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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. NICHOLAS HAYES RAE, Defendant and Appellant.	A095637 (Napa County Super. Ct. No. CR102579)

Defendant Nicholas Rae appeals his conviction of one count of elder abuse. (Pen. Code, § 368, subd. (b)(1).) He claims error in the admission of evidence of uncharged personal and financial misconduct and instructional error. We hold that the evidence of uncharged misconduct was admissible under Evidence Code sections 1101, subdivision (b) and 1109, subdivision (a)(2) and that the jury instructions were proper. In the published portion of the opinion, we hold that a unanimity instruction under CALJIC No. 17.01 was not required because defendant was engaged in a continuous course of conduct.

We further hold that the trial court did not err in failing to instruct sua sponte on the defense of consent because consent is not available to a defendant charged with abuse.

We affirm the judgment.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, only the Factual and Procedural Background, part III of the discussion, and the Disposition are certified for publication.

FACTUAL AND PROCEDURAL BACKGROUND

Helen Johnson was an 86-year-old widow living alone in her home in Calistoga when she met defendant Nicholas Rae in approximately 1996. The only information about their early relationship comes from the transcript of a police interview with defendant after Johnson's death, in which he stated that he met Johnson when he did some work on her sprinkler system, and he moved into her home soon after they met. Until June of 2000, Johnson was able to walk around the house and yard. However, she could not see well, and shortly after defendant moved in he began to take care of writing checks and paying household bills. Defendant invited a friend, Joe Jessie Ramirez , to the house a few times a week to help with jobs around the house and with cooking and cleaning. Defendant paid Ramirez with Johnson's money. Ramirez had a prior felony conviction.

In mid-June of 2000, Johnson suffered from sciatic pain, possibly from a fall, and an impacted bowel. Over the course of what a physician stated was "a long period of time," defendant left her in a chair in her bedroom.

On June 25, 2000, Johnson tried to get out of the chair, and defendant noticed that she had developed sores on her back. He called 911. The responding police officer noted that the bedroom was dirty with a strong odor of urine, and there were flies in the house. Soiled linens were on the floor in the bedroom, and open containers of beer and soda were on the countertops, dresser, and nightstand. Johnson was taken to the St. Helena Hospital emergency room.

The nurse who attended her testified that Johnson's back and upper thighs and the back of her nightgown were covered in dried feces. When the nurse peeled the nightgown away a layer of skin came with it in some areas. Johnson had pressure sores,[1]

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[1] The hospital attending physician testified that pressure sores (also called decubitus ulcers) are caused by pressure being exerted on an area of skin over a long period, and are consistent with long periods of sitting or lying down without moving.

and one sore in her perianal area had live maggots in it. The nurse testified that Johnson appeared emaciated and that her condition was one of the worst the nurse had ever seen.

Johnson stayed in the hospital overnight and on the following day, June 26, she was seen by the doctor. He noted that she was very thin and dehydrated. Johnson was discharged from the hospital that same day. On June 27, a home health care nurse from Adventist Home Health Care found Johnson in her bed at home, wearing a diaper that was wet with urine. The mattress and the dressing over the pressure sore in Johnson's coccyx area were also soaked with urine.

The home health care nurse asked defendant to get Johnson some diapers or Depends pads as soon as possible, and she rejected defendant's idea that he could use paper towels between Johnson's legs to keep her dry. She told defendant that she would order a hospital bed with an alternating pressure mattress, as Johnson's bed made providing care difficult and the hospital bed would help relieve pressure and help the sores to heal.

The nurse showed defendant how to change the sheets and how to move Johnson back and forth to keep the pressure off her sores; she stressed the importance of keeping a dry, clean dressing on the sore in the coccyx area. She also explained that getting Johnson out of bed was good for her circulation and would take weight off the pressure sores, and that feeding Johnson was important for wound healing and she should get three meals a day, plus snacks.

On June 28, a home health aide and a social worker from Adventist visited Johnson. Again, Johnson was soaked with urine, as was her bed, and there was nothing underneath her or in between her legs to absorb the urine. She had not been moved to the hospital bed. Defendant admitted that he was overwhelmed. The social worker believed that Johnson needed a nursing home and started trying to make arrangements for her to be placed.

