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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JUAN JOSE VILLATORO, Defendant and Appellant.	B222214 (Los Angeles County Super. Ct. No. BA339453)

APPEAL from a judgment of the Superior Court of Los Angeles County. William N. Sterling, Judge. Affirmed.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr. and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

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Juan Jose Villatoro appeals from the judgment entered after a jury convicted him of various counts of kidnapping, robbery, rape, and other sex crimes he committed against five women over a three-year period. We reject his claims of instructional and evidentiary error, and also conclude that his use of a stun gun to commit some of the crimes was sufficient evidence that he used a deadly or dangerous weapon. We therefore affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Five women accused Juan Jose Villatoro of kidnap, robbery, rape, and other forcible sex crimes.

R.I.

R.I. was a prostitute who got into Villatoro's Honda Civic at around 3:00 a.m. on May 25, 2005, after agreeing to have sex with him for $80. After driving to a nearby residential area, Villatoro stopped the car, pulled out a gun, and told R.I. he would kill her if she moved. Villatoro forced her to have vaginal and anal intercourse, then whipped her on the back for about 20 minutes with some electrical extension cords. Villatoro took R.I.'s cell phone, and then told her to get out of the car. He did not pay her.

Later that morning, a Los Angeles police officer was called to Centinela Hospital to conduct a rape investigation. When he arrived, R.I. was being treated for injuries to her back. She told the officer what had happened.

A nurse conducted a rape exam of R.I. She had numerous bruises on her back, along with bruising on her vagina, and swelling in her legs. These wounds were consistent with R.I.'s account of the attack. DNA samples taken from R.I. were later found to match Villatoro's DNA.

About two months after the incident, R.I. identified Villatoro from a photographic six-pack lineup.

N.G.

Between midnight and 1:00 a.m. on June 21, 2006, 18-year-old N.G. was walking home when Villatoro drove up in a white Honda, pointed a gun at her, and said he would kill her unless she got into his car. N.G. got in the car, and Villatoro drove off. He held a razor to N.G.'s ribcage as he drove. Villatoro stopped the car in a residential area, then had vaginal intercourse with N.G. and inserted his fingