

Appendix A

California Court of Appeal Opinion

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL LUCERO,

Defendant and Appellant.

D072851

(Super. Ct. No. FWV1301177)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Gregory S. Tavill, Judge. Affirmed.

Patrick Morgan Ford for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Scott C.
Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Michael Lucero guilty of second degree murder (Pen. Code, § 187,
subd. (a)) and assaulting a child under the age of eight with force likely to produce great

bodily injury, resulting in the child's death (*id.*, § 273ab, subd. (a)). The trial court sentenced Lucero to a prison term of 25 years to life.

Lucero contends that the trial court prejudicially erred in three separate evidentiary rulings: (1) admitting certain evidence of domestic violence that Lucero perpetrated on his cohabitating girlfriend, who was the mother of the victim; (2) excluding certain evidence regarding whether the mother of the victim performed sexual acts with other men at a strip club where she worked; and (3) excluding certain evidence concerning drug use by the mother of the victim. Lucero also contends that the trial court erred in denying his ex parte application to allow a polygraph test to be performed on him prior to sentencing. We conclude that Lucero's contentions lack merit, and accordingly we affirm the judgment.¹

I.

FACTUAL AND PROCEDURAL BACKGROUND

Lucero met Olivia in mid-October 2012 at a strip club where she worked as a dancer and Lucero was a customer. Lucero and Olivia began dating, and by mid-November 2012, Lucero had moved into the apartment where Olivia lived with her two-year-old son (the Child) and her mother.² Lucero soon stopped working (except for

¹ In a separate order, we deny Lucero's petition for habeas corpus that was ordered to be considered concurrently with this appeal.

² To protect the privacy of the parties involved, we refer to Olivia by her first name and to her son as "the Child," and we intend no disrespect by doing so.

monthly service in the Marine Corp reserves), so that Olivia's job at the strip club was the main source of income for the household.

Lucero began to criticize Olivia because she worked at the strip club, and he became concerned about what she might be doing with other men during "VIP dances" in private rooms because, as he explained, "I know what goes on back there." As Lucero admitted at trial, he verbally abused Olivia by calling her demeaning names such as "slut" and "worthless," and he accused her of having sex with other men. Lucero also set rules about Olivia's work, such as the hours she could work, a restriction against doing VIP dances, and a requirement that she promptly text him back while at work. The rules imposed by Lucero limited Olivia's income, and Olivia and Lucero would often argue about whether she was breaking the rules. Olivia and Lucero also argued about a low budget movie that she acted in during December 2012, against Lucero's wishes, in which her role was to make it appear she was performing fellatio in a party scene.

In January 2013, Olivia's mother moved out of the state, and Olivia, Lucero and the Child moved into a new apartment together. Without Olivia's mother present in the household, Lucero took on the job of taking care of the Child while Olivia worked at the strip club in the evenings.

At trial, the jury heard evidence of several occasions on which Lucero physically assaulted Olivia as a result of arguments about her job. Specifically, Olivia testified that Lucero choked her several times, dragged her across the floor once, pushed her out of the car on more than one occasion, pinned her to the ground, slammed her against a wall, threatened to kill her and threatened "to shove a baseball bat up [her] woman area."

In January 2013, Olivia called 911 to ask for advice about what to do about Lucero assaulting her. As a result of the 911 call, Olivia met with a police officer who advised her of her options, such as having Lucero arrested and obtaining a restraining order. In February 2013, Olivia phoned a friend while Lucero was pinning her down on the ground, and the friend called 911, causing the police to arrive at the apartment. A third party testified to witnessing one violent incident in mid-March 2013, during which Lucero grabbed Olivia's hair and slammed her head onto the car dashboard before driving away. A manager at the apartment complex where Olivia and Lucero lived testified that in March 2013, Olivia told her that Lucero had choked her, and the apartment manager saw marks on Olivia's neck.

Lucero admitted that he and Olivia occasionally shoved each other, and that he had twice forced Olivia out of the car during arguments, including one time when he grabbed her by the hair. However, he denied any other physical assaults.

On March 27, 2013, Olivia asked a friend to take care of the Child for the day. Before dropping off the Child at the friend's house, Olivia told the friend that the Child had several bruises on his face and back. According to Olivia's testimony, she did not know where the bruises came from, but she untruthfully told her friend that the Child got the bruises at daycare and that the police were investigating. When the friend asked the Child where he got the bruises, he raised his fists in front of his face and said "bish," with a mean look on his face.

By March 29, 2013, the Child was vomiting and appeared to be sick. For several days, the Child vomited, had a bloated stomach, and stated that his stomach hurt.

According to Olivia she did not take the Child to the doctor, because, as Lucero told her, authorities might take the Child away upon seeing the bruises on his body.

On April 3, 2013, Lucero drove Olivia to work around 7:00 p.m. According to statements by Olivia and Lucero, the Child was still very sick with stomach problems when Olivia went to work but otherwise was talking and was acting normal. According to Lucero, the Child went to bed around 10:00 p.m., after which Lucero occasionally checked on him. Shortly before midnight, Lucero called Olivia at work to say that the Child had stopped breathing. Olivia told Lucero to call 911, which he did, and he performed CPR as instructed by the 911 operator. When paramedics arrived, the Child had no pulse and was not breathing. On the way to the hospital, the paramedics were able to obtain a pulse, but the Child never again began breathing on his own and never regained consciousness. After attempts at medical intervention in the hospital, the Child was pronounced dead at approximately 10:00 a.m. on April 4, 2013.