During the social worker's visit, defendant had difficulty staying on the topic or working at problem solving. He told her that his father was one of the heads of the CIA and had had part of his brain taken out by the government because he had argued with

President Kennedy over the Cuban missile crisis. This apparently delusional thinking gave the social worker cause for concern about whether defendant had the long-term ability to be Johnson's caregiver, and she made arrangements for another caregiver to stay the night. She planned to return herself the next morning to take Johnson to a nursing home—a plan to which she believed defendant had agreed by the time she left.

Another nurse visited in the afternoon and found conditions much the same. Johnson's bed was again wet with urine and she had paper towels between her legs. The nurse again advised defendant how to feed and care for Johnson.

A home health aide came to the house that evening with instructions to stay the night and care for Johnson. She stayed only a few minutes, because she became frightened when defendant yelled at her. Johnson was wet and smelled of urine, and Johnson told the aide that she really needed help, and that she was hungry and had not yet had lunch or dinner, although it was 5:30 p.m. There was no food in the refrigerator.

The following day, June 29, the social worker and the home health care nurse went together to the house to speak to Johnson about placement in a skilled nursing facility. Everything was set up for her admission; all she needed to do was agree. They found Johnson still in her own bed in the bedroom, not in the hospital bed, with paper towels between her legs. Defendant had removed the bandage on the wound on her coccyx, saying that the wound needed open air, and he insisted that the nurse was wrong in saying that the wound needed a bandage.

The social worker and the nurse discussed the skilled nursing facility with Johnson, who at first said "no, no, no," but then began to listen when they told her that she would receive physical therapy and it would help her to become strong enough to walk again. When it seemed that Johnson was considering going, defendant ran into the room from his room, where he had been listening, and yelled at Johnson not to go, at which point she said, "I guess I can't go then." Defendant became extremely agitated and angry, and eventually the social worker and the nurse left, believing it was unsafe for them to stay.

Over the next few days Adult Protective Services (APS) workers attempted to find in-home caregivers to assist with Johnson's care, and to persuade her to go to a nursing home. At first, defendant was cooperative with the attempt to find other caregivers, but then he became angry and agitated, refused any more help, cursed at the APS workers, and left hostile voicemail messages for them. He did not move Johnson to the hospital bed and insisted her sores were healing and that he did not need help. He refused to allow APS workers to talk to Johnson unless he was listening in on the call.

Defendant called police on the evening of July 6 to say that Johnson had died. The cause of death was bilateral pulmonary emboli, which may be caused by inactivity. When police arrived a cloth was wrapped around her lower body and a towel was inserted into her vaginal area. The bed was soaked with urine and there was feces on the towel. In the bedroom, there was feces on the floor, a full package of Depends, rolls of paper towels, and a bag full of garbage. The bathroom and washer/dryer area were filthy.

Defendant was arrested on charges of violation of Penal Code sections 368, subdivision (b)(3), elder abuse, and 368, subdivision (c), embezzlement from an elder, occurring from June to July 6, 2000. The embezzlement charge was dropped before trial began, and the information filed December 27, 2000 charged defendant with violation of Penal Code section 368, subdivision (b)(1), based on events occurring between June 6 and July 6, 2000 (the charged period). After trial, the jury found defendant guilty of one count of endangering the person or health of an elder, Penal Code section 368, subdivision (b)(1).[2] In a bifurcated bench trial, the court found true the allegation that defendant had two prior felony convictions.

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[2] Penal Code section 368, subdivision (b)(1), provides: "Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult, with knowledge that he or she is an elder or a dependent adult, to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not to exceed six thousand

The trial court suspended imposition of sentence, placed defendant on five years formal probation, imposed a restitution fine of $800, and as a term of probation ordered defendant to serve 365 days in Napa County Jail.

DISCUSSION

Defendant raises five separate issues on appeal. He contends that the trial court erred in admitting Ramirez's testimony about uncharged misconduct that occurred before the charged period; in admitting evidence relating to defendant's financial relationship with Johnson; in refusing to instruct the jury that all jurors must agree unanimously about what acts formed the basis of the guilty verdict; in failing to sua sponte instruct the jury on the defense of consent; and in misstating the prosecution's burden of proof in giving oral instructions to the jury. We consider each challenge in turn.

