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CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. GEORGE EDWARD JOHNSON, SR., Defendant and Appellant.	C052747 (Super. Ct. No. 96F07807)

APPEAL from a judgment of the Superior Court of Sacramento County, Steve White, Judge. Affirmed.

Linda M. Leavitt, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Julie A. Hokans, Supervising Deputy Attorney General, Michael Dolida, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted 64-year-old defendant George Edward Johnson, Sr., of first degree murder (Pen. Code, § 187, subd.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I, II, and IV.

(a) -- count one)[1] and stalking (§ 646.9, subd. (a) -- count two) of his estranged wife Linza Johnson, and found true the allegation that defendant personally used a firearm in the commission of count one (§ 12022.5, subd. (a)(1)). The court found true the allegation that defendant had a prior serious felony conviction within the meaning of sections 667, subdivision (a), a "strike." (§§ 667, subds. (b)-(i) & 1170.12.) The court sentenced defendant to an aggregate term of 50 years to life plus 19 years.

On appeal, defendant argues that he is entitled to reversal because: (1) the court abused its discretion and violated his constitutional right to counsel by denying his request to substitute retained counsel; (2) the court abused its discretion under Evidence Code section 352 and violated his due process rights by admitting evidence of uncharged incidents of domestic violence; (3) the court violated his due process rights by instructing the jury with Judicial Council of California Criminal Jury Instructions (2006), CALCRIM No. 852; and (4) the prosecutor committed misconduct during closing argument. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The events giving rise to the charges against defendant occurred in 1996. In *People v. Johnson* (2000) 77 Cal.App.4th 410 (*Johnson*), this court affirmed defendant's conviction

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[1] Hereafter, undesignated statutory references are to the Penal Code.

following his first trial. That conviction was overturned for instructional error in a federal habeas corpus proceeding. The court re-arraigned defendant on the current charges in October 2005.

In September 1996, defendant and Linza lived together with their sons, 22-year-old George, Jr., and 15-year-old Marquez. In late September 1996, George, Jr., arrived home to find his mother limping and in pain. He took her to the hospital for treatment and then called the police. After interviewing Linza, the police arrested defendant. George, Jr., told defendant not to return to the house.

Michael Stansfield, a family friend, spent time at the Johnson residence after defendant moved out. Linza told Stansfield about her relationship with defendant. Stansfield observed key events that occurred in the fall of 1996.

Stansfield and George, Jr., testified that defendant came by the house a few times in October and November 1996. Defendant telephoned the house every other day. On some occasions, defendant simply drove by in his car. Other times he came to the door.

On one occasion, Linza and Stansfield were sitting in Linza's car in front of the house, waiting for Marquez to come out. Defendant drove up and stopped his car next to Linza's. He got out and bent over as if retrieving something. Thinking that defendant was reaching for a gun, Linza drove away. Defendant chased Linza in his car and she was unable to return to the house for more than 30 minutes.

On another occasion, Linza and Stansfield were returning from a high school basketball game in a car driven by Linza's friend Frank. When they stopped at a traffic light, defendant pulled up next to them. Frank made a left turn and defendant followed. Frank sped through surrounding streets in an effort to lose defendant. The chase lasted approximately 20 minutes.

Linza telephoned George, Jr., early on the morning of November 9, 1996. She sounded nervous and told him that defendant had nearly run her off Bowling Drive. Linza said that defendant knocked over several mailboxes during the chase. When Linza arrived home, George, Jr., inspected the car and saw new marks on the bumper. He and Linza called 911 and met California Highway Patrol Officer Lisa Beaudette at the scene of the incident. When Beaudette first arrived, she observed that several four-foot-tall mailboxes and a Federal Express box had been knocked off their concrete bases and scattered along the sidewalk and driveway on Bowling Drive. Beaudette also found a license plate from defendant's car in a search of the area.

Approximately two weeks before the murder, defendant went to the door of the house. He got into an argument with George, Jr., who would not let him inside. Defendant called Linza a whore and a bitch. He angrily yelled that he was going to get a gun and blow George, Jr.'s head off.