At trial, the chief medical examiner of the County of San Bernardino, Dr. Frank Sheridan, testified to the medical findings that he made during his autopsy of the Child. Dr. Sheridan explained that there were a number of bruises on the Child's face and back, which he described as looking "fresh," along with blunt force injury to the Child's face. In addition, the Child had two serious injuries to his body: a head injury and an abdominal injury.

The head injury consisted of a skull fracture on the right side of the Child's head, and a subdural hemorrhage with swelling of the brain. According to Dr. Sheridan, the head injury resulted either from a blow with a heavy object or from slamming the Child's

head against a surface, and did not appear to be caused accidentally. Dr. Sheridan testified that the head injury was not survivable because of the severe swelling to the brain. Dr. Sheridan concluded that immediately upon receiving the head injury, the Child would have been either severely impaired in his neurological functioning or rendered unconscious.

Relying on the autopsy findings alone, Dr. Sheridan was able to determine that the head injury occurred no more than 36 hours before the Child died. In addition, based on information provided to him that the Child had been observed acting relatively normal when Olivia left for work, Dr. Sheridan concluded that the head injury must have occurred *after* Olivia left for work, as the Child would have been either unconscious or experiencing severe neurological impairment after receiving the fatal head injury.

Dr. Sheridan explained that the abdominal injury consisted of a laceration to the Child's pancreas caused by a blunt force impact applied in a very concentrated area, and was not accidental. The abdominal injury appeared to be inflicted earlier than the head injury, and was "a few days old" when the Child died. According to Dr. Sheridan, if left untreated, the abdominal injury could have eventually been fatal, but the head injury was the immediate cause of death.

At trial, Lucero presented the testimony of a competing medical expert, Dr. Janice Ophoven. Dr. Ophoven agreed with Dr. Sheridan that both the head injury and the abdominal injury were intentionally inflicted acts of abuse, but she disagreed about which injury was the immediate cause of the Child's death. According to Dr. Ophoven, the Child died due to the abdominal injury, which was several days old. Dr. Ophoven

explained that the injury to the Child's abdomen "tore his pancreas in half," eventually leading to "shock and cardiac arrest and death." Dr. Ophoven opined that the head injury was not the primary cause of death, and was a relatively minor injury that the Child could have survived. She opined that the Child would still have been able to walk, talk and act normally after receiving the head injury. According to Dr. Ophoven, the evidence did not suggest that the head injury occurred shortly before Lucero called 911. Dr. Ophoven also stated that Dr. Sheridan did not perform all of the necessary tests during the autopsy to enable her to determine when the head injury incurred. Based on the available information, Dr. Ophoven believed that the head injury could have occurred as long as 72 hours before death.

Lucero was charged with second degree murder (Pen. Code, § 187, subd. (a)) and assaulting a child under the age of eight with force likely to produce great bodily injury, resulting in the child's death (*id.*, § 273ab, subd. (a)).

During trial, numerous witnesses testified, including Olivia and Lucero. In his testimony, Lucero denied ever striking or injuring the Child. Lucero admitted that he argued with Olivia about her job, had sometimes insulted her and pushed her, and had twice forced her out of the car. However, he denied ever choking Olivia or hitting her. According to Lucero, on the evening of April 3, the Child was acting normal except for his stomach problems that were making him vomit. When Lucero later went to check on the Child in bed, he noticed that the Child was not breathing and immediately called Olivia and then called 911. During Olivia's testimony, she denied causing any of the

injuries to the Child and stated that Lucero was the only other person with access to the Child.

The jury heard evidence of certain accidental injuries that the Child incurred throughout the months prior to his death when in the care of various people other than Lucero, such as injuries to his head or face from hitting his head on a door, from falling off a trampoline and from hitting his head on a windowsill. However, there was no evidence or suggestion that those injuries were related to the injuries that ultimately caused the Child's death.

As reflected in defense counsel's closing argument, Lucero's main defense was that if Dr. Ophoven's testimony was credited, the People had not proven beyond a reasonable doubt that the Child's head injury was inflicted on the evening of April 3, 2013, while Lucero was taking care of the Child, and thus the evidence did not prove that it was necessarily Lucero who inflicted the Child's injuries. Defense counsel did not offer a theory as to how the Child's injuries occurred, but suggested that there was "some evidence that points to Olivia." Defense counsel argued that Olivia could have been charged with child endangerment for not taking the Child to the doctor, and he questioned whether Olivia exaggerated the extent of Lucero's physical aggression toward her.

The jury found Lucero guilty on both counts, and the trial court sentenced him to prison for a term of 25 years to life.

II.

DISCUSSION

A. *The Trial Court Did Not Prejudicially Err in Admitting Evidence of Lucero's Domestic Violence Against Olivia*

As we have explained, during trial, the jury heard extensive evidence of the verbal and physical abuse that Lucero inflicted on Olivia. Lucero contends that the trial court prejudicially erred in admitting that evidence.

1. *Trial Court's Ruling on the People's Motion in Limine*

The question of the admissibility of the domestic violence evidence was discussed during motions in limine, when the People filed a motion to admit evidence of Lucero's domestic violence against Olivia, and Lucero filed a written opposition.

At the in limine hearing, the trial court explained that based on the motion in limine, it appeared that the People were seeking to admit nine categories of evidence relating to Lucero's domestic violence against Olivia. The nine categories were: (1) verbal abuse and control by Lucero; (2) arguments about Olivia acting in the movie; (3) arguments about financial issues; (4) Olivia's contact with the police in January 2013 about possibly obtaining a restraining order; (5) the incident in January 2013 in which Lucero pinned Olivia against the wall, leading her to make a call to the police; (6) an incident in February 2013 in which Lucero dragged Olivia on the ground; (7) a March 2013 incident in which Lucero assaulted Olivia on the way to work; (8) a March 2013 incident in which Lucero choked Olivia and threatened to kill her; and (9) several incidents in which Lucero forced Olivia out of the car during an argument.