I. *The Trial Court's Admission of Ramirez's Testimony Was Not an Abuse of Discretion, and Any Error Was Harmless*

Before trial, defense counsel moved to exclude the testimony of prosecution witness Ramirez on the grounds that his testimony was irrelevant because it predated the charged conduct, was unduly prejudicial under Evidence Code section 352, and involved uncharged misconduct in violation of Evidence Code section 1101.[3] The trial court overruled the motion and denied defense counsel's subsequent motion for a mistrial on the same grounds. It is significant to our analysis that the court did limit Ramirez's testimony to his observations of defendant and Johnson during the year 2000 and prohibited him from testifying to any conclusions. The court also prohibited Ramirez from testifying that defendant watched pornographic movies. In addition, after closing arguments, the trial court gave a limiting instruction to the jury regarding the purpose for which they could consider the history of the relationship between defendant and Johnson,

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dollars ($6,000), or by both that fine and imprisonment, or in the state prison for two, three, or four years."

[3] All statutory references are to the Evidence Code unless otherwise stated.

their meeting, and the financial relationship between the defendant and Johnson (see part II, *post*). The court instructed that the testimony was admitted solely for the purpose of allowing the jury to evaluate whether the defendant had care and custody of Johnson. Thus the court crafted rulings that showed a careful weighing and analysis.

When Ramirez took the stand, he testified that he had visited Johnson's house two to four times every week during 2000, until the end of April, when defendant no longer allowed him to speak with Johnson when he came to work. On May 31, 2000, Ramirez was arrested and jailed for assault with a deadly weapon in an unrelated incident. He did not visit Johnson again. Ramirez testified that he believed defendant was an alcoholic, that defendant drank every day, and that he would sometimes blend hard liquor into Johnson's glass of wine. Defendant did not like Johnson to have company or to talk to other people. Johnson took up smoking after defendant moved in with her, and burned up her electric blanket by starting a fire with a cigarette. Defendant refused to get her a new blanket. Defendant swore at Johnson, causing her to cry. During the month before Ramirez went to jail, defendant would not let him speak to Johnson, saying that she wanted to be alone. Ramirez also testified that defendant had promised him that if Ramirez ever was placed in jail, he would bail him out. When Ramirez called him from jail, defendant promised to hire a lawyer, but never did so.

We review the trial court's evidentiary rulings for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 214-215.) The trial court's decision to admit or exclude evidence will not be overturned unless it was arbitrary, capricious, and patently absurd and resulted in a miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

A. *The Testimony Regarding Defendant's Promises to Ramirez About His Incarceration Was Irrelevant and Should Have Been Excluded, but the Error Was Harmless*

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) Relevant evidence in criminal cases is that which " 'tends logically, naturally, and by reasonable inference to establish any fact material for the prosecution or to overcome any

material matter sought to be proved by the defense. [Citation.] Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the jury.' " (*People v. Freeman* (1994) 8 Cal.4th 450, 491.)

The testimony about defendant's failure to bail Ramirez out of jail or help him obtain the services of an attorney was not relevant to any issue before the jury in this case. It did not relate to the issue of whether Johnson was in the care of defendant, nor was it relevant to the relationship between defendant and Johnson. Defendant did not take the stand, so it did not bear on his credibility at trial.

However, a judgment will not be reversed for error unless the error "resulted in a miscarriage of justice." (§ 353, subd. (b).) A miscarriage of justice occurs only where it is reasonably probable the defendant would have achieved a different result had the error not occurred. (*People v. Breverman* (1998) 19 Cal.4th 142, 149; *People v. Watson* (1956) 46 Cal.2d 818, 836.) In light of the strength of the evidence properly admitted against defendant, it is not reasonably probable that the court's exclusion of Ramirez's testimony on this limited subject would have changed the outcome of the case. Any error in the admission of the evidence was harmless.

B. *Ramirez's Testimony Was Admissible Under Section 1101, Subdivision (b)*

The balance of Ramirez's testimony was relevant, as it established the nature of the relationship between the defendant and Johnson, that is, that Johnson was in the care and custody of defendant, which is an element of the crime of elder abuse. (Pen. Code, § 368, subd. (b)(1); CALJIC No. 9.38.) The general rule of Evidence Code section 1101 is that prior acts are not admissible to prove conduct on a specific occasion. Section 1101 prohibits the introduction of otherwise admissible evidence of a person's character, including specific incidents of uncharged misconduct, when such evidence is offered to prove the person's conduct on a specified occasion. (§ 1101, subd. (a); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Evidence of other acts is admissible when it is offered for the purpose of proving facts other than the person's character or disposition, including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake

or accident. (§ 1101, subd. (b); *People v. Ewoldt, supra,* 7 Cal.4th at p. 393.) This list is not exhaustive. "The categories listed in section 1101, subdivision (b), are examples of facts that legitimately may be proved by other-crimes evidence." (*People v. Catlin* (2001) 26 Cal.4th 81, 146.)

