpreter.

their child and M.G.'s other child. M.G. moved out for a month in 2012 when someone told her that defendant had been speaking to another woman.

At times, defendant's construction job required him to work outside of Santa Cruz County for a whole workweek. In February and March 2013, defendant worked in Fairfield and did not live fulltime at the Jefferson Street apartment. He returned to the Jefferson Street apartment on Fridays and stayed the weekend.

Defendant testified that on March 16, 2013, the date he had the altercation with M.G. outside her sister's residence, he and M.G. were a "couple." He indicated that they were living together and got along "well." He denied that M.G. had broken up with him the prior October. When defendant was asked whether he had packed up some of his belongings in October 2012, he testified: "Once I came to pack up some things, but I often went far away to work, and I would bring clothes with me, but I never was going to leave the house." Defendant also denied that he left belongings at the apartment as an excuse to keep coming over. He testified that he had "always lived" at the Jefferson Street apartment before the March 2013 incident occurred. When asked whether he had told the police after the March 2013 altercation that he and M.G. were "separated," defendant testified, "We had problems. I left. I never said that we had broken up." Defendant acknowledged that he and M.G. were never married. When asked about his reference to her as his wife, he testified, "She's not legally my wife, but that was my way of saying it, because that's how I consider her."

In 2012, defendant went on vacation to Mexico for about a month. When he returned, M.G. acted "strange." She did not want to talk to him at times and would not let him see her telephone. However, she never asked defendant to leave in January 2013, nor did she give him the impression that she did not want to be with him. Defendant denied that M.G. had ever called the police on him prior to January 2013.

On a Friday in February 2013, defendant came home from work to the Jefferson Street apartment and found M.G. and her sister drinking, which bothered defendant

because the children were present. M.G.'s sister also yelled at him and was aggressive with him. Defendant called the police on M.G.'s sister. He told the police officer that he and his "wife" lived at the apartment. He also told the officer that he did not want to continue arguing with M.G.'s sister, and that he was going to leave and then come back. M.G. was angry defendant had called the police and threatened he "would pay for it." The following day, defendant returned to the apartment.

On Friday, March 15, 2013, defendant left work in Fairfield. Defendant testified that he went to his sister's house because M.G. was still "upset" with him and because his brother was visiting from out-of-state. Defendant tried calling M.G. once or twice but her phone was turned off.

Defendant and his brother went to a dance in Gilroy. While his brother went inside the club, defendant went to get some food. At some point, defendant saw Vasquez, who was a friend and a coworker of M.G. Defendant had a friendly encounter with him. Defendant was not looking for M.G. and did not see her.

Defendant and his brother eventually left Gilroy, and defendant dropped his brother off at his sister's house. Defendant went to the Jefferson Street apartment and became "concerned" because M.G. and the children were not there. Defendant saw beer and a lot of M.G.'s clothes on the bed. Defendant went to look for M.G. at her sister's house because M.G. liked to drink with her sister and that was where the two women would go to drink. Defendant was also "worried" for his child because M.G. did not know how to drive very well and because both women drank "a lot." Defendant went to M.G.'s sister's residence sometime after 3:00 a.m.

Upon arriving at M.G.'s sister's house, defendant saw Vasquez's car. As defendant approached the car, M.G. got out and the car pulled away. Defendant felt anger, desperation, and panic among other emotions. Defendant testified that he and M.G. "never had problems," that he "wasn't expecting this from her," and that "anybody could get angry if they see their partner with another person." Defendant asked M.G.

"why was she with" the other man, "why was she doing that to [defendant]," and "what was she doing with [the other man] in the car." M.G. denied doing anything, and defendant got angry. He twice called her a "whore" during the incident.

At some point defendant asked M.G. for her phone, and she gave it to him. The phone was locked when defendant tried to look at it, and M.G. took it back. Defendant denied taking the phone out of M.G.'s hand by force. When asked whether he took the phone with him, he testified that the phone "fell."

