Filed 7/11/08

CERTIFIED FOR PARTIAL PUBLICATION*

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ISAIAS SANDOVAL, Defendant and Appellant.	C056451 (Super. Ct. No. 06F08421)

APPEAL from a judgment of the Superior Court of Sacramento County, John A. Mendez, Judge. Affirmed.

John Schuck, 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, Marcia A. Fay, Deputy Attorney General, for Plaintiff and Respondent.

---

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

A jury convicted defendant Isaias Sandoval of spousal rape with force (Pen. Code, § 262, subd. (a)(1) - count one),[1] corporal injury to a spouse (§ 273.5, subd. (a) - count two), felony false imprisonment (§ 236 - count three), criminal threats (§ 422 - count four) and damaging a wireless communication device, a misdemeanor (§ 591.5 - count five).

Sentenced to state prison for an aggregate term of six years, defendant appeals contending (1) the trial court prejudicially erred in excluding the testimony of a defense expert, (2) the trial court failed to instruct the jury to find each element true beyond a reasonable doubt, (3) Evidence Code section 1109 is unconstitutional, and (4) the trial court abused its discretion in allowing the prosecution to introduce evidence of prior domestic violence. We reject defendant's contentions and will affirm the judgment.

FACTS

A.G. and defendant had been married to each other for 11 years; during the last three years they were separated. After their separation, A.G. moved to Sacramento with the children in February 2006, leaving defendant behind and not telling him where she was going. Nonetheless, defendant found her and

---

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

arrived in Sacramento in May or June 2006. In September 2006, A.G. lived with defendant and their two children.

About 9:00 a.m. on September 21, 2006, A.G. and defendant argued about defendant's lack of employment. A.G. told defendant that their relationship was not working and he needed to move out. A.G.'s testimony about what happened next differed from her earlier statements to the police.

At trial, A.G. testified that defendant asked her not to evict him, grabbing her upper arms and pushing her in the back with one hand. She did not fall down but instead threw herself to the ground so he would get scared and leave, thinking she was going to call the police. He agreed to leave but she changed her mind and did not want him to leave because he had no place to go and would end up using drugs, so she tried to call the police to report that he hit her. She used her cell phone but defendant took it and broke it. Angry, she broke the phone more. She went to the bedroom. Defendant followed A.G. into the bedroom where they had consensual sex. At first, she did not want to have sex. After he asked for forgiveness and she forgave him, they had consensual sex. She described the sex as gentle. About noon, A.G. left defendant in their apartment and ran to the complex office where she called the police. She was crying. The 911 tape was played for the jury.

A.G. admitted that she had previously reported the following to the police. Defendant threw her to the floor and hit her in the face two times with his fist. He took his belt off, made a loop with it and threatened to strangle her with it. He took her cell phone and broke it, preventing her from calling the police. He also threatened to stab her to death with a knife if she called the police. He placed a towel over her nose and mouth and pulled her underpants down. She pleaded with him to stop, telling him she did not want to have sexual intercourse, and tried to push him off. He bit her hand. She continued to struggle but he penetrated her vagina with his penis and ejaculated. She went to the bathroom. Defendant made her return to the bedroom and stay for about an hour and then told her he would leave. She called 911 from the apartment office, reporting that she could not use her cell phone because defendant had broken it, that he had hit her, thrown her to the floor, struck her in the head, forced her to have sexual intercourse, and locked her up in a room.

At trial, A.G. denied that defendant hit her, threatened to kill her or her sister, or threatened to stab her. A.G. explained away her scratches on her hand as caused by cleaning. Although defendant bit her on the hand and back, he had done so before during sex. She bit herself on the inside of her lip and her ear injury was an old one. She had no explanation for the

bruise over her right eye. She had a fingernail mark on her nose.

A.G. claimed at trial that defendant had pushed her, but only once, days before the incident on September 21. She denied that he had beaten her three years before and had threatened to hurt her if she called the police. A.G. admitted at trial that she told Ann Tran on September 26, five days after the current incident, that defendant had a history of domestic violence, and that A.G. was afraid defendant might hurt family members if released from jail. She admitted she told Tran that defendant hit her, threw her on the bed, covered her mouth with a towel and raped her, and that three years before, defendant had beaten her and threatened to hurt her if she reported it.