Ramirez's testimony was admitted by the court for the limited purpose of proving that Johnson was in the care and custody of defendant. The testimony tended to show that defendant had the opportunity to commit elder abuse.

C. *Ramirez's Testimony Was Also Admissible Under Section 1109, Subdivision (a)(2)*

Although not raised by the parties nor expressly relied on by the court, Ramirez's testimony was admissible under section 1109, subdivision (a)(2). A trial court's decision will be affirmed if it is correct on any basis, even one that is different from that given by the trial court. (*Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329; *Estate of Beard* (1999) 71 Cal.App.4th 753, 776.)

In 1995, the Legislature enacted the first of three recent exceptions to the prohibition on character evidence in cases of sexual abuse, domestic violence and elder abuse. (§ 1108, subd. (a), § 1109, subds. (a)(1) & (2).) Section 1108 was added to the Evidence Code to permit the introduction of evidence of other sexual offenses in sexual abuse cases. (§ 1108, subd. (a); Assem. Bill No. 882, approved by Governor, Sept. 2, 1995, Assem. Final Hist. (1995-1996 Reg. Sess.).) In 1996, the Legislature added section 1109, which permits the introduction of other acts of domestic violence by the defendant in a domestic violence prosecution. (§ 1109, subd. (a)(1); Sen. Bill No. 1876, approved by Governor, July 20, 1996, Sen. Final Hist. (1995-1996 Reg. Sess.).) In 2000, the Legislature amended section 1109 to permit the admission of other acts of elder abuse in elder abuse cases. (§ 1109, subd. (a)(2); Assem. Bill. No. 2063, approved by Governor, July 6, 2000, Assem. Final Hist. (1999-2000 Reg. Sess.).)[4] The latter bill was

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[4] Evidence Code section 1109, subdivision (a)(2), provides: "Except as provided in subdivision (e) or (f) [rendering inadmissible evidence of acts occurring more than 10 years earlier and evidence relating to licensed health facilities], in a criminal action in which the

intended to strengthen the prosecution of cases involving elder abuse. (Bill Analysis, Assembly Third Reading, AB 2063 as amended April 6, 2000.)

The elder abuse amendment to section 1109, enacted on July 6, 2000, took effect on January 1, 2001, pursuant to Government Code section 9600, which provides that as long as at least 90 days have passed after the enactment date, statutes enacted at regular sessions are effective the January 1 following their enactment. (Gov. Code, § 9600, subd. (a).) Section 1109, subdivision (a)(2) was applicable to this trial because new statutes are presumed to operate prospectively, and statutes governing the conduct of trials may be applied to cases that are pending at the time of the statute's enactment. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287-288.) "Even though applied to the prosecution of a crime committed before the law's effective date, a law addressing the conduct of trials still addresses conduct in the future" and therefore does not violate the constitutional rule against ex post facto legislation. (*Id*. at p. 288, citing U.S. Const., art. I, § 10, cl. 1, Cal. Const., art I., § 9.)

Sections 1108 and 1109 are exceptions to the exclusionary rule set forth in section 1101, subdivision (a). Sections 1108 and 1109 do not limit the purpose for which the evidence may be used and do not require that it be rendered admissible by showing its relevance to some other issue. (§§ 1108, 1109; Simons on California Evidence (2001) § 6:14, p. 323.) The acts testified to by Ramirez fall within the terms of section 1109, subdivision (a)(2) because they constituted "other abuse of an elder or dependent adult." (§ 1109, subds. (a)(2) & (d); Welfare & Inst. Code, § 15610.07.[5]) The testimony

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defendant is accused of an offense involving abuse of an elder or dependent adult, evidence of the defendant's commission of other abuse of an elder or dependent adult is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

[5] Section 1109 provides that " '[a]buse of an elder or a dependent adult' has the meaning set forth in Section 15610.07 of the Welfare and Institutions Code." (§ 1109, subd. (d).) That section, in turn, defines elder abuse as "physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering," or "the deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering." (Welf. & Inst. Code, § 15610.07, subds. (a) and (b).)

demonstrated that before June 2000 defendant engaged in acts of elder abuse, including physical abuse and neglect, and it was admissible.