Another incident occurred on Monday, December 9, 1996, three days before the murder. Linza arrived home "jittery, nervous [and] frightened." She told George, Jr., and Stansfield that when she returned to her car after buying groceries,

defendant was there. Linza said that he put a gun to her head and made her get into the car. Defendant drove Linza to the home of his sister Ethel who was not at home. Defendant told Linza that he wanted to have sex with her "mainly because she was still his wife and as long as she was his wife, he could have sex with her." Linza talked to defendant about reconciling so that he would let her go. Defendant telephoned Linza's sister, Antionette Farris, later the same day and told her that he had pulled a gun on Linza. He said that he wanted to talk to Linza, but she did not want to talk to him. Defendant told Farris that he hoped Linza would not force him to hurt one of their sons. He stated that if he had to hurt one of their sons, he would hurt or kill Linza as well. Defendant also told Farris about the incident in which he chased Linza with his car and crashed into some mailboxes.

Linza rented a U-Haul truck on Wednesday, December 11, 1996, so she could move out of the house. She, George, Jr., Marquez, Stansfield and Stansfield's son started loading the truck that night. They parked the truck away from Linza's house so that defendant would not know that she was moving. They continued loading the truck the following morning. Linza received two telephone calls from defendant between 5:30 and 6:00 a.m. Stansfield heard Linza tell defendant that she was not moving anything out of the house and that he should not come over because of the restraining order.

Defendant arrived at the house between 8:00 and 9:00 a.m. in his sister's blue Honda Accord. He approached George, Jr.,

who was standing in the front yard. Defendant demanded the keys to the house, saying, "'You're not leaving -- you're not going anywhere.'" He grabbed the keys, unlocked the front door, and headed for the kitchen with George, Jr., right behind him. A scuffle ensued. Defendant pulled a small black revolver from his back pocket. George, Jr., knocked the gun from defendant's hand, but it landed within defendant's reach. Fearing that defendant would shoot him, George, Jr., ran from the house. He and Stansfield's son went to a neighbor's house to call 911.

When defendant reached the kitchen, he pulled the telephone wire from the wall and threw the phone on the floor. Linza came out of the master bedroom telling defendant to put the gun down so that they could talk. Defendant responded that he was going to kill her. He and Linza struggled in the hallway and inside the master bedroom. Stansfield heard the bedroom door slam, Linza saying, "George, George, stop, George stop," then three gunshots.

Stansfield tried to get out of the house through the garage, but the door was locked. When defendant left the house, Stansfield went back inside the house to call 911 from George, Jr.'s room. Defendant was on the porch and Linza was at the front door. Stansfield heard defendant say, "Bitch, you lied to me." Linza had her hand over the deadbolt, talking with defendant. She was trying to get defendant to calm down and leave, but defendant continued to demand that she unlock the door. Stansfield described defendant's voice as "mean and ugly."

While making the 911 call in George, Jr.'s, room, Stansfield heard shooting. She hid in the closet. When Stansfield came out, she saw Linza laying on the floor near the front door.

There were two witnesses to what occurred on the front porch. George, Jr., who was across the street calling 911 from the neighbor's house, saw defendant standing close to the front door. He heard defendant scream, "Open up the door." At that point, George, Jr., heard two or three more gunshots. Defendant had a gun in his left hand when he turned and walked toward Linza's car.

Tsugio Tomono, the Johnson's neighbor, saw defendant arrive at the house around 9:00 a.m. Shortly after defendant entered the house, Tomono saw two young men run across the street and heard gunshots. He then heard glass breaking and "three pops." Both George, Jr., and Tomono watched defendant leave the scene.

Paramedics arrived at the Johnson house at 9:27 a.m. They were unable to revive Linza. The forensic pathologist testified that Linza died from a gunshot wound to the chest.

Defendant's cousin Marcellous Johnson, Jr., lived in Rancho Cordova with his daughter and her children. Defendant arrived at Marcellous's apartment between 10:00 and 11:00 a.m. the morning of the murder. His left arm was injured and wrapped in a shirt. Defendant told Marcellous that he had just shot and killed his wife. Defendant explained that he injured his arm when he put it through the front door window at his house. Marcellous offered to take defendant to the hospital but

defendant did not want to go. Marcellous testified that defendant was sober when he arrived at the apartment, but drank until the police arrived to arrest him the following morning.