Defense counsel informed the trial court that he was not contesting the admission of the first through fifth items. However, defense counsel specifically objected to the admission of the eighth item (concerning choking and death threats) on the ground that the evidence was highly prejudicial and the acts were not corroborated. Defense counsel also generally explained that he was objecting to the admission of "specific very serious accusations" that Olivia did not raise until the police questioned her when the Child was in the hospital. Defense counsel's general objection reasonably can be understood to cover evidence categories six, seven and nine.

The trial court ruled that it would admit the evidence of domestic violence pursuant to both Evidence Code section 1109 and Evidence Code section 1101, subdivision (b).³ The trial court also explained that it would not exclude the domestic violence evidence under section 352, as it was not unduly prejudicial and had substantial probative value.

During trial, the jury was presented with the evidence of domestic violence we have described in the factual background.⁴

³ Unless otherwise indicated, all further statutory references are to the Evidence Code.

⁴ The jury was instructed on the manner in which it could use the evidence of domestic violence in reaching its verdicts, and Lucero does not take issue with those instructions.

2. *The Domestic Violence Evidence Was Properly Admitted Under Section 1109, Subdivision (a)(1)*

Lucero's first argument is that the domestic violence evidence was improperly admitted under section 1109, subdivision (a)(1).

a. *Section 1109, Subdivision (a)(1) Applies Because the Prosecution Involved Domestic Violence Against the Child*

Section 1109, subdivision (a)(1) provides that, with certain exceptions not relevant here, "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."⁵ Here, the trial court held, pursuant to *People v. Dallas* (2008) 165 Cal.App.4th 940 (*Dallas*), that Lucero's alleged offenses against the Child involved domestic violence because the Child lived with Lucero. Accordingly, section 1109 applied, making the evidence of Lucero's domestic violence against Olivia admissible if not otherwise excluded under section 352. Lucero contends that the trial court erroneously applied *Dallas*, and that section 1109 is therefore not applicable. As we will explain, Lucero's argument lacks merit.

In *Dallas*, the defendant was charged with felony infliction of injury to a child (Pen. Code, § 273d, subd. (a)) and felony child abuse (*id.*, § 273a, subd. (a)) based on injuries sustained by his girlfriend's baby, who lived in the same home as the defendant.

⁵ Under section 1101, subdivision (a), with certain exceptions, evidence of a person's character, including evidence of specific instances of past conduct, is inadmissible when offered to prove the person's conduct on a specified occasion.

(*Dallas, supra*, 165 Cal.App.4th at pp. 942-943.) At trial, evidence was admitted of (1) the defendant's prior acts of child abuse;⁶ and (2) the defendant's prior acts of domestic violence against a former girlfriend. (*Dallas*, at pp. 947-948.) Among other things, the defendant argued on appeal that the trial court erred in admitting the prior acts of domestic violence against the former girlfriend because "he was charged only with child abuse, not domestic violence, and therefore evidence of acts of domestic violence was not admissible under Evidence Code section 1109." (*Dallas*, at p. 952.) After conducting a detailed statutory analysis, *Dallas* rejected the defendant's argument, concluding that "because defendant lived with the baby, this was . . . a prosecution for 'domestic violence' so that prior acts of domestic violence were . . . admissible under Evidence Code section 1109, subdivision (a)(1)." (*Dallas*, at pp. 942-943.)

Dallas's statutory analysis focused on the definition of "domestic violence" set forth in section 1109. As *Dallas* explained, "Evidence Code section 1109 provides: ' "Domestic violence" has the meaning set forth in Section 13700 of the Penal Code. Subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, "domestic violence" has the further meaning as set forth in Section 6211 of the Family Code, if the act occurred no more than five years before the charged offense.' ([] § 1109, subd. (d)(3).)" (*Dallas, supra*, 165 Cal.App.4th at p. 952.) Turning to Family Code section 6211, *Dallas* noted that domestic

⁶ Under section 1109, subdivision (a)(3), in a prosecution for child abuse, evidence of the defendant's commission of other acts of child abuse is not made inadmissible by section 1101, subject to exclusion of the evidence under section 352.

violence was defined there as "including abuse committed against either '[a] cohabitant or former cohabitant, as defined in Section 6209,' (Fam. Code, § 6211, subd. (b)) or '[a] child of a party' (Fam. Code, § 6211, subd. (e))." (*Dallas*, at p. 953.) Further, *Dallas* explained that "Family Code section 6211 expressly incorporates the following definition in Family Code section 6209: ' "Cohabitant" means a person who regularly resides in the household.' " (*Dallas*, at p. 953) Therefore, because "[t]he baby regularly resided in defendant's household," the defendant "was charged with an offense involving 'domestic violence' within the meaning of Family Code section 6211." (*Dallas*, at p. 953.) Based on its statutory analysis, *Dallas* concluded that "the trial court did not err by admitting the evidence of prior acts of domestic violence." (*Id.* at p. 957.)