D. *Ramirez's Testimony Was Not More Prejudicial than Probative Under Section 352*

The admission of evidence of uncharged prior elder abuse under section 1109 is explicitly conditioned on the admissibility of the evidence under section 352. (See *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1313-1314.) Section 352 provides that evidence may be excluded "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." (§ 352.)

In *People v. Falsetta* (1999) 21 Cal.4th 903, the Supreme Court rebuffed a constitutional challenge to section 1108 [allowing other instances of sexual abuse in sexual abuse cases], and held that admission of evidence of two prior sexual assaults by the defendant under circumstances similar to those of the charged assault was proper. (21 Cal.4th at p. 908.) The court reasoned that the trial court's discretion to exclude unduly prejudicial evidence under section 352 saves section 1108 from defendant's constitutional challenge and provides a safeguard of defendant's rights. (*Id.* at pp. 916-917; see also *People v. Hoover* (1999) 77 Cal.App.4th 1020, 1026-1027 [§ 1109 held constitutional for the same reasons analyzed in *Falsetta* in its examination of § 1108].)

Section 352 requires the court to "engage in a careful weighing process" before admitting evidence pursuant to the section 1108 exception. (*Falsetta, supra,* 21 Cal.4th at p. 917.) "Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]"

(*Ibid.*) The Supreme Court's analysis in *Falsetta* applies with equal force in evaluating evidence under section 1109. (*People v. Jennings, supra,* 81 Cal.App.4th at pp. 1313-1314.)

To our knowledge, there are no reported cases applying the section 352 balancing test to uncharged misconduct evidence in the context of elder abuse. We analogize to the facts in *People v. Brown* (2000) 77 Cal.App.4th 1324, where the court considered the issue under section 1109 in a domestic violence case in which the defendant claimed that the trial court violated due process when it admitted evidence of his violence toward two previous girlfriends, in a prosecution for various assault charges against a current girlfriend. (*Id.* at pp. 1330, 1332.) The trial court held that the evidence was admissible after conducting a lengthy hearing on its relevance and giving an explanation of the reasons for its admission. (*Id.* at p. 1338.) The appellate court affirmed.

Here, as in *Brown*, the trial judge properly weighed the relevant factors. The trial court heard a lengthy proffer and argument from counsel on the nature and relevance of the evidence. It considered the remoteness of some of the evidence and limited the testimony to events occurring in the year 2000. It considered the degree of certainty of the commission of the prior acts and the likelihood of confusing, misleading or distracting the jurors and limited the testimony to events that Ramirez had actually observed, prohibiting him from testifying to any conclusions or opinions. The court evaluated the similarity to the charged offenses and concluded that the previous acts were part of a continuing course of conduct and were thus probative of the relationship between the parties. Ramirez's testimony as limited by the trial court was not inflammatory, and the acts to which he testified (defendant's failing to get Johnson a new blanket, pouring hard liquor into her wine, swearing at her and isolating her) were not as serious as the acts charged at trial, which included ongoing neglect of Johnson's most basic needs. Finally, Ramirez's testimony was only a small part of the testimony at trial. The record amply demonstrates that the trial court understood and fulfilled its responsibilities under section 352.

While Ramirez's testimony was certainly prejudicial in the sense that it contributed to the conviction, this is a characteristic of all evidence that tends to prove guilt. (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.) " 'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant . . . and which has very little effect on the issues. . . . "prejudicial" is not synonymous with "damaging." ' " (*Ibid.,* citing *People v. Bolin* (1998) 18 Cal.4th 297, 320.) The evidence is only considered to be more prejudicial than probative if, "broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.' " (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)

The evidence in this case did not pose such a risk. The evidence was probative of the defendant's relationship with the victim and the court's limitations on Ramirez's testimony, along with the limiting instruction to the jury following argument, sufficiently mitigated the potentially prejudicial impact of the evidence on the jury.