Defendant asked M.G. "why she was doing that" to him and told her that he "loved her very much." Defendant testified that he and M.G. did not struggle with each other, and that the conversation did not become physical. However, he also testified that he grabbed M.G. because she tried to hit him after he called her a "whore."

At some point the altercation moved to the grass. Defendant testified that M.G. was "very drunk" and was going to fall. She sat down, defendant sat next to her, and they started talking or arguing. Defendant called her a "whore." At some point, M.G. asked defendant to forgive her. M.G. also became angry, told him to "look," and told him that she had not done anything. M.G. displayed her underwear under her skirt. Defendant stood up. M.G. took off her underwear, threw it at defendant, and said, "Go ahead, smell it, you dog, you idiot." According to defendant, M.G. "wanted to show that she hadn't done anything" when she and Vasquez had stopped somewhere besides the dance. The underwear landed on the ground. Defendant picked it up and put it in his pocket because M.G. was drunk, he thought the underwear would remain there, and he felt embarrassed.

Defendant initially testified that he broke up with M.G. that night, and that he told her they "were no longer going to be together." He later testified that they "did not break up" but simply had a "discussion" about it.

Defendant eventually left the scene because he "didn't want to be arguing anymore." He never tried to check on his child while he was there. Defendant testified that after the incident, M.G. and her sister threatened him during two phone calls.

Defendant denied pinning M.G. to the ground, forcibly removing her underwear, forcing her legs apart, or sticking his fingers in her vagina. He also denied taking her cell phone with him. Defendant further denied that he had ever threatened M.G., or threatened to take their child from her. He also denied causing the bruises on M.G.'s thighs. Defendant testified that M.G. had "very delicate" and "very sensitive" skin. He indicated that she might have gotten the bruises when she was working in the fields picking berries and putting her elbows on her knees. He testified that she had in the past arrived home from work with bruises on her thighs and pointed them out to him. Defendant testified that he initially lied to the police about the underwear belonging to someone else because he "was embarrassed to tell [the police] that [his] wife had thrown her underwear at [him]."

Defendant testified that he had not spoken to M.G. since the incident, a protective order currently prohibited him from talking to M.G., and he was in compliance with the order.

Watsonville Police Officer Scott Mead testified that on February 15, 2013, he was dispatched to Jefferson Street for a disturbance call in which defendant had asked to have his "sister-in-law" removed from the residence because she was intoxicated. Upon arriving at the residence, the officer could smell alcohol on the "sister-in-law" but believed she was still able to care for herself. The officer asked her "if she didn't mind leaving, just to get rid of the problem for the day," and that she was not banned from the residence. The woman agreed to leave. The officer determined that no crime had occurred. The officer had the impression that another woman who was present, and who identified herself as defendant's wife, was a resident of the apartment.

Raoul Ortiz, the owner of the company where defendant worked, testified that defendant had been employed at the company since 2002. Defendant's most recent position was union foreman. Ortiz testified that defendant was an honest and nonviolent person and a "fantastic" employee. Ortiz had never met V.F., defendant's former wife. Ortiz might have met M.G. once, but he did not know her. Ortiz did not know all the details of the case involving M.G.

C. *Verdicts and Sentencing*

The jury found defendant guilty of forcible sexual penetration by a foreign object (§ 289, subd. (a)(1); count 1) and inflicting corporal injury on the mother of his child (§ 273.5, subd. (a); count 3). The jury also found defendant guilty of petty theft (§ 484, subd. (a)), a lesser offense of second degree robbery charged in count 2.

The trial court sentenced defendant to serve the midterm of six years in prison for count 1 (§ 289, subd. (a)(1)), with a concurrent term of six months on count 2. The court stayed a three-year term for count 3 (§ 273.5, subd. (a)) pursuant to section 654.

III. DISCUSSION

A. *Admission of Evidence of Prior Incidents of Domestic Violence*

1. Background

a. pretrial motions

The prosecution filed a pretrial motion seeking to introduce evidence of the three prior incidents of domestic violence involving defendant and his former wife V.F. Two of the incidents occurred in September and October 2000 and resulted in convictions, while a third incident occurred in January 2002 and the resulting case was apparently dismissed after a violation of probation was found.