Defendant told Marcellous more details about the killing. Defendant said that he and Linza were supposed to go outside to talk, but once he stepped outside, Linza slammed and locked the front door. According to defendant, he knocked on the door and said, "Please let me in." Defendant told Marcellous that when Linza failed to let him in the house, he put his hand through the broken window and shot Linza three times. He fired more than one shot because he was not sure if he had hit Linza with the first one. Defendant threw the gun out of the car window on the way to Marcellous's apartment.

Prior Incidents of Domestic Violence

The prosecution introduced evidence of four uncharged incidents of domestic violence between defendant and Linza. The first incident occurred on December 4, 1986. George, Jr., saw defendant punch Linza twice on the side of the head. Sacramento County Sheriff's Deputy Rolfe Appel, who responded to the call, testified that Linza had a slight cut and minor swelling on the left side of her face near her eye.

The second incident occurred on December 31, 1988. On that date, George, Jr., saw defendant hit Linza in the stomach causing her to collapse and have a seizure. Defendant called 911. Sacramento County Sheriff's Detective Arnold Petty, Jr., spoke with defendant about the incident four days later. Defendant admitted hitting Linza "on the side down low, just

like she said." Defendant also admitted that Linza had a seizure after she fell down.

The third incident occurred around October 29, 1990. Defendant admitted to Deputy Samuel Rivera that he slapped Linza with his hand because she did not want to talk with him.

The fourth incident occurred on August 23, 1992. George, Jr., testified that while in the car with his parents and brother, he saw defendant punch Linza in the face.

Defendant's Testimony

Defendant testified in his own defense. He denied chasing Linza and her friends after the basketball game. Defendant acknowledged running into some mailboxes on November 9, 1996, but denied chasing Linza that day. As to the December 9, 1996 incident, defendant testified that Linza came to his sister's house voluntarily. He stated that they talked and drank for three hours.

Defendant gave a different account of the events of December 12, 1996. He testified that he and Linza had agreed to a divorce. He planned to move back to the house after she and the boys moved out. According to defendant, Linza called him at 8:30 a.m. on December 12, 1996, and told him to come over and pick up a set of house keys.

In his testimony, defendant described a series of unfortunate accidents that occurred after he arrived at the house. Defendant was not thinking about the gun in his back pocket. He had carried it with him when visiting an unfamiliar neighborhood the night before. Defendant claimed it was the

first time he had carried a gun, but admitted in later testimony that he had used a gun to shoot somebody in 1979. According to defendant, it was George, Jr., who pulled the gun from defendant's back pocket. Defendant testified that he accidentally pulled the phone cord out of the wall when moving a lamp. He shot the hole in the bedroom door in an attempt to get Linza to stop fighting him. Once locked outside, defendant wanted to get the keys to his sister's car so he could leave. He used the gun to break the glass in the door so he could reach the lock on the inside. In the process of breaking the glass, the gun went off. Defendant caught his arm on a piece of the broken glass. As defendant tried to free his arm, the gun accidentally fired a second time. Defendant testified that he did not intend to fire the gun and did not intend to shoot his wife.

DISCUSSION

I.

Motion To Substitute Retained Counsel

Defendant contends that the court abused its discretion and violated his constitutional right to counsel by denying his motion to substitute retained counsel on the first day of trial. We conclude that the court acted within its discretion and there was no constitutional violation.

The parties agree on the general principles governing motions to substitute retained counsel. A criminal defendant's due process right to effective assistance of counsel includes the right to retain counsel of his or her own choosing. (*People*

v. Courts (1985) 37 Cal.3d 784, 789.) "Although there is not an *absolute* right to be represented by a particular attorney, the courts will make all *reasonable* efforts to insure that a defendant financially able to retain an attorney of his own choice can be represented by that attorney. Under certain circumstances, due process is denied to a defendant who is not granted a continuance in order to secure a private attorney of his own choosing. [Citation.]" (*People v. Johnson* (1970) 5 Cal.App.3d 851, 858.)