II. *The Trial Court's Admission of Evidence of the Financial Relationship Between Defendant and Johnson Was Not an Abuse of Discretion*

A. *Defendant Waived Any Claim of Error as to This Evidence*

Defendant contends that the trial court erred when it admitted portions of his tape-recorded interview with the police relating to his financial relationship with Johnson. In the interview, defendant related that he originally helped Johnson with some of her bills, then began handling her banking and finances for her. He was in charge of her money, and he kept records for some time but eventually stopped. While he was taking care of the finances, he bought a new car, and bought a computer for himself and one for his friend Fred Cole. Defendant gave blank checks to Cole and others. He claimed that Johnson liked him to write out checks for cash, which she would keep in a jar and dole out. At Johnson's direction, defendant got into stock trading. At least once, funds were low and some checks bounced; after money was transferred from one account to another,

the checks stopped bouncing. Defendant related that two different investigations were pending into illegal use of Johnson's credit cards over the Internet. He paid for everything he bought, but others used her credit card.

At trial, the audiotape of the interview was played for the jury without objection from defense counsel. The prosecutor handed out transcripts of the tape to the jurors when the tape was played, also without objection. After the tape was played, the prosecutor continued his direct examination of the officer who interviewed the defendant, defense counsel cross-examined, and then the parties entered into a stipulation regarding some additional evidence and the prosecution rested. The defense then rested its case, "subject to the court's ruling on exhibits that may be offered for evidence."

Later, defense counsel objected to admission of the defendant's interview statement "through the end of page 32" of the transcript of the tape, which was the section pertaining to financial matters. The objections were the same as those made to Ramirez's testimony: that the evidence related to uncharged misconduct and was more prejudicial than probative under section 352. The trial court found "the whole tape to be probative and interestingly of benefit with respect to argument on the part of both sides. Even the content when it comes to financial matters. We are talking in terms of the relationship between the [*sic*] Miss Johnson and your client. The nature of that relationship and its bearing on the proof issues. So I think it's highly relevant, and for that reason your objection is noted, but it's overruled."

Defendant now asserts that the admission of the portions of the tape-recorded statement relating to the financial relationship between him and Johnson was an abuse of discretion. However, defendant failed to preserve his right to appeal this issue because he failed to timely object to the evidence at trial, and he has waived his claim of error. "It is the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection at the trial on the ground sought to be urged on appeal." (*People v. Welch* (1972) 8 Cal.3d 106, 114-115.)

In *People v. Barnett* (1998) 17 Cal.4th 1044, the police officer viewed photographs and testified about them without objection from defense counsel. Counsel

subsequently made an objection when the prosecutor moved to have the photographs received into evidence, and the trial court overruled the objection and admitted the photographs for a limited purpose. (*Id.* at pp. 1121-1122.) The Supreme Court affirmed, holding that the subsequent objection was untimely and inadequate to preserve the issue for appeal. (*Ibid.*)

Similarly, in the case before us defendant's objection to the evidence of the financial relationship was untimely. Counsel did not object until after the witness had been excused, both the prosecution and the defense had rested, and the jury had been dismissed for the day and instructed to return the next day for closing arguments. He has waived his right to appeal on this issue.

B. *The Evidence Was Admissible Under Sections 1101 and 1109*

Even absent waiver, the objections were properly overruled. The evidence was admissible pursuant to sections 1101 and 1109 for the same reasons discussed in Parts I.A. through I.D., *ante.* Johnson's dependence on defendant to take care of her financial business went to the issue of his care or custody of her, and financial misconduct is included in the definition of elder abuse referred to in section 1109. (§ 1109, subd. (d); Welf. & Inst. Code, § 15610.07, subd. (a).) The trial court found the evidence probative of the nature of the relationship between defendant and Johnson, and noted that the evidence was not entirely prejudicial to defendant in that some portions of it tended to show that Johnson was competent and in control of her own decision-making—a fact that supported defendant's assertion that Johnson made her own decisions about her health care.

III. *The Trial Court Did Not Err in Refusing To Give CALJIC 17.01 Regarding Unanimity*

Defendant argues that the trial court committed prejudicial error when it refused to instruct the jury on unanimity pursuant to CALJIC 17.01.[6] The court refused defendant's request to give the instruction, stating "there may be multiple legal elements contained in the particular charges in question, but there could be a continuing course of conduct on the evidence. So I don't think 17.01 is appropriate." We agree, and hold there was no error.