According to the prosecution, in the September 2000 incident, defendant was angry at V.F., who had been at her mother's house, because he did not know where she was and he became physically abusive with her. He also threatened to kill her if she was with anyone else. Defendant told the police that he had argued with V.F., that she wanted

to separate from him, and that he had grabbed her by the neck to hold her and not hurt her. In the October 2000 incident, defendant accused V.F. of lying about being at school, grabbed her, and threatened to kill her if she was seeing another man. He also threw a stick at her car, followed her, blocked her car, and tried to pull her out of the car. Defendant told the police that they had argued, that V.F. lied about where she had been, that he accused her of sleeping with someone else, that V.F. slapped him and left, and that he followed her only to talk to her. He denied threatening her. In the 2002 incident, defendant and V.F. argued because he was swearing and telling her that he wanted to be "free" from her. He grabbed her by the front of her sweatshirt, followed her, slapped her, grabbed her by the hair, and pushed her to the floor. V.F. grabbed the phone to call the police, and defendant left after stating he was not going to get caught. Defendant later told the police that he did not like how V.F. was talking to him, that she pushed him and then he pushed her away, and that he left the house because she continued to push him. He denied pulling her hair.

The prosecution contended that the evidence was admissible pursuant to Evidence Code sections 1109 and 352. The prosecution argued that the prior incidents, which involved defendant's threat to kill his wife and a belief that she was cheating on him, and the current charged offenses showed defendant's "same controlling behavior and jealousy" and his "propensity to be both physically and verbally abusive." The prosecution also argued that the prior incidents were not too remote in time, and that admission of the incidents was in the "interest of justice" under Evidence Code section 1109, subdivision (e), and *People v. Johnson* (2010) 185 Cal.App.4th 520 (*Johnson*). The prosecution further argued that the charged offenses were "far more heinous" than the prior acts, and that the testimony regarding the prior acts and the admission of the certified records of the prior convictions would not result in an undue consumption of time.

Defendant filed a pretrial motion seeking to exclude evidence of the three prior incidents of domestic violence pursuant to Evidence Code sections 1109 and 352, and on the grounds that admission of the evidence would violate his constitutional rights to due process and a fair trial. Defendant contended that the prior incidents, which occurred 11 years and 13 years before the charged offenses, were remote in time and involved a different victim. Defendant also argued that the prior incidents were unduly prejudicial.

At the hearing on the motion, defendant further argued that allowing testimony from the victim in the earlier incidents would involve an undue consumption of time. The prosecution argued at the hearing that, although there were several years between the prior incidents of domestic violence and the charged offenses, defendant had been with M.G., the victim in the charged offenses, for seven years and she had not reported every incident of domestic violence during that timeframe. The prosecution also argued that M.G. had reported to the nurse that she had been threatened by defendant.

The trial court ruled that the two incidents from 2000, which resulted in convictions, were admissible but not the third incident from 2002, which resulted in defendant admitting a violation of probation in a case that was ultimately dismissed. The court stated that there were similarities between the two earlier incidents and the charged offenses because defendant appeared to react with threats and violence to the possibility of his "wife" being with someone else. The court also referred to *Johnson*, *supra*, 185 Cal.App.4th 520, and indicated that admission of the prior incidents, which occurred more than 10 years before the charged offenses, was in the interest of justice. (Evid. Code, § 1109, subd. (e).) The court believed that M.G.'s testimony at the preliminary examination "may be considered unusual and hard to understand." However, if M.G.'s testimony was put in the context of defendant's "responses and his jealousy . . . at the possibility that somebody else is seeing someone he considers to be his woman, then it makes more sense." The court also indicated that the two prior incidents from 2000 were probative and not unduly prejudicial. The court stated that the incident from 2002 would

be excluded unless facts were brought out during the trial that caused it to review or revise its ruling.

b. Evidence Code section 402 hearing

During trial, after M.G. and all the other prosecution witnesses had testified regarding the charged offenses, the court held an Evidence Code section 402 hearing, at which V.F. testified about defendant's three prior incidents of domestic violence. V.F. claimed to remember only some of the details of the incidents and testified that her statements to the police after each incident were the truth.