The parties also acknowledge the limitations on a defendant's right to hire or fire retained counsel. "[T]he 'fair opportunity' to secure counsel of choice provided by the Sixth Amendment 'is necessarily [limited by] the countervailing state interest against which the sixth amendment right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of "assembling the witnesses, lawyers, and jurors at the same place at the same time."'" (*People v. Ortiz* (1990) 51 Cal.3d 975, 983-984.) Thus, the right to retained counsel "must be carefully weighed against other values of substantial importance, such as that seeking to ensure orderly and expeditious judicial administration, with a view toward an accommodation reasonable under the facts of the particular case. [Citation.] A defendant may not, for example, demand a continuance if he is unjustifiably dilatory in obtaining counsel [citation], or if he arbitrarily chooses to substitute counsel at the time of trial [citation]. 'There are

no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.' [Citation.]" (*People v. Byoune* (1966) 65 Cal.2d 345, 346-347.)

When defendant seeks substitution of retained counsel on the day of trial, the question becomes "whether such a disruption was reasonable under the circumstances." (*People v. Turner* (1992) 7 Cal.App.4th 913, 919.) We review the court's ruling for abuse of discretion. (*People v. Jeffers* (1987) 188 Cal.App.3d 840, 850.) Here, the court properly weighed the relevant considerations and did not abuse its discretion in denying the motion.

The court re-arraigned defendant on the current charges on October 12, 2005. Two weeks later, the court set the trial date in February 2006. At the trial readiness conference on February 1, 2006, nearly four months after arraignment, defendant made an oral *Marsden* motion.[2] Defendant made no mention of seeking retained counsel at that time. The court denied the motion finding that: (1) the motion was untimely, coming one week before trial; and (2) there had been no irreconcilable breakdown in the relationship between defendant and appointed counsel.

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

On February 16, 2006, the first day of trial, attorney John Brennan made an oral motion to substitute as retained counsel. He requested a two-and-one-half-month continuance to prepare for trial. Brennan represented that the prosecutor had agreed to a trial date that would allow for the substitution. In response to questioning by the court, the prosecutor stated that the People had their witnesses under subpoena and were ready to proceed. She had been concerned that two witnesses from out of state might not be available to testify if the trial were continued, but told Brennan's law partner she had no objection to a continuance if the defense stipulated that the prosecution could use the transcript from the first trial if her witnesses failed to appear.

Appointed defense counsel did not object to the substitution but suggested that the court explore the issues discussed with defendant in the *Marsden* hearing held on February 1, 2006. At the second *Marsden* hearing, the court found that defendant's misgivings about appointed counsel's representation did not rise to the level that would warrant his replacement. At the close of the hearing, the court stated, "Now, I'm going to bring the attorneys back in and I'm going to look at the request separate from *Marsden* of whether they may substitute in on [defendant's] behalf."

Back on the record with all counsel present, Brennan offered a four-sentence argument: "[Y]our Honor, for the record, we're only requesting about two-and-[one]-half months of a continuance on this matter. We fully believe we'll be ready

to go at that point, and it's not really delaying the proceedings that much. It's not a delay tactic. It's giving [defendant] an opportunity to have counsel of his choosing." Brennan did not explain why defendant waited until the day of trial to substitute retained counsel.

The court indicated that it would have granted Brennan's request to substitute as retained counsel had it come at an earlier time, but ruled the current motion untimely. The court explained: "As it stands now, this is the eighth day of ten. This is eight of ten for trial. We are starting the trial. It's sent to me, to this Court, for beginning the trial today. The district attorney is ready. Her witnesses are subpoenaed. Her exhibits are marked. She's ready to try the case. [Defendant's] attorney is ready. He has prepared for this case, and he, as I have indicated already, is a very fine lawyer who is going to be able to fully and adequately and capably represent [defendant]. And given the compilation of all these factors, not the least of which is that this is the day of trial, your motion to substitute in Mr. Brennan and Mr. Wise, very fine attorneys that they are, is denied."

Defendant argues that on this record, "[t]he only entity that faced the possibility of prejudice was the trial court itself, but no showing was made that this would somehow affect the 'orderly and expeditious judicial administration.'" He maintains that the requested continuance was "brief." Defendant also contends that it was unnecessary for the court to hold a second *Marsden* hearing to explore the state of communications

between defendant and appointed counsel "rather than discuss directly [defendant's] request to retain counsel of his choice."