At trial, A.G. admitted that when she was examined at a hospital, she told a nurse practitioner and a domestic violence advocate who was present that defendant had threatened to hit her with a belt and to cut her up with a knife and threatened to kill her and her sister. She also admitted that defendant punched A.G. in the face, dragged her by her hair, grabbed her by her arms and wrists, pinched her lips together to keep her quiet, put a towel over her nose and mouth, broke her cell phone and forced her to have sexual intercourse.

About 2:00 p.m. on September 21, 2006, the apartment complex's security guard, Jose Hernandez, went to the complex

office and saw A.G. She was crying. She needed an interpreter when the police arrived. She told Hernandez that she had a domestic violence problem at home. At trial, A.G. denied discussing the September 21 incident with the complex's security guard prior to the arrival of the police.

When Sacramento Deputy Sheriff Kenny Lee arrived at the apartment complex office, Hernandez interpreted for Lee and A.G. A.G. had bruising and redness on her forehead, scratches on her nose and back, redness on the inside of her leg, abrasions on her elbow and wrist and a bite mark on her hand. At her apartment, A.G. showed the officer the belt in the bathroom and broken cell phone pieces. A.G. told the officer that she was married to defendant, that they had moved from Mexico, and that she had moved the previous year to Sacramento from the Bay Area to get away from defendant and did not tell him she was moving. Defendant found her three months before the September 21 incident and she let him move in provided that he obtain employment and assist around the house. On September 21, they argued because he had done neither and she told him to move out. She then recounted the incident.

The sexual assault examination revealed non-motile sperm in A.G.'s vagina which was consistent with a sexual assault earlier in the day and a small tear in A.G.'s vaginal opening which was

a new injury and very unusual for someone who does not report a sexual assault.

When interviewed by detectives on September 25, 2006, defendant admitted that he had argued with A.G., broke her cell phone because she was going to call the police, bit her hand and her back, and hit her once with the belt. He admitted he grabbed her, taking her to bed where they had sexual intercourse even though she said no. He claimed that she liked him to bite her. He also claimed that he had been using "crystal" the day of the incident.

On October 11, 2006, defendant's telephone call from jail to a woman named "Sonia" was monitored. He stated that the sexual abuse charge was "screwing" him up and if "she take[s] off the charges" he would not bother A.G.

On December 20, 2006, defendant's telephone call from jail was monitored. He claimed he received a letter and "she says that . . . she'll help me. That I tell her how. That she was told that she can't take away the charges." Defendant said she could help him by "not appearing at trial."

On February 5, 2007, Sonia Orozco-Gutierrez visited defendant at the jail. Defendant told her that "if they don't [] find her this time the case will close" and "the case closes if -- if she doesn't appear."

DISCUSSION

I.

Defendant first contends that the trial court prejudicially erred in excluding defense expert testimony on marital relationships and sex. We conclude there was no error.

Background

Prior to presentation of defense evidence, defense counsel sought to call Deborah Davis as an expert and the trial court conducted an Evidence Code section 402 hearing at the prosecutor's request. Davis was a psychology professor at the University of Nevada and had taught psychology classes for 34 years. She had taught seminars pertaining to romantic relationships for 16 years, which included the topic of handling conflict. She had also published research on sex in relationships, which included research on rape and consent. She also owned Sierra Trial and Opinion Consultants, a corporation. Defense counsel offered Davis as an expert on marital relations and sex.

The prosecutor questioned Davis. Davis admitted that she had never qualified to testify in court on the topic of marital relations and sex; she had "never been asked to serve as one." She had served as a consultant on the topic in a civil case and three criminal cases, all for the defense. She had previously qualified as an expert on the topic of eyewitness accuracy and

interrogations and confessions, each time for the defense. With respect to the current case, Davis had reviewed the preliminary hearing transcript and defendant's statement to the police. She planned to testify about couples, conflict and sex, and the theory colloquially referred to as "make-up sex," which she described as a "phenomena of sex being more arousing after a fight in some circumstances," as a pattern of behavior and why it occurs. She explained that the make-up sex in literature was "investigated" under other theories, that is, "attachment theory, excitation transfer theory, and so on." She planned to inform the jury about things they did not know in order to come to their own conclusions, "not to come to a conclusion [herself]."