The unanimity instruction is not required where the criminal acts are so closely connected that they form a single transaction or where the offense itself consists of a continuous course of conduct. (See *People v. Diedrich* (1982) 31 Cal.3d 263, 282.) Offenses which are continuous in nature include the failure to provide for a minor child, child abuse, contributing to the delinquency of a minor, and animal cruelty. (*People v. Sanchez* (2001) 94 Cal.App.4th 622, 631, 633 (*Sanchez*).)

Because the language of Penal Code section 368, subdivision (b)(1) (formerly subdivision (a)) derives from the felony child abuse statute, Penal Code section 273a, it is appropriate to review the decisions interpreting section 273a in our analysis of section 368, subdivision (b)(1). (*People v. Heitzman* (1994) 9 Cal.4th 189, 204-205; *People v. Sargent* (1999) 19 Cal.4th 1206, 1216, fn. 6.)

In *People v. Ewing* (1977) 72 Cal.App.3d 714, the defendant was convicted of felony child abuse under circumstances likely to produce great bodily harm or death. (Pen. Code, § 273a; *Ewing, supra,* 72 Cal.App.3d at p. 716.) He challenged his conviction on the basis that the trial court failed to instruct the jury pursuant to CALJIC

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[6] CALJIC 17.01 reads as follows: "The defendant is accused of having committed the crime of _____ [in Count _____]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count ___] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he][she] committed only one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count ___], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict."

No. 17.01. The Third District held that Penal Code section 273a is a statute that may be violated by a continuous course of conduct or by a series of acts over a period of time. (*Id.* at p. 717.) The court noted that although the child abuse statute may be violated by a single act, it is more commonly applied to "repetitive or continuous conduct. [Citations.] Here, the information alleged a course of conduct in statutory terms which had occurred between two designated dates. The issue before the jury was whether the accused was guilty of the course of conduct, not whether he had committed a particular act on a particular day." The court concluded the continuous course of conduct exception applied. (*Ibid.*) The same is true in the case before us.

Our conclusion that Penal Code section 368 may be violated by a continuous course of conduct is further supported by an examination of the statutory language at issue in order " 'to determine whether the Legislature intended to punish individual acts or entire wrongful courses of conduct.' " (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1310 [unanimity instruction not required where resident child molester statute expressly states it is to be treated as a continuous-course-of-conduct crime].) When the language of the statute focuses on the goal or effect of the prohibited crime, the offense is a continuing one. (*Sanchez, supra,* 94 Cal.App.4th at p. 632.) The elder abuse statute provides for penalties for anyone who "willfully causes or permits any elder or dependent adult . . . to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or . . . willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered . . . ." (Pen. Code, § 368, subd (b)(1).) The statute is focused on the effect of the crime on the victim: unjustifiable physical pain or mental suffering.

A continuing course of conduct has been held to exist where the wrongful acts were successive, compounding, and interrelated. (*Sanchez, supra,* 94 Cal.App.4th at p. 632; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 275; see *People v. Avina, supra,* 14 Cal.App.4th at p. 1311.) In the context of elder abuse, malnourishment and dehydration, festering bedsores, bowel impaction and unsanitary and unhealthy living conditions are

the result of continuous neglect and failures of appropriate care, rather than one single act or omission. The wrongful acts were successive, compounding, and interrelated.

Defendant argues that because there was evidence of two separate events, one before and one after Johnson's hospitalization in late June, a unanimity instruction was required. We disagree. A continuous course of conduct, by its nature, may stop and start, and the two-day period during which defendant did not have charge of Johnson's care did not interrupt his course of conduct. A close temporal connection is not required where the continuous course of conduct exception is implicated. (*People v. Avina, supra,* 14 Cal.App.4th at p. 1309.) Johnson's suffering did not cease when she went into the hospital and then resume when she came home to defendant's care. Her suffering, magnified by her helplessness and enforced isolation from other people, continued unabated.

On the facts of this case, defendant's failure to provide Johnson with appropriate nutrition, to help her to move when she was unable to move herself, to clean her when she was incontinent, and to cooperate with health care workers and caregivers attempting to assist him in providing necessary care, as well as his failure to provide adequate care by refusing to use the hospital bed and refusing to adhere to the instructions of the health care workers who came to the home, constituted a continuing course of conduct. A unanimity instruction was not required. The trial court's refusal to instruct the jury pursuant to CALJIC 17.01 was not error.