At the conclusion of the Evidence Code section 402 hearing, the trial court ruled that all three incidents were admissible. The court explained that it had held the hearing because it wanted to reconsider its ruling and see and hear V.F. testify. The court indicated that it had been reconsidering its ruling in view of M.G.'s "very bizarre" trial testimony, in which she indicated that the incident was consensual "in a very unusual way," rather than recanting her testimony as the court found often to be the case.

Regarding the similarities between the prior offenses involving V.F. and the charged offenses involving M.G., the trial court stated that defendant had "similar motives." He was jealous, followed his women, wanted to know where they were, did not believe them, was angry when they gave answers that he thought were untrue, and accused both of having sex with another man. The court also found that defendant pushed both women to the floor, chased a car, engaged in flight from the scene so he would not be caught, and made a threat to kill in V.F.'s case and a threat to take a child away and use immigration status in M.G.'s case. The women both stated that a struggle had occurred but both appeared to minimize the struggle. The court further found that defendant's statements to the police were similar in that he partially blamed the victim and he made partial admissions and partial denials. The court concluded that the prior domestic violence incidents were "very probative" and, "particularly given the testimony

of [M.G.],” would “be of assistance to the jury in trying to decide what has actually happened in this matter.”

At trial, V.F. testified about the two incidents in 2000 and the incident in 2002. V.F. did not remember all the details of the three incidents. Ota, who was a police officer dispatched to the scene of the September 2000 incident, testified regarding his in-person interview of V.F. and his phone interview of defendant about the incident. Watsonville Police Officer Lopez’s testimony was limited to confirming that he had acted as translator during Officer Ota’s call. Espejo, who was a policer officer dispatched to the scene of the October 2000 incident, testified regarding his interviews of V.F. and defendant about the incident. Also admitted into evidence were court records reflecting defendant’s convictions for misdemeanor battery on a cohabitant and misdemeanor assault for the September and October 2000 incidents.

2. The parties’ contentions

Defendant contends that the trial court committed prejudicial error and violated his rights to a fair trial and due process by admitting evidence pursuant to Evidence Code sections 1109 and 352 that he committed acts of domestic violence against his former wife V.F. He argues that the evidence had minimal, if any, probative value and was so prejudicial that it rendered his trial fundamentally unfair. Regarding the lack of probative value, defendant contends that the prior acts were not similar to the charged offense involving M.G. and were too remote in time without any intervening acts of domestic violence. He also argues that the evidence was unduly prejudicial within the meaning of Evidence Code section 352 because the evidence “evoked a great emotional bias” against him, and that the presentation of this evidence at trial was unduly time consuming because he had to “re-litigate the facts and circumstances” of the earlier offenses.

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 offenses were remarkably similar to the charged incident” because defendant “demanded

that the women explain their whereabouts, demanded proof of fidelity by reviewing cell phone histories, and used force and threats to force compliance with his demands." The Attorney General further argues that the prior acts were not too remote in time because defendant committed additional acts of violence against M.G. that were not reported during their seven-year relationship. The Attorney General also contends that even if the evidence was erroneously admitted, the error was not prejudicial.

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.] [Evidence Code 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*).)

Evidence Code 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 [Evidence Code section] 1101 if the evidence is not inadmissible pursuant to [Evidence Code section] 352." Thus, "[e]ven if the evidence is admissible under [Evidence Code] section 1109, the trial court must still determine, pursuant to [Evidence Code] 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.)

Evidence Code section 1109 also contains a provision addressing the remoteness of an uncharged prior act. Subdivision (e) of Evidence Code 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." (*Johnson*, *supra*, 185 Cal.App.4th at p. 537, fn. omitted.) 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 [Evidence Code] 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.)