Contrary to defendant's argument, the court is not the equivalent of a party that is "prejudiced" by a request for continuance. The Legislature grants the court power to "provide for the orderly conduct of proceedings before it . . . ." (Code Civ. Proc., § 128, subd. (a)(3).) Here, the court ruled that the untimely motion to substitute retained counsel and request for continuance would disrupt the orderly trial process. Its ruling is supported by the fact that the prosecution had subpoenaed witnesses and both counsel were ready to go to trial. Moreover, the charged offenses occurred in 1996, a federal court had overturned defendant's first conviction, and the court could reasonably conclude that both parties faced challenges in examining witnesses whose memories might have faded in the ensuing years. The prosecutor expressed concern about the availability of out-of-state witnesses in the event of a continuance. The court had discretion to reject in the interest of justice the proposed stipulation to use testimony from the first trial in the event those witnesses were unavailable.

In his reply brief, defendant argues that he was not dilatory or unreasonable in moving to substitute retained counsel on the first day of trial. He suggests that once the federal court overturned his conviction, there were "certain difficulties in reaching and obtaining new counsel." He highlights the date of his first *Marsden* motion, not the date of his rearraignment in Sacramento County Superior Court, and

emphasizes that he made arrangements to hire new counsel within two weeks of the court's denial of the *Marsden* motion. Neither of these arguments was made in the trial court or in defendant's opening brief to counter a potential claim of lack of diligence. Moreover, there is nothing in the record to support this claim. We reject it.

Finally, the court did not misunderstand the difference between a *Marsden* motion and a request to substitute retained counsel. The court held separate hearings to address the issues relevant to each motion. Timeliness was an issue common to both. The court did not abuse its discretion in ruling that the request to substitute counsel and request for continuance were untimely. Defendant does not challenge the court's denial of his *Marsden* motions.

II.

Evidence of Uncharged Domestic Violence

Defendant argues that the court abused its discretion and violated his due process rights by admitting evidence of uncharged acts of domestic violence under Evidence Code sections 1109 and 352. On the constitutional question, defendant concedes that we are required to follow *People v. Falsetta* (1999) 21 Cal.4th 903, which holds that Evidence Code section 1108, a similar statute dealing with admission of uncharged sexual offenses, does not violate due process. Defendant raises the due process issue to preserve it for federal review. The remaining question is whether the court abused its discretion

under Evidence Code section 352 by admitting four incidents of uncharged domestic violence. We conclude it did not.

Evidence of prior criminal conduct is generally inadmissible to show that the defendant has a propensity or disposition to commit those acts. (Evid. Code, § 1101, subd. (a).)[3] However, the Legislature created exceptions to the general rule where the uncharged acts involve sexual offenses or domestic violence. (Evid. Code, §§ 1108 & 1109.) By its express language, Evidence Code section 1109 requires the court to engage in the weighing process under Evidence Code section 352 before admitting propensity evidence.[4] (Evid. Code, § 1109, subd. (a)(1); *Falsetta, supra,* 21 Cal.4th at p. 917; *People v. Johnson, supra,* 77 Cal.App.4th at p. 418 [applying *Falsetta* to

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[3] Evidence Code section 1101, subdivision (a) states: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

[4] Evidence Code section 1109 reads in relevant part: "(a)(1) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Evidence Code section 1109 "since the two statutes are virtually identical"].) In this weighing process, the court must consider factors such as relevance, similarity to the charged offense, the certainty of commission, remoteness, and the likelihood of distracting or inflaming the jury. (*Falsetta, supra,* at p. 917.) We review a challenge to admission of prior bad acts under Evidence Code section 352 for abuse of discretion and will reverse only if the court's ruling was "'arbitrary, whimsical, or capricious as a matter of law. [Citation.]'" (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

Defendant maintains that "the evidence of the prior incidents of domestic violence involving [defendant] and Linza had little, if any, probative value with respect to the disputed factual issues in the case. Identity was not in dispute; [defendant] did not deny that he was involved in Linza's death. Rather, the principal issues were whether the killing of Linza was accidental or negligent or an intentional act with malice." Defendant argues that evidence of prior domestic violence "added nothing to what the jurors already knew: that [defendant] and Linza had difficult times, separating and arguing." He also contends that evidence that he hit Linza with his hand in the past was not probative of what happened the morning of Linza's death. Defendant argues that the evidence of prior incidents of domestic violence was not relevant to defendant's mental state because they involved general intent crimes. He points out that "[t]his is a far different mental state than was required to convict [defendant] of first degree murder on a theory of

premeditation and deliberation." Lastly, defendant asserts that the evidence was unduly prejudicial, creating the risk that the jury would prejudge the case based on evidence lacking probative value. We disagree with defendant's assessment of the relevance of the evidence of prior incidents of domestic violence and that the evidence was unduly prejudicial.