IV. *The Trial Court Had No Obligation to Give a Sua Sponte Instruction on the Defense of Consent*

Defendant next argues that the trial court erred by failing to sua sponte instruct the jury on the defense of consent. The trial court's duty to instruct the jury on an issue where neither side requests an instruction necessarily begins with the question of whether the law and evidence in the case require any instruction.

The defense of consent is restricted to cases where consent negates an element of the charged offense. Consent is not a defense to most crimes. (*People v. Carr* (2000) 81 Cal.App.4th 837, 842.) We find no authority for the proposition that the defense of

consent is available to a defendant charged with causing or permitting an elder to suffer unjustifiable physical pain or mental suffering. (Pen. Code, § 368, subd. (b)(1).) However, in *People v. Manis* (1992) 10 Cal.App.4th 110, the court rejected the argument that Penal Code section 368 violates the due process rights of elderly persons who might prefer to neglect their medical needs. (*People v. Manis, supra,* 10 Cal.App.4th at p. 116, disapproved on other grounds in *People v. Heitzman, supra,* 9 Cal.4th at p. 209, fn. 17.) Like the court in *Manis* we consider defendant's argument here "frivolous in the factual context of this case, and we reject it." (*Ibid.*)

While Johnson had the right to make her own health care decisions, her decision to accept defendant's continued presence in her home as her caretaker did not constitute consent to being left helpless and without appropriate care for days at a time, lying in her own urine and excrement, underfed, and subjected to unclean conditions. In the particular circumstances of this case the trial court did not err in failing to give a consent instruction.

V. *The Trial Court Did Not Commit Prejudicial Error When It Misspoke the Instruction Setting Forth the Burden of Proof*

Defendant asserts reversible error, an infringement of defendant's constitutional right to due process, occurred when the trial court misstated the prosecution's burden of proof as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt *of his guilt* is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. (Emphasis added.)

The written instruction given to the jurors stated the instruction correctly under CALJIC 2.90, as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt *whether her [sic] guilt* is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving her [*sic*] guilty beyond a reasonable doubt. (Emphasis added.)

In evaluating whether an erroneous instruction violates due process, we consider " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.) We conclude there is no reasonable likelihood, and no prejudice attached to the trial court's misreading of the instruction.

Defendant argues that the oral burden of proof instruction given by the court is "confusing, misleading, and somewhat nonsensical." He argues that the error was compounded by the fact that the court told the jury that although the written instructions mistakenly referred to a female defendant, that mistake didn't "make any difference."

We do not agree with either of defendant's contentions. The error does not alter the meaning of the instruction in any significant way. The trial court's oral departure from a written instruction was harmless: the jury was given a written version that was correct. (*People v. Garceau* (1993) 6 Cal.4th 140, 189-190 [error in reading instruction deemed harmless because the jury received the correct instruction in written form]; *People v. Crittenden* (1994) 9 Cal.4th 83, 138.) The trial court instructed the jury that the written instructions in their final form should govern the deliberations: "You are not to be concerned with the reasons for any modification [in the written instructions]. Every part of the text of an instruction, whether typed, printed, or handwritten, is of equal importance. You are to be governed only by the instructions in its final wording."

Under *Crittenden*, we also "consider whether, in light of the argument of counsel, the trial court's slight misreading of the instruction could have been prejudicial." (*Crittenden, supra,* 9 Cal.4th at p. 138.) The court reiterated the burden of proof in its instruction as to willfulness and criminal negligence ("[the D.A.'s] burden is beyond a reasonable doubt as to each and every element") and its instruction on lesser included offenses ("If you are not satisfied beyond a reasonable doubt that the defendant is guilty . . ."). Defense counsel reiterated the burden of proof four separate times in his closing argument. Moreover, both the oral and written instructions given on the reasonable doubt standard contain additional language stating the burden of proof: "This

presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." We conclude that the misreading was not prejudicial.

We find no reversible error.

DISPOSITION

The judgment is affirmed.

GEMELLO, J.

We concur.

JONES, P.J.

SIMONS, J.

People v. Rae, A095637

Trial court:	Napa County Superior Court
Trial judge:	Hon. William M. Kelsay
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