Defense counsel argued Davis's opinion was relevant to the issue of consent and defendant and A.G.'s pattern of interaction. Defense counsel planned to ask Davis a hypothetical question about make-up sex. The prosecutor opposed Davis's testimony arguing that it was not outside the scope of common knowledge and experience and that Davis lacked expertise.

The trial court precluded the testimony, finding that the testimony would not assist the jury "in any way," that Davis's proffered testimony was not beyond the jury's common experience and not relevant to any defense since Davis stated that she was not reaching a conclusion herself and that her general testimony

would not address the issue of whether defendant actually and reasonably believed that A.G. consented. The court noted that Davis had never qualified as an expert in marital relations and sex, commenting that it was "probably because" the testimony "simply would not assist the trier of fact and/or it's not necessarily beyond the common experience of the jurors." The court also noted that Davis had never interviewed defendant or A.G.

Analysis

Defendant contends that the trial court abused its discretion in excluding Davis's proffered testimony. Defendant claims the trial court's erroneous ruling also violated his right to due process and to present a defense. (U.S. Const., 5th, 6th, and 14th Amends.; Cal. Const., art. I, §§ 7, 15; *In re Martin* (1987) 44 Cal.3d 1, 29-30; *People v. Garcia* (2005) 134 Cal.App.4th 521, 536.) Defendant argues that Davis was fully qualified to testify as an expert on the topics of marital relations and sex and her testimony was relevant to consent. With respect to Davis's qualifications, defendant asserts that it was undisputed that she had extensive experience. Citing *McCleery v. City of Bakersfield* (1985) 170 Cal.App.3d 1059, defendant claims that the practice should not be to exclude for lack of prior testimony because there would never be any experts. With respect to the relevance of Davis's testimony,

defendant cites nothing on point but argues Davis's testimony on "make-up" sex would "disabuse jurors regarding misconceptions about the likelihood of consensual sexual relations immediately after a heated and physical argument." Citing *People v. Wells* (2004) 118 Cal.App.4th 179, he claims such testimony is analogous to expert testimony on child sexual abuse accommodation syndrome (CSAAS). (*Id.* at p. 186.) We find no error.

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. . . ." (Evid. Code, § 720, subd. (a).) Expert opinion is appropriate if it is "(a) [r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) [b]ased on matter (including his special knowledge . . .) . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject . . . ." (Evid. Code, § 801.)

A trial court's determination as to whether an expert should be allowed to opine about a particular subject is reviewed on appeal for abuse of discretion. (*People v. Catlin* (2001) 26 Cal.4th 81, 131; *People v. Mayfield* (1997) 14 Cal.4th 668, 766; *People v. Manriquez* (1999) 72 Cal.App.4th 1486, 1492.)

CSAAS cases involve expert testimony regarding the responses of a child molestation victim. Expert testimony on the common reactions of a child molestation victim is not admissible to prove the sex crime charged actually occurred. However, CSAAS testimony "is admissible to rehabilitate [the molestation victim's] credibility when the defendant suggests that the child's conduct after the incident--e.g., a delay in reporting--is inconsistent with his or her testimony claiming molestation. [Citations.]" (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300 (*McAlpin*).) "'Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior. . . .' [Citation.]" (*Id.* at p. 1301.) "For instance, where a child delays a significant period of time before reporting an incident or pattern of abuse, an expert could testify that such delayed reporting is not inconsistent with the secretive environment often created by an abuser who occupies a position of trust. Where an alleged victim recants his story in whole or in part, a psychologist could testify on the basis of past research that such behavior is not an uncommon response for an abused child who is seeking to remove himself or herself from the pressure created by police investigations and subsequent court proceedings. In the typical criminal case, however, it is the

People's burden to identify the myth or misconception the evidence is designed to rebut. Where there is no danger of jury confusion, there is simply no need for the expert testimony. [Citation.]" (*People v. Bowker* (1988) 203 Cal.App.3d 385, 394.)[2]

We reject defendant's argument that Davis's testimony is akin to CSAAS testimony. First, the evidence was not proffered to rehabilitate the complaining witness; it was offered to explain her consent and to bolster her recantation at trial. Second, the proffered evidence did not relate to any behavior of the complaining witness, subsequent to the criminal conduct, that was inconsistent with the crime. Finally, the defense identified no myth or misconception held by the jury that needed to be addressed. Defense counsel's argument was simply that not