In this case, the trial court properly found that evidence of defendant's prior acts of domestic violence was probative of his propensity to engage in acts of domestic violence. (Evid. Code, § 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.) Defendant's prior acts of domestic violence and the

charged offenses involved the mothers of defendant's children. All the incidents involved arguments between defendant and the women and ultimately resulted in defendant engaging in physical abuse against the women. The charged offenses, along with the September and October 2000 incidents in particular, involved defendant wanting to know where the women had been, his belief that the women were with another man and/or having sex with another man, his anger, and his subsequent physical abuse of the women. Defendant also made threats of physical harm to M.G. at some point and made threats to V.F. during the September and October 2000 incidents if either M.G. or V.F. was with another man. In the 2002 incident, similar to the charged offenses, defendant argued with the women, grabbed them, pushed them to the ground, and left the scene when the women indicated they were going to call the police. In view of the substantial similarities between the prior incidents of domestic violence against V.F. and the charged offenses involving M.G., the prior incidents were highly probative of defendant's propensity to engage in domestic violence, particularly when defendant suspected the mother of his child of being with another man. The prior incidents were thus relevant to the issue of whether defendant committed the charged offenses against M.G.

In addition, defendant's prior acts of domestic violence were not prejudicially more inflammatory than the conduct for which he was charged. (Evid. Code, § 352.) Whereas the prior incidents involved defendant grabbing, pushing, and slapping V.F., the charged offenses involving M.G. included similar conduct and also forcible sexual penetration.

The prior incidents were also not too remote. "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, defendant apparently went from his relationship with V.F. to a relationship with M.G. Although defendant contends that there were no incidents of domestic violence in the intervening

years between the prior domestic violence involving V.F. and the charged offenses involving M.G., the evidence at trial reflected otherwise. M.G. reported to the nurse that defendant always threatened to hit her and anyone else that he saw her with. (See Evid. Code, § 1109, subd. (d)(3); § 13700, subds. (a) & (b) [domestic violence includes placing a person in reasonable apprehension of imminent serious bodily injury].) M.G. also told the police sergeant who was present during the nurse's interview of her that defendant had previously hit her, but that she did not call the police because defendant was the father of her child.

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 incidents of domestic violence against V.F., particularly the incidents occurring in 2000, and the charged offenses involving M.G., where defendant wanted to know where the women had been, his belief that the women were with another man and/or having sex with another man, his anger, and his subsequent physical abuse of the women. He also threatened both women with physical harm if they were with another man. The charged offenses were also similar to the 2002 incident, as defendant argued with both women, grabbed them, pushed them to the ground, and left the scene when the women indicated they were going to call the police.

For the same reason, although the prior incidents occurred more than 10 years before the charged offenses, the prior incidents were not rendered inadmissible under Evidence Code section 1109, subdivision (e). In view of the substantial similarities between the charged offenses of 2013 and defendant's prior acts of domestic violence, particularly in 2000 when defendant reacted with threats and physical abuse upon the belief that the mother of his child had been with another man, the trial court reasonably

determined that evidence of the prior incidents was more probative than prejudicial, and that admission of the evidence was therefore "in the interest of justice" (Evid. Code, § 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].)

Lastly, we are not persuaded that the presentation of evidence of prior acts of domestic violence in this case involved an undue consumption of time. (Evid. Code, § 352.) Defendant observes that the trial testimony by V.F. and by law enforcement regarding the three incidents in 2000 and 2002 spanned approximately 85 pages of the reporter's transcript. Two exhibits containing court records that reflect defendant's convictions for the incidents in 2000 were also admitted into evidence. We observe that defendant addressed the prior incidents on direct and cross-examination over the course of approximately 17 pages of the reporter's transcript. Without providing an estimate as to the overall length of the trial, or legal authority supporting the proposition that 100 pages of trial testimony and admission of two exhibits constitutes an undue consumption of time, we are not persuaded by defendant's contention that a "significant amount of time" was consumed in this case in the presentation of the evidence concerning prior domestic violence. In this regard we observe that the evidentiary portion of the trial took place over approximately three and one-half days, and that the prosecution's evidence of prior domestic violence was presented during only part of one of those full days. On this record, we cannot conclude that the amount of trial time spent on the prior incidents of domestic violence was such an undue consumption of time that the trial court abused its discretion by failing to exclude the prior incidents. (See *People v. Frazier* (2001) 89 Cal.App.4th 30, 42 [no error in admitting evidence of uncharged sexual offenses under Evidence Code section 1108 where time spent on those issues was less than one-third of the total trial time].)