The same analysis applies here. Because the Child lived in Lucero's household, Lucero was charged in this case *with committing domestic violence* within the meaning of Family Code section 6211. Accordingly, Evidence Code section 1109, subdivision (a)(1) is applicable to permit the admission of evidence of other acts of domestic violence, subject to exclusion under section 352.⁷

⁷ Even though the history of the defendant's bad acts in *Dallas* involved *both* prior acts of domestic violence *and* prior acts of child abuse, Lucero is incorrect in stating that *Dallas's* holding was limited to deciding that " 'prior acts of child abuse' were admissible under section 1109." On the contrary, as we have explained, the relevant holding in *Dallas* is that prior acts of *domestic violence against an adult* are admissible under section 1109, subdivision (a)(1) in a prosecution for child abuse when the child resides with the defendant. Accordingly, contrary to Lucero's characterization, this case does not present "an issue of first impression" as to the scope of section 1109, subdivision (a)(1) when a defendant on trial for child abuse has committed prior acts of domestic violence against an adult. *Dallas* squarely addresses the issue.

Lucero also contends that *Dallas* and section 1109, subdivision (a)(1) are not applicable because those authorities address only the admission of instances of *domestic violence*, but some of the evidence admitted here, such as the demeaning "name calling" and the "pushing and shoving" did not meet the statutory definition of domestic violence.⁸ Lucero contends that, accordingly, evidence of such conduct should not have been admitted under section 1109, subdivision (a)(1). Lucero's argument fails because defense counsel did not object to the admission of the evidence that Lucero now claims should not have been admitted under section 1109, subdivision (a)(1) on the ground that it does not constitute domestic violence. Specifically, as we have explained, defense counsel expressly stated during the in limine hearing that he was *not* objecting to the admission of evidence of name calling or the instance in which Lucero pushed Olivia against the wall, causing her to call the police. Moreover, defense counsel objected only

⁸ Section 1109 defines "domestic violence" by reference to Penal Code section 13700 and Family Code section 6211. (§ 1109, subd. (d)(3).) Specifically, Penal Code section 13700, subdivision (b) defines domestic violence as "abuse" committed against certain persons, and "abuse," in turn, is defined as "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another." (Pen. Code, § 13700, subd. (a).) Family Code section 6211 defines domestic violence as "abuse" perpetrated against certain persons. In turn, Family Code section 6203 states that "abuse" means: "(1) To intentionally or recklessly cause or attempt to cause bodily injury. [¶] (2) Sexual assault. [¶] (3) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another. [¶] (4) To engage in any behavior that has been or could be enjoined pursuant to Section 6320. [¶] (b) Abuse is not limited to the actual infliction of physical injury or assault."

to "specific very serious accusations" that were not corroborated. Lucero admitted at trial that he and Olivia pushed and shoved each other on occasion.⁹

Lucero also argues that evidence of certain acts of domestic violence should not have been admitted under section 1109, subdivision (a)(1) because those acts were not described by the People in their motion in limine. Specifically, Lucero contends that during Olivia's testimony she described certain additional acts, namely Lucero's threat "to shove a baseball bat up [her] woman area" and *multiple* threats to kill her. Lucero contends that the admission of this evidence violated section 1109, subdivision (b), which states that "[i]n an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, in compliance with the provisions of Section 1054.7 of the Penal Code." We reject Lucero's argument because he made no objection or motion to strike during Olivia's testimony regarding the evidence that he now claims was improperly admitted in violation of section 1109, subdivision (b), and he therefore may not now seek to obtain reversal of the verdict based on the purported improper admission of that evidence. (§ 353 ["A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an

⁹ Moreover, based on our discussion in section II.A.3, *post*, even if they were not admissible as instances of domestic violence as that term is used in section 1109, subdivision (a)(1), the instances of demeaning verbal abuse and the pushing and shoving are admissible as prior bad acts to prove Lucero's motive to injure the Child pursuant to section 1101, subdivision (b).

objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion."].)¹⁰

In sum, we conclude that the trial court properly concluded that section 1109, subdivision (a)(1) applied to the evidence that the People sought to admit concerning Lucero's domestic violence against Olivia.

b. *The Trial Court Did Not Abuse Its Discretion in Concluding That the Evidence Should Not Be Excluded Under Section 352*

Lucero next contends that even if section 1109, subdivision (a)(1) applies to the domestic violence evidence at issue here, the trial court erred in concluding that the evidence should not be excluded pursuant to section 352.

¹⁰ At oral argument, Lucero focused on an argument that was only briefly mentioned in his appellate briefing. Specifically, he argued that as a matter of statutory interpretation, section 1109 does not allow for cross admissibility or "cross-pollination" of the different types of bad acts referred to in section 1109, subdivision (a), such as the "domestic violence" referenced in subdivision (a)(1), the "abuse of an elder or dependent person" referenced in subdivision (a)(2), or the "child abuse" referenced in subdivision (a)(3). Lucero contends that because these three types of bad acts appear in different parts of the statute, in a prosecution for one type of bad act (such as child abuse), section 1109 does not allow the admission of evidence of a different type of past bad act (such as domestic violence). Lucero's argument is inapplicable here because the bad act for which Lucero was prosecuted and his prior physical abuse of Olivia both fall under *the same* subdivision in section 1109, in that they are both *acts of domestic violence*. *Dallas's* statutory analysis on that subject is sound. As used in section 1109, subdivision (a)(1), domestic violence includes abuse committed against "a person who regularly resides in the household," "regardless of whether the person is an adult or a child. (*Dallas, supra*, 165 Cal.App.4th at p. 953, citing Fam. Code, §§ 6209, 6211.) Thus, the trial court's ruling that Lucero's past physical abuse of Olivia was admissible under section 1109 does not require any cross admissibility or "cross pollination" of the different subdivisions of that statute.

As we have explained, section 1109, subdivision (a)(1) allows for the admission of prior acts of domestic violence only "if the evidence is not inadmissible pursuant to Section 352." Section 352 provides that "[t]he 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." In applying section 352, the trial court enjoys "broad discretion," and "[a] trial court's discretionary ruling under Evidence Code section 352 will not be disturbed on appeal absent an abuse of discretion." " (*People v. Clark* (2016) 63 Cal.4th 522, 586 (*Clark*).) A trial court's exercise of its discretion under section 352 " 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Lucero contends that the trial court abused its discretion in admitting evidence that he committed acts of domestic violence against Olivia because the evidence was "prejudicial in the extreme." Focusing on the domestic violence incidents involving "the death threats and attempted strangulation," he argues that Olivia's claims "were dubious, not similar to the charged counts, and never resulted in arrests or criminal charges, much less convictions." He argues that "[t]his is precisely the kind of inflammatory and specious claim that section 352 was intended to weed out."

As an initial matter, we note that " '[t]he 'prejudice' referred to in . . . section 352 applies to evidence which uniquely tends to evoke an emotional bias against the

defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' " [Citation.]' . . .

[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction." (*People v. Scott* (2011) 52 Cal.4th 452, 491.) "Relevant factors in determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s)." (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.) Here, the emotional reaction of a juror to hearing evidence of Lucero's domestic violence against Olivia would be no stronger than the reaction to evidence of the severe injuries inflicted on the Child. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [prejudice of uncharged acts lessened because they were "no more inflammatory" than the charged offenses].)

Further, although Lucero was not charged or convicted of any acts of domestic violence against Olivia, we do not agree with Lucero's contention that Olivia's claims of domestic violence are so "dubious" that the trial court abused its discretion in concluding that admitting evidence about the incidents would not be unduly prejudicial. Third party witnesses corroborated some of the incidents of violence against Olivia. The apartment manager corroborated the choking incident by stating that she saw marks on Olivia's neck. Another third party witness testified to seeing an incident in which Lucero

slammed Olivia's head against a dashboard, confirming that Lucero did act violently toward Olivia. Further, there was substantial corroboration of other less serious acts by Lucero against Olivia. Lucero admitted to engaging in demeaning verbal abuse, forcing Olivia out of the car, and pushing and shoving Olivia, all of which made it more likely, rather than less likely, that the other acts described by Olivia were true. Moreover, because Lucero was able to introduce certain impeachment evidence that allowed the jury to assess for itself whether Olivia was telling the truth, there was less prejudice in allowing Olivia to testify to the incidents of domestic violence. For example, the jury heard evidence that Olivia initially told the police that Lucero did not physically assault her and that she hit him as well. The jury was also made aware that the apartment manager previously told a private investigator that she did not see any marks on Olivia's neck, although Olivia told her that Lucero "hurt her."

We are also not convinced by Lucero's contention that the domestic violence evidence was not probative because it was "not similar to the charged counts." For one thing, the incidents against Olivia all occurred within a few months of the injuries to the Child, providing relevant evidence about Lucero's state of mind and propensity for domestic violence during that time period. In addition, the type of assaults involved in Lucero's violence toward Olivia and the injuries to the Child are similar. The Child had a fractured skull caused by either a blow to the head or having his head slammed against a surface. Lucero's domestic violence toward Olivia included an instance, confirmed by a third party witness, of slamming her head against a dashboard, as well as instances of force applied to her neck when choking her.

Based on all of these considerations, we conclude that the trial court did not abuse its discretion in concluding that the evidence of domestic violence against Olivia was not required to be excluded under section 352.¹¹

3. *The Trial Court Properly Admitted the Domestic Violence Evidence Pursuant to Section 1101, Subdivision (b)*

As a separate basis for the admission of the domestic violence evidence, the trial court ruled that the evidence was admissible pursuant to section 1101, subdivision (b) to show Lucero's motive for injuring the Child. As we will explain, we agree.

With certain exceptions, section 1101, subdivision (a) provides that "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."

However, pursuant to section 1101, subdivision (b), the admission of such evidence is not

¹¹ Citing *People v. Disa* (2016) 1 Cal.App.5th 654, Lucero contends that even if the trial court properly concluded in applying section 352 that *some* of the domestic violence evidence was admissible, it abused its discretion by "allowing too much inflammatory evidence." We reject the argument. As we have explained, during motions in limine, defense counsel did not object to the admission of most of the domestic violence evidence, but only to the more serious and purportedly uncorroborated instances of choking and making threats to kill Olivia. We conclude that the trial court did not abuse its discretion in ruling that those more serious instances should not be excluded pursuant to section 352. The more serious instances of domestic violence had significant probative value because they show the extent of Lucero's rage and frustration around the time that the Child was injured, and they demonstrate Lucero's propensity to inflict serious injuries in the course of committing domestic violence, in a way that the less serious instances do not. Further, Lucero may not now seek reversal based on an objection as to the cumulative or excessive nature of the evidence of domestic violence as presented at trial, as he made no such objections during the presentation of evidence. (§ 353, subd. (a).)

prohibited by subdivision (a), when evidence of a past bad act is "relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

(§ 1101, subd. (b).) Accordingly, under section 1101, subdivision (b), "[i]f an uncharged act is relevant to prove some fact other than propensity, the evidence is admissible, subject to a limiting instruction upon request." (*People v. Bryant, Smith, and Wheeler* (2014) 60 Cal.4th 335, 406.) We review for abuse of discretion a trial court's ruling on the admissibility of evidence under section 1101. (*People v. Fuiava* (2012) 53 Cal.4th 622, 667-668.)