---

[2] Faced with the question of the admissibility of expert testimony concerning "rape trauma syndrome," *People v. Bledsoe* (1984) 36 Cal.3d 236 observed, "In a number of the cases in which the issue has arisen, the alleged rapist has suggested to the jury that some conduct of the victim after the incident--for example, a delay in reporting the sexual assault--is inconsistent with her claim of having been raped, and evidence on rape trauma syndrome has been introduced to rebut such an inference by providing the jury with recent findings of professional research on the subject of a victim's reaction to sexual assault. [Citations.] As a number of decisions have recognized, in such a context expert testimony on rape trauma syndrome may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths. [Citations.]" (*Id*. at pp. 247-248, fn. omitted.) *Bledsoe* concluded that rape trauma syndrome testimony is inadmissible to prove the victim was in fact raped. (*Id.* at pp. 248-251.)

everyone may be aware of make-up sex. As the Attorney General argues, the concept of "make-up" sex was within the common knowledge and experience of the jurors, was not relevant to the issue of consent and would not have assisted the jury on the issue of consent. We conclude the proffered expert testimony would not have assisted the jury in understanding the concept of make-up consensual sex. Nor would it have assisted the jury in determining the complaining witness's credibility -- the primary issue at trial. There was simply no need for expert testimony.

The trial court's statement that Davis had never qualified before to testify on marital relations and sex, particularly make-up sex, was simply part of the trial court's observation that the testimony would not assist the trier of fact. The trial court did not abuse its discretion in excluding Davis's testimony. Defendant's constitutional claims likewise lack merit for the reasons stated.

II.

Defendant next contends that the trial court erred in failing to instruct the jury that it must find every element of the crimes has been proved beyond a reasonable doubt. He cites one instruction, the reasonable doubt instruction, Judicial Council of California Criminal Jury Instructions (2006-2007), CALCRIM No. 220. He argues California case law, Evidence Code section 502 and instructions from other jurisdictions all

require jury instructions which apprise jurors that the prosecution must prove every element beyond a reasonable doubt.

The Fifth and Sixth Amendments to the United States Constitution "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*United States v. Gaudin* (1995) 515 U.S. 506, 509-510 [132 L.Ed.2d 444, 449].)

In reviewing a challenge to the instructions given to the jury, we consider the entire charge, not parts of an instruction or a particular instruction. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) Defendant must show a reasonable likelihood that the jury misunderstood the challenged instructions. (*People v. Cain* (1995) 10 Cal.4th 1, 36-37 (*Cain*); *People v. Anderson* (2007) 152 Cal.App.4th 919, 938 (*Anderson*).)

Orally, the court instructed the jury in the language of CALCRIM No. 220 as follows:

"The fact that a criminal charge has been filed against the [] defendant is not evidence that the charge is true. You must not be biased against a defendant just because he has been arrested, charged with a crime, or brought to trial.

"You also must not be biased against a defendant because he is in custody. Do not speculate about the reason. The fact he

is in custody is not evidence that the charges are true, and you must completely disregard this circumstance[] in deciding the issues in this case.

"A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove the defendant guilty beyond a reasonable doubt.

"Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt, unless I specifically tell you otherwise.

"Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

"In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial.

"Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal, and you must find him not guilty."

The written instruction given to the jury provided the same as the foregoing except as follows. Instead of informing the jury, "This presumption requires that the People prove the defendant guilty beyond a reasonable doubt," the written

instruction informed the jury, “This presumption requires that the People prove each element of a crime beyond a reasonable doubt.”

Although conceding CALCRIM No. 220 was given to the jury in written form and included the language “prove each element of a crime,” defendant argues reversal is required because the trial court omitted this language in orally instructing the jury. “[M]isreading instructions is at most harmless error when the written instructions received by the jury are correct. [Citation.]” (*People v. Box* (2000) 23 Cal.4th 1153, 1212; see *People v. Osband* (1996) 13 Cal.4th 622, 687.)

We reject defendant’s claim that “at no point in the instructions was the jury ever told that each element of a charged offense must be proved beyond a reasonable doubt.” (Italics omitted.) Considering the entire charge to the jury, the trial court’s omission of certain words in orally instructing the jury in the language of CALCRIM No. 220 was not error. CALCRIM No. 220, in writing, included the missing language. CALCRIM No. 220 further stated, which the court also orally gave, “Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.” In instructing on each crime, the trial court orally and in writing told the jury that the People must prove each of the elements. Further, in instructing on prior uncharged domestic

violence evidence, the trial court specifically instructed, "The People must still prove each element of every charge beyond a reasonable doubt." Defendant has failed to show a reasonable likelihood that the jury misunderstood CALCRIM No. 220 as he claims. (*Cain, supra,* 10 Cal.4th at pp. 36-37; *Anderson, supra,* 152 Cal.App.4th at p. 938.)