The record reveals that the court carefully considered the three incidents that occurred in August 1992, December 1988, and December 1986, which George, Jr., referred to in his testimony. Defense counsel challenged admission of the 1986 incident on grounds of remoteness, a concern which the court shared. Thereafter, the court limited the testimony to the basic facts surrounding each incident, excising references to rape and threats made to George, Jr. The court stated that it had performed the balancing process required under Evidence Code sections 1109 and 352 and concluded that the evidence was admissible. By this ruling, the court impliedly found that the evidence was relevant to the issues before the jury. Contrary to defendant's argument, the court could reasonably conclude that the prior incidents of domestic violence, which appeared to have escalated into stalking and car chases in the fall of 1996, were relevant to defendant's mental state on the morning she was killed. Concisely presented, the facts of the uncharged incidents did not inflame the jury to defendant's prejudice. (*Falsetta, supra,* 21 Cal.4th at p. 917.)

Neither party directs us to the court's findings regarding admission of Deputy Rivera's testimony concerning the fourth

incident of prior domestic violence. However, even if Rivera's testimony was erroneously admitted, the error was harmless under any standard. The facts set forth in the factual and procedural background show that the evidence against defendant was overwhelming.

III.

CALCRIM No. 852

Defendant describes challenges and amendments to the 1996, 1999 and 2002 versions of CALJIC No. 2.50.02 regarding the use of Evidence Code section 1109 evidence and argues that CALCRIM No. 852 suffers from the same fundamental flaw as the CALJIC instructions used in the past. Defendant contends that "[b]y expressly permitting the jury to do the impermissible – infer guilt based on propensity – the instruction violates the defendant's due process rights. Moreover, CALCRIM 852 is both internally inconsistent and inconsistent with other instructions given to the jury in this case and, as a result, confuses and misleads the jury about the burden of proof and what must be proved in order to find the defendant guilty of the charged offense." There is no merit in defendant's argument. The court instructed the jury with CALCRIM No. 852, which states in relevant part:

"The People presented evidence that the defendant committed domestic violence that was not charged in this case, specifically, four acts alleged to have occurred in 1986--one in 1986, one in 1988, one in 1990, and one in 1992.

"Domestic violence means abuse committed, for our purposes, against an adult who is a spouse. Abuse means intentionally or recklessly causing or attempting to cause bodily injury or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else.

"You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. [¶] Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. [¶] A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely.

"If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and based on that decision also conclude that the defendant was likely to commit and did commit the offense charged in Count One of the Information or the lesser offenses of which I also instructed you on relating to Count One. [¶] If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of any of those offenses. The People must still prove each element of every charge beyond a reasonable doubt. [¶] . . . [¶]

"Do not consider this evidence for any other purpose, except for the limited purpose of the 1992 allegation. You may consider that as a prior inconsistent statement."

As we explained, Evidence Code sections 1108, allowing admission of evidence of uncharged sexual offenses, and 1109, allowing admission of evidence of uncharged domestic violence, is "virtually identical." (*Johnson, supra*, 77 Cal.App.4th at p. 417.) Likewise, the language of CALCRIM No. 1191, the current instruction on Evidence Code section 1108, tracks the language of CALCRIM No. 852, the current instruction on Evidence Code section 1109.[5] This court recently rejected a

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[5] The version of CALCRIM No. 1191 given in *People v. Schnabel* (2007) 150 Cal.App.4th 83 (*Schnabel*) read in relevant part: "'You may consider [the uncharged sex offenses] evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely, that is, the uncharged crimes evidence. [¶] If you decide that the defendant committed the uncharged offense or offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit the sex offenses as charged here. [¶] If you conclude that the defendant committed the uncharged offense or offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the charged sexual offenses. The People must still prove each element of every charge beyond a reasonable doubt.'" (*Id.* at p. 87, fn. 3.)