Here, as the trial court ruled, evidence that Lucero committed domestic violence against Olivia in the months immediately before the death of the Child was relevant to prove Lucero's *motive* for injuring the Child. The issue of Lucero's motive to injure the Child was particularly important in this case where Lucero's guilt was based primarily on circumstantial evidence. " 'In a case where the identity of a person who commits a crime is attempted to be proven by circumstantial evidence, such as in the case at bar, evidence of a motive on the part of a defendant charged is always a subject of proof, and the fact of motive particularly material.' " (*People v. Kovacich* (2011) 201 Cal.App.4th 863, 896.)

Case law establishes that one circumstance in which prior bad acts may be admitted on the issue of motive is when " 'the uncharged act evidences the existence of a motive, but the act does not supply the motive. . . . [T]he motive is the cause, and both the charged and uncharged acts are effects. *Both crimes are explainable as a result of the same motive.*' " (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1381.) That

circumstance is present here, in that the People's theory was that Lucero's domestic violence against Olivia and the injury to the Child were explainable as the result of the same motive, namely Lucero's rage and frustration toward Olivia for her work at the strip club and her violation of the rules that he required her to follow at work.

As the People argued both during motions in limine and during trial, Lucero's rage and domestic violence against Olivia tended to prove that Lucero had a motive to injure the Child. Lucero was angry at Olivia and he took out his frustration on the Child, whom he was left to care for while Olivia was at work, where he believed she was having sex with other men. The evidence of Lucero's domestic violence against Olivia tended to show that Lucero was enraged and frustrated toward Olivia, and that the same rage and frustration caused him to injure the Child.

The connection between Lucero's motive to commit violence on Olivia and his motive to commit violence on the Child was brought out by other evidence at trial, showing that Lucero was enraged at Olivia for her work and frustrated by taking care of the Child while she worked. Among other things, Olivia testified that Lucero once told her, "I'll make you pay in a way you'll never forget." The jury heard evidence that minutes before the Child stopped breathing on April 3, 2013, Lucero and Olivia sent each other text messages, in which they were arguing about Olivia's job, and Lucero was upset with Olivia because she told him that she was going to work until 1:00 a.m. The evidence at trial also included text messages from Lucero to Olivia, expressing frustration about taking care of her sick child.

In sum, the evidence of domestic violence against Olivia tended to prove the People's theory that Lucero's rage and frustration toward her was the motive that caused Lucero to injure the Child. Therefore, we conclude that the trial court did not abuse its discretion in concluding that evidence of Lucero's domestic violence toward Olivia was admissible pursuant to section 1101, subdivision (b) to show Lucero's motive to harm the Child.¹²

B. *Lucero Has Identified No Erroneous Exclusion of Evidence Regarding Olivia's Performance of Sexual Acts at Work*

We next consider Lucero's contention that the trial court erroneously excluded evidence concerning whether Olivia was engaging in sexual acts at work. According to Lucero, the evidence was important because it would show that he was acting rationally by criticizing Olivia's work rather than acting as "a raging maniac who was angry that his girlfriend was a dancer." Lucero further contends that the evidence would have caused the jury to question Olivia's credibility because prostitution is a crime of moral turpitude. However, as we will explain, the trial court did not exclude any of the evidence that defense counsel proposed to present at trial on that issue. Accordingly, Lucero has not established that there was any error.

The issue of Olivia's possible participation in sexual acts at work was first raised by defense counsel outside of the presence of the jury prior to his cross-examination of

¹² Our analysis as to whether the trial court erred in concluding that section 352 did not require the exclusion of the domestic violence evidence is equally applicable to the section 352 analysis in connection with admission of the evidence under section 1101, subdivision (b).

Olivia, when he requested permission from the trial court to ask Olivia whether her VIP dances included any sexual activity. He explained that "[i]f [Olivia] says yes, that will be the end of it in terms of questioning her," but if Olivia denied it, he wanted to confront her with a text message from September 2012, in which she described sexual acts taking place during VIP dances. The trial court denied the request, stating that the court would "take it question by question" but that "right now, I don't want you asking her anything about any sex acts she was involved in within the VIP room." Nevertheless, upon cross-examining Olivia, defense counsel defied the trial court's ruling, and asked Olivia whether she engaged in sexual acts with customers, as Lucero accused her of doing. Olivia denied engaging in sexual acts, and testified that "the money [she] earned was for nonsexual acts."

Later outside the presence of the jury, defense counsel asked the trial court if he could impeach Olivia with the text message. Observing that defense counsel had defied the trial court's ruling, so that "the state of the evidence" now included Olivia's denial of having engaged in sexual acts at work, the trial court decided that it would allow defense counsel to once again ask Olivia if she lied to Lucero about not engaging in sexual acts at work. If Olivia responded that she did not lie to Lucero about that subject, then defense counsel could "use proper impeachment" and "show her the document" containing the text message, and "take it from there."

Based on the trial court's ruling, defense counsel asked the following questions:

"Q: Olivia, I wanted to ask you a question about the arguments you had with Mr. Lucero about your dances at the club. He accused you of engaging in some type of sex with customers; is that correct?

"A: Yes.

"Q: And you denied it to him, correct?

"A: Yes. [¶] . . . [¶]

"Q: Did you lie to Mr. Lucero when you told him that you don't have sex with customers?

"A: I did not lie to him when I told him. I do not have sex with customers—with customers."

Defense counsel then showed Olivia the text message, and asked, "And does that refresh your memory as to whether or not you engage in sex with customers?" Olivia replied, "I do not engage in sex with customers." Then, reading the content of the text message that Olivia exchanged with someone, defense counsel asked the following question: "Did he ask you about, What are you doing VIP?" You said, "Right now, yes. Laugh out loud." He said, "Is it the same as a dance? Do you do more than just dance sometimes?" And you said, "They can jerk off while I play with myself. LOL." "Did you say that to him?" Olivia answered, "Yes. I said that in the text message."