Accordingly, based on the record in this case, we conclude that the trial court did not err or abuse its discretion under Evidence Code section 352 in admitting evidence of defendant's prior acts of domestic violence against V.F. as propensity evidence under Evidence Code section 1109. Defendant has not shown a violation of his rights to a fair trial and due process.

B. *Constitutionality of Evidence Code Section 1109*

1. Due Process

Defendant also contends that the trial court violated his right to due process when it admitted evidence of his prior acts of domestic violence under Evidence Code section 1109, because that section itself violates his constitutional right to due process.

In *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), our Supreme Court observed: "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*Id*. at p. 913.) The *Falsetta* court held that Evidence Code section 1108, which permits the admission, in a sex offense case, of the defendant's other sex offenses for the purpose of showing a propensity to commit such offenses, "is constitutionally valid." (*Id*. at p. 907.) Specifically, the court concluded "the trial court's discretion to exclude propensity evidence under [Evidence Code] section 352 saves [Evidence Code] section 1108 from defendant's due process challenge." (*Id*. at p. 917.)

The admission of evidence of prior acts of domestic violence under Evidence Code section 1109 is also subject to the limitations of Evidence Code section 352. By analogy under the ruling in *Falsetta*, this limitation on Evidence Code section 1109 ensures that it does not violate the due process clause. (See *Falsetta*, *supra*, 21 Cal.4th at p. 917.) Defendant acknowledges that after *Falsetta* was decided, several courts have applied its reasoning to reject claims that the admission of prior acts of domestic violence under Evidence Code section 1109 violates due process. (See e.g., *Johnson*, *supra*, 185 Cal.App.4th at pp. 528-529; *People v. Cabrera* (2007) 152 Cal.App.4th 695, 704;

People v. Escobar (2000) 82 Cal.App.4th 1085, 1095-1096; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1309-1310 (*Jennings*); *People v. Brown* (2000) 77 Cal.App.4th 1324, 1332-1334; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1026-1029; *People v. Johnson* (2000) 77 Cal.App.4th 410, 417-420.) We agree with the reasoning of these cases.

Defendant contends that the issue should be revisited in view of *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769 (*Garceau*), reversed on other grounds *sub nom. Woodford v. Garceau* (2003) 538 U.S. 202. In *Garceau*, the Ninth Circuit Court of Appeals determined that a jury instruction permitting an inference of criminal propensity from evidence that the defendant committed uncharged crimes violated due process. (*Garceau*, *supra*, at pp. 773, 775-776.)

We decline defendant's invitation to revisit the due process issue based on *Garceau*. First, defendant does not point to any language in *Garceau* that conflicts with the reasoning in *Falsetta* concerning Evidence Code section 1108, or the reasoning in any of the cases that have applied *Falsetta* to Evidence Code section 1109. Second, assuming there is a conflict between *Garceau* and *Falsetta*, defendant acknowledges that this court must follow *Falsetta*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *Forsyth v. Jones* (1997) 57 Cal.App.4th 776, 782-783 [Ninth Circuit Court of Appeals decision is not binding on a California appellate court].) Third, defendant acknowledges that in *United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1024-1027 (*LeMay*), the Ninth Circuit Court of Appeals rejected a due process challenge to Federal Rule of Evidence, rule 414 (28 U.S.C.), which permits a court to admit evidence of similar crimes in child molestation cases and which is the rule upon which Evidence Code section 1108 was modeled (*Falsetta*, *supra*, 21 Cal.4th at p. 912). Fourth, subsequent to *Garceau*, the California Supreme Court has expressly refused to reconsider *Falsetta*. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1288-1289; *People v. Loy* (2011) 52 Cal.4th 46, 60-61 [relying in part on the decision by the Ninth Circuit Court of Appeals in

LeMay].) We therefore reject defendant's due process challenge to Evidence Code section 1109.