constitutional challenge to CALCRIM No. 1191 in ***Schnabel***,[6] stating:

"As to defendant's challenge to the instruction, it is based on his assertion that the instruction on the use of prior sex offenses 'wholly swallowed the "beyond reasonable doubt" requirement.' The California Supreme Court has rejected this argument in upholding the constitutionality of the 1999 version of CALJIC No. 2.50.01. (***People v. Reliford*** (2003) 29 Cal.4th 1007, 1012–1016.) The version of CALJIC No. 2.50.01 considered in ***Reliford*** is similar in all material respects to Judicial Council of California Criminal Jury Instructions (2006) CALCRIM No. 1191 (which was given here) in its explanation of the law on permissive inferences and the burden of proof. We are in no position to reconsider the Supreme Court's holding in ***Reliford*** (***Auto Equity Sales, Inc. v. Superior Court*** [1962] 57 Cal.2d [450] at p. 455), and by analogy to ***Reliford***, we reject defendant's argument regarding the jury instruction on use of his prior sex offenses." (***Schnabel, supra,*** 150 Cal.App.4th at p. 87, fn. omitted.) The same rationale applies to the case before us.

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6 The Supreme Court ordered ***Schnabel*** depublished on July 25, 2007, by a grant of review on an unrelated issue. (***People v. Schnabel***, 2007 Cal. LEXIS 7885 (July 25, 2007).) The Reporter of Decisions subsequently directed that the opinion be ordered published. (***People v. Schnabel***, 2007 Cal. LEXIS 12134 (October 24, 2007).)

IV.

Prosecutorial Misconduct

Defendant contends that the prosecutor committed prejudicial misconduct by misstating the reasonable doubt standard and shifting the burden of proof during closing argument. He maintains that the prosecutor's use of the term "articulate" improperly suggested that jurors had to have a "good reason" to doubt. We reject his contention.

"'"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.]" (***People v. Samayoa*** (1997) 15 Cal.4th 795, 841 (***Samayoa***).) At the same time, "'"'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]'"'" (***People v. Hill*** (1998) 17 Cal.4th 800, 819 (***Hill***).) In reviewing a claim of misconduct based on the prosecutor's argument to the jury, we will not "'lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (***People v. Frye*** (1998) 18 Cal.4th 894, 970.)

"As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*Samayoa, supra,* 15 Cal.4th at p. 841.)

We conclude that defendant forfeited his claim of misconduct by failing to make a timely objection and request an admonition at trial. (See *People v. Panah* (2005) 35 Cal.4th 395, 462.) However, we address the merits of defendant's claim to show that defense counsel was not ineffective for failing to object to the prosecutor's comments.

Toward the end of the prosecutor's argument on reasonable doubt, she stated: "Now, all 12 of you have to go back into that jury deliberation room and you have to listen to the thoughts and concerns of other people. And if one of you says to the other 11, I have a reasonable doubt, the other 11 of you ask that person cordially to explain themselves, to *articulate* the doubt, to determine if the doubt is based upon the real evidence that was up here, the believable evidence that was up here or if it's an imaginary doubt. Because not every single piece of this puzzle will be here. There will be questions that may be unanswered by the evidence. [¶] As his Honor explained

to you earlier when the question was asked about Frank Smith, you are not to speculate about things that are not before you. And neither side has to call every person mentioned by the evidence. So ask yourselves and ask the other people back there, am -- what I'm feeling, is it based on something real, is it based on something I can ***articulate*** or is it based on the fact that somebody is calling a picture of San Francisco St. Louis, even though there's absolutely no evidence to back that up." (Italics added.)

Read in context, the prosecutor's comments did nothing more than emphasize each juror's duty to deliberate by engaging the other jurors in a discussion of the evidence. The court subsequently instructed the jury on the same point. There is no reasonable likelihood "that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (***Samayoa, supra,*** 15 Cal.4th at p. 841.) We therefore conclude that there was no misconduct.

DISPOSITION

The judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

DAVIS, Acting P.J.

MORRISON, J.