During redirect examination, the prosecutor asked Olivia about the text message, as follows:

"Q: So when he asked you, as I recall the statement was, what do you do in a VIP dance? Did you feel he was specifically asking you personally, Olivia, what Olivia does?

"A: I'm not sure. I just responded. [¶] . . . [¶]

"Q: Okay. And when you responded—and I believe it was from memory, 'They can jerk off while I play with myself.'

"A: Yes. I responded that.

"Q: . . . Were you referring to you, Olivia, does in fact do that?

"A: No.

"Q: What were you referring to?

"A: I was just responding as to what—cause I'm not sure exactly what I wrote. I was using texting. I just used 'I' in the sentence.

"Q: So that's something that some people can do over at the club? You've heard about this?

"A: I've heard about it. Girls told me about it. . . . I don't believe it's exactly allowed but they get away with it, I guess.

"Q: And you personally, do you engage in that conduct?

"A: No.

"Q: When there's a VIP dance, are there people watching what happens inside?

"A: No.

"Q: Are there cameras?

"A: Yes.

"Q: What I mean is, are there security people?

"A: On the other side of the camera, yes.

"Q: And what's the purpose of that?

"A: To make sure nothing happens, or make sure we don't get hurt. And to see who's in which room. But I'm not sure if someone's always in the camera room watching. . . .

"Q: You are aware that there's camera capability and that all activity in the VIP room can be watched?

"A: All of the club, yes. [¶] . . . [¶]

"Q: And in your experience as a dancer, have you ever seen dancers being raided or investigated by vice officers?

"A: I seen it. I saw police come in with several of them and just come and investigate certain girls.

"Q: Has that ever happened to you?

"A: No."

On recross-examination, defense counsel did not raise the issue further. Counsel made no attempt to pursue whether the cameras in the VIP rooms were functional, the significance of whether Olivia was ever investigated by vice officers, the type or frequency of sexual conduct that other dancers engaged in at the club, or the reasonableness of Olivia's statement that she was not referring to herself in the text message. Because defense counsel made no attempt to ask about those issues, the record does not reveal whether the trial court would have allowed that questioning in light of the prosecutor's redirect examination.

The issue of Olivia's sexual activity at work was also raised by defense counsel during Lucero's testimony. Specifically, Lucero testified that after he began dating Olivia, he engaged in sexual relations with her in a VIP room at her workplace.

On appeal, Lucero contends that the trial court improperly excluded evidence as to whether Olivia was engaging in sexual acts at work. However, Lucero does not point to any proffered evidence that would have been admitted at trial had the trial court ruled differently or any cross-examination that the trial court prevented him from conducting. Lucero argues that he "should have been permitted to present evidence that Olivia was a

prostitute" and "should have been given wide latitude in showing Olivia (and/perhaps the other dancers) were paid for sex in the VIP room, that patrons paid extra for the activity, and that security cameras were turned off during the private 'dances' " However, defense counsel never identified any evidence other than the text message that he proposed to rely upon to show that Olivia engaged in sexual acts at work. Indeed, defense counsel was allowed to pursue exactly the course of questioning that he initially proposed when raising the issue with the trial court at the beginning of Olivia's cross-examination. Although Lucero argues that he "should have been given a full opportunity for cross-examination on the issue," defense counsel made no attempt to pursue recross-examination on the issues that he now claims the trial court prevented him from exploring. Accordingly, because Lucero has not identified any evidence that the trial court excluded on the issue of whether Olivia engaged in sexual acts at work, he has not established that the trial court erred.

C. *Lucero Has Identified No Erroneous Exclusion of Evidence Regarding Olivia's Drug Use*

Lucero argues that the trial court improperly prevented him from introducing evidence concerning Olivia's use of crystal methamphetamine in the weeks prior to the Child's death. Lucero contends that the evidence should have been admitted to show that it may have been Olivia who injured the Child. According to Lucero, "[h]ad the jury learned that along with Olivia's other maternal deficiencies, she had been using crystal meth in the days before the boy died, it may well have found [Lucero] not guilty." However, as we will explain, Lucero's argument fails because he has not identified any

evidence of Olivia's drug use that the trial court prevented him from presenting to the jury.

Defense counsel first raised the issue of drug use during Olivia's cross-examination, when he asked whether during "the last couple of weeks before [the Child] went to the hospital, when he was with Mr. Lucero, were you ever involved in doing crystal meth?" The trial court sustained an objection. Defense counsel then attempted to ask, "At any time when you were caring for your son, were you under the influence?" The trial court sustained another objection and then held a discussion with counsel. During that discussion, the trial court allowed questioning of Olivia outside the presence of the jury to determine how she would have answered defense counsel's questions. Olivia stated that she did not use crystal methamphetamine or any other illegal drug in the two weeks before the Child died, and the single time that she ever tried crystal methamphetamine was before she moved into the new apartment with Lucero.

Defense counsel explained to the trial court that he wanted to ask Olivia in front of the jury whether she used drugs around the time of the Child's death, and he then planned to impeach her with testimony from Lucero about Olivia's drug use and *possibly* with testimony from another dancer at Olivia's job who would say that Olivia was using crystal methamphetamine during the week of the Child's death. During the discussion, defense counsel also stated that if Lucero testified "that she was high and stoned some of the time that she was caring for [the Child] . . . , then if you'll allow me to recall her, then I'm happy to do so." Defense counsel also indicated he could "call a crystal meth expert" to testify that someone can become more violent when using crystal methamphetamine.