2. Equal Protection

Defendant contends that Evidence Code section 1109 violates his right to equal protection because propensity evidence is admissible only in certain types of cases and is otherwise excluded in criminal prosecutions. Defendant acknowledges that California appellate courts have rejected equal protection challenges to Evidence Code section 1109. (*Brown, supra,* 192 Cal.App.4th at p. 1233, fn. 14; *People v. Price* (2004) 120 Cal.App.4th 224, 240; *Jennings, supra,* 81 Cal.App.4th at pp. 1310-1313.) He contends, however, that *Jennings* in particular is flawed in concluding that domestic violence defendants are not similarly situated with other defendants and that the rational basis test, rather than strict scrutiny, applies.

We first observe that defendant failed to raise an equal protection challenge to Evidence Code section 1109 in the trial court. A defendant generally may not argue on appeal that evidence should have been excluded for a reason different than that raised in the trial court. (*People v. Partida* (2005) 37 Cal.4th 428, 433-435; *People v. Williams* (1997) 16 Cal.4th 153, 250; Evid. Code, § 353, subd. (a).)

Even assuming defendant has not forfeited his claim on appeal, we find the reasoning of *Jennings* sound and determine that defendant's equal protection claim is without merit.

In *Jennings*, the appellate court explained that Evidence Code section 1109 "treats all defendants charged with domestic violence equally; the only distinction it makes is between such domestic violence defendants and defendants accused of other crimes. Neither the federal nor the state constitution bars a legislature from distinguishing among criminal offenses in establishing rules for the admission of evidence; nor does equal protection require that acts or things which are different in fact be treated in law as though they were the same. The equal protection clause simply requires that, 'in defining

a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which the classification is made." ' [Citation.] Absolute equality is not required; the Constitution permits lines to be drawn. [Citation.] The distinction drawn by [Evidence Code] section 1109 between domestic violence offenses and all other offenses is clearly relevant to the evidentiary purposes for which this distinction is made." (*Jennings*, *supra*, 81 Cal.App.4th at p. 1311.)

The appellate court in *Jennings* applied the rational basis test after concluding, as we have in this case, that Evidence Code section 1109 does not infringe upon a defendant's right to due process. (*Jennings*, *supra*, 81 Cal.App.4th at p. 1312.) Under the rational basis test, "the statute will satisfy constitutional equal protection requirements if it simply bears a rational relationship to a legitimate state purpose. [Citations.]" (*Ibid.*, fn. omitted.) The appellate court in *Jennings* explained that "domestic violence is quintessentially a secretive offense, shrouded in private shame, embarrassment and ambivalence on the part of the victim, as well as intimacy with and intimidation by the perpetrator." (*Id.* at p. 1313.) The "special relationship between victim and perpetrator," with its "unusually private and intimate context," sufficiently distinguishes these cases from "the broad variety of criminal conduct in general. Although all criminal trials are credibility contests to some extent, this is unusually—even inevitably—so in domestic . . . abuse cases, specifically with respect to the issue of victim credibility. The Legislature could rationally distinguish between these . . . cases and all other criminal offenses in permitting the admissibility of previous like offenses in order to assist in more realistically adjudging the unavoidable credibility contest between accuser and accused." (*Ibid.*)

Defendant does not offer a persuasive basis to depart from *Jennings*. For example, the fact that other crimes, such as premeditated murder as suggested by defendant, may be committed in secret does "not demonstrate the absence of the required rational basis for the Legislature's distinction between" the crimes (*Jennings*, *supra*, 81 Cal.App.4th at

p. 1313). We conclude that defendant's equal protection challenge to Evidence Code section 1109 lacks merit.

IV. DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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MÁRQUEZ, J.