Defendant's reliance upon Evidence Code section 502 is misplaced as is his reliance upon jury instructions in other jurisdictions. Evidence Code section 502 provides: "The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt." Evidence Code section 501 provides: "Insofar as any statute, except Section 522, assigns the burden of proof in a criminal action, such statute is subject to Penal Code Section 1096."

Penal Code section 1096 provides: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to an acquittal, but the effect of this presumption is only to place

upon the state the burden of proving him or her guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.'"

The trial court may, but is not required to, instruct the jury in the language of Penal Code section 1096. (Pen. Code, § 1096a; *People v. Freeman* (1994) 8 Cal.4th 450, 503.) "Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, [citation], the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. [Citation.] Rather, 'taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury.' [Citation.]" (*Victor v. Nebraska* (1994) 511 U.S. 1, 5 [127 L.Ed.2d 583, 590].) The instructions here did just that.

In view of the foregoing discussion, we need not discuss the language used in instructions from other jurisdictions cited by defendant as establishing a requirement that the reasonable

doubt instruction phrase reasonable doubt in terms of "each element."

III.

Defendant next contends that Evidence Code section 1109 violates his right to due process and is thus unconstitutional, on its face and as applied, requiring reversal. Defendant's contention is forfeited by his failure to object on this ground in the trial court and, in any event, it lacks merit.

The Attorney General notes that defendant did not object on due process grounds to the admission of the prior domestic violence evidence. Defendant objected to the prosecution's failure to move in limine to introduce the prior evidence. Defendant also objected on the ground of Evidence Code section 352. In his opening brief, defendant concedes he failed to object on constitutional grounds.

People v. Falsetta (1999) 21 Cal.4th 903 (*Falsetta*) upheld the constitutionality of Evidence Code section 1108 which allows admission of prior sex offenses. Evidence Code section 1108 is similar to Evidence Code section 1109. We are bound by *Falsetta* on the constitutionality of Evidence Code section 1108 (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), but *Falsetta* is not binding as to Evidence Code section 1109. An objection on constitutional grounds to Evidence Code section 1109 was required in the trial court to preserve the issue for

appeal. (*People v. Holt* (1997) 15 Cal.4th 619, 666.) In any event, applying the reasoning of *Falsetta*, courts, including this one, have held that no due process violation occurs in admitting prior domestic violence evidence pursuant to Evidence Code section 1109. (*People v. Price* (2004) 120 Cal.App.4th 224, 240; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1025-1030; *People v. Johnson* (2000) 77 Cal.App.4th 410, 412, 416-420 [an opinion of this court].) We concur.

As applied, there is no due process violation. The trial court instructed the jury on the limited use of the prior uncharged domestic violence evidence (CALCRIM No. 852).[3] As

---

[3] The court instructed the jury in the language of CALCRIM No. 852 as follows:

"The People presented evidence that the defendant committed domestic violence that was not charged in this case. Domestic violence means abuse committed against an adult who is a spouse.

"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

discussed in part IV, *post*, the trial court did not abuse its discretion in admitting the evidence. Thus, we reject defendant's "as applied" claim.

IV.

Finally, defendant contends that the trial court abused its discretion in admitting the prior uncharged domestic violence evidence. On appeal, he adds that the prejudice inherent in the evidence was "exacerbated by the prosecutor during closing argument." He also claims that the admission of such evidence resulted in a denial of his rights to due process, a fair trial and fundamental fairness. Further, acknowledging that the trial court gave a limiting instruction, he claims that "no juror could ever limit his or her consideration to the supposedly proper purpose of the evidence." We are not persuaded.

---

commit domestic violence, and based on that decision, also conclude that the defendant was likely to commit and did commit the crimes charged in Count Two and Count Four of the Information.

"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 the crimes charged in Count Two and Count Four of the Information.

"The People must still prove each element of every charge beyond a reasonable doubt. Do not consider this evidence for any other purpose."

In determining whether to admit domestic violence evidence under Evidence Code sections 1109 and 352, the trial court considers the nature of the prior offense, its relevance and similarity to the current offense, as well as its potential to evoke an emotional bias against defendant, the consumption of time, remoteness, and whether the evidence will distract the jury from the current charged offense. (See *Falsetta, supra*, 21 Cal.4th at p. 917 [Evid. Code, § 1108]; *People v. Harris* (1998) 60 Cal.App.4th 727, 737-741 [same].) The trial court's ruling is reviewed for abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

The three-year-old prior acts involved physical violence as did the present offenses. The several-day-old prior act involved shoving or pushing. The prior acts are no more inflammatory than the present offenses. True, as defendant claims, the jury was unaware whether defendant had been punished for the prior uncharged offenses. The evidence of the prior incidents, however, was limited and very few details were offered unlike the present offenses. We reject defendant's claim that the priors would "predominate the deliberations and prevent fair and impartial consideration of the evidence of the current offense." Here, defendant was charged with corporal injury to a spouse and criminal threats. He physically and sexually abused A.G. and threatened to kill A.G. as well as her

sister. The prior uncharged domestic violence evidence was highly relevant to both charges, especially criminal threats which required the element of sustained fear. Also, A.G. recanted and, despite defendant's claim otherwise, the prior uncharged domestic violence offenses were relevant to show that she was truthful when she first reported the current incident.

Evidence Code section 1109, subdivision (e) provides that acts more than 10 years old are inadmissible unless the trial court determines the evidence should be admitted in the interests of justice. That one of the acts was three years old here does not make it "remote" under Evidence Code section 352.

Defendant complains about the prosecutor's closing argument wherein he cited defendant's prior domestic violence as evidence of defendant's propensity to commit the offenses.[4] To the extent

---

[4] The prosecutor argued:

"Prior domestic violence is evidence of guilt. It's two areas of the law that you are allowed to take into consideration, prior conduct as direct evidence of guilt of the charges before you.

"Usually the law says, look, we want the jury to decide what happened on this contact. We don't want them to know he's robbed three prior banks and that, therefore, he must be the bank robber in this case.

"But in domestic violence, the law has decided once an abuser, always an abuser. It's powerful evidence, and I need only prove the prior instance by a preponderance, meaning the slightest tipping of the scales, fifty-one percent.

defendant is attempting to raise a claim of prosecutorial misconduct, it is forfeited because he failed to raise the argument under separate heading with supporting argument and authority. (Cal. Rules of Court, rules 8.360(a), 8.204(a)(1)(B); *People v. Harper* (2000) 82 Cal.App.4th 1413, 1419, fn. 4.) Further, defense counsel voiced no objection to the prosecutor's statements at trial which bars any claim on appeal. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1058.) In any event, the prosecutor's argument was proper comment on the

---

"If you believe it's more likely than not that he beat her three years ago and threatened her, if she reported it, then you can use that as a propensity, meaning that he was likely to commit and did commit this act, only with regards to Count Two and Four, the assault and the threats.

"What it specifically says is if you decide that the defendant committed the uncharged domestic violence, you may, but not required to, conclude from that evidence that the defendant was disposed, or inclined to commit domestic violence.

"And based on that decision, you may also conclude that the defendant was likely to commit and did commit Counts Two and Four.

"And the reality is, if you are deciding that Count Two and Four are true, you are deciding that Count One and Three and Five are true.

"Because if you believe he threatened her, she lied in court. If you believe he assaulted her, then she lied in court.

"Again, not sufficient by itself to prove guilt."

evidence which came in as propensity evidence under Evidence Code section 1109 and inferences to be drawn from such evidence.

Defendant's claim that the jury would not have been able to limit the evidence as instructed ignores the well-settled presumption otherwise. (*People v. Adcox* (1988) 47 Cal.3d 207, 253; *People v. Yovanov* (1999) 69 Cal.App.4th 392, 407.)

Having found no error in admitting the evidence, we reject defendant's argument that the effect of the court's ruling had the additional consequence of violating his rights to due process, a fair trial and fundamental fairness. (*People v. Partida* (2005) 37 Cal.4th 428, 433-439 [limited due process claim not forfeited].)

DISPOSITION

The judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

SCOTLAND, P.J.

NICHOLSON, J.