The trial court ruled that it would not presently allow defense counsel to question Olivia in front of the jury about her drug use, but that the order was without prejudice. The trial court explained that "[i]f Mr. Lucero testifies, if you bring in different evidence that makes it relevant to this case, I will revisit that and then you can recall [Olivia]." Defense counsel replied, "That's fine. That's all I want."

Prior to the trial court's ruling, there was some debate about whether defense counsel should have disclosed to the prosecutor that he planned to call a witness about Olivia's crystal methamphetamine use, or whether that testimony would qualify as impeachment that did not have to be disclosed prior to trial, especially if defense counsel was not sure he was going to call that witness. However, the trial court clarified during its ruling that its decision did not depend on that issue, stating that "[i]t's beside the point," and acknowledging that "[c]learly, unless you're going to call her, you don't have to turn it over."

During the remainder of the trial, defense counsel did not question Lucero about Olivia's drug use, and he did not attempt to call a dancer from Olivia's work to testify on that subject. Therefore, the trial court had no occasion to revisit the issue of whether defense counsel should be permitted to recall Olivia to question her about drug use.

On appeal, Lucero contends that the trial court improperly prevented him from presenting evidence about Olivia's drug use on the ground (1) that the evidence was irrelevant; and (2) defense counsel had not earlier disclosed that evidence. Lucero contends that both bases for the trial court's ruling were legally flawed. However,

Lucero's argument fails because it depends on a misunderstanding of the trial court's ruling.

As we have explained, the trial court did not rule that Olivia's drug use would be irrelevant to the issues presented at trial, and it did not rule that Lucero was prevented from presenting such evidence because of a failure to disclose it to the prosecutor. On the contrary, after hearing testimony from Olivia outside the presence of the jury, the trial court concluded that because Olivia would *deny* any illegal drug use around the time of the Child's death, and because defense counsel had not yet presented any evidence that such drug use *did* in fact occur around the time of the Child's death, it would not allow defense counsel to cross-examine Olivia about her drug use *until* evidence of her drug use was presented at trial. The trial court put no limitation on defense counsel's ability to present evidence of Olivia's drug use, either through Lucero's testimony or the testimony of a different witness. However, defense counsel did not follow up by presenting any such evidence. Therefore, Lucero has not established any error.

Moreover, even if the trial court *had* ruled in Lucero's favor by allowing defense counsel to ask Olivia about her drug use, Lucero has not explained how that ruling could have resulted in a verdict more favorable to him. As Olivia indicated in her testimony outside the presence of the jury, she would have *denied* any illegal drug use around the time of the Child's death had defense counsel questioned her about it, and thus the jury would not have heard any evidence of drug use that could have influenced its verdict. Therefore, not only has Lucero failed to establish any erroneous exclusion of evidence, he has also failed to establish any possible prejudice amounting to a miscarriage of

justice. (Cal. Const., art. VI, § 13 ["No judgment shall be set aside . . . on the ground of . . . the improper . . . rejection of evidence . . . unless . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."].)

D. *The Trial Court Did Not Err in Denying the Ex Parte Application to Allow a Polygraph Examination Prior to Sentencing*

Prior to sentencing, Lucero filed an ex parte application for leave to allow a polygraph examination to be administered to him in jail. According to the accompanying declaration of counsel, the polygraph examination was "necessary to assist counsel in both preparing for the sentencing hearing, as well as any appropriate[] posttrial motions."¹³ The trial court issued an order denying the ex parte application. The order cites section 351.1, subdivision (a), along with case law, to support the ruling.

The trial court properly denied the application because evidence from a polygraph examination is not admissible in a sentencing hearing or a posttrial motion absent a stipulation of the parties, and no such stipulation was presented here.

Section 351.1, subdivision (a) states, "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal

¹³ Although not specified in the ex parte application, defense counsel's subsequent sentencing memorandum stated that the polygraph examination was sought to "bolster [Lucero's] claim of innocence."

offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results." Our Supreme Court has held that the prohibition on polygraph evidence is constitutional, even in a capital case. (*Clark, supra*, 63 Cal.4th at p. 631; *People v. Richardson* (2008) 43 Cal.4th 959, 1032-1033.)

Counsel's declaration stated that the polygraph results would be used for the sentencing hearing and post trial motions. Both of those proceedings are "post conviction motions [or] hearings" within the meaning of section 351.1, subdivision (a), as they occur after conviction. Lucero has cited no authority to the contrary that would make an exception to section 351.1 for the evidence presented by the defendant to the trial court in the context of sentencing, whether through the vehicle of a probation officer's report or a defendant's sentencing memorandum.

Lucero cites *People v. Forney* (2016) 3 Cal.App.5th 1091, which he describes as having "authorized probation officers to consider polygraph exams in other contexts." However, *Forney* is inapposite, as it concerns the permissibility of a probation condition applied under a sex offender management program requiring the defendant to undergo polygraph examinations as a condition of probation. (*Id.* at pp. 1106-1108.) *Forney* has no bearing on whether the trial court may consider evidence from a polygraph examination in a sentencing hearing, even if that evidence is presented to the trial court through a probation officer's report as part of the sentencing process.

We accordingly conclude that the trial court properly denied the ex parte application to allow the polygraph examination, as evidence from the polygraph examination would not have been permitted as part of the sentencing hearing or a

posttrial motion. (See *Clark, supra*, 63 Cal.4th at p. 630 [trial court did not abuse its discretion in denying an application for funds for a polygraph examination of a capital defendant for use in the penalty phase, as the results would have been inadmissible under section 351.1].)

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.



03/15/2018

KEVIN J. LANE, CLERK

By  Deputy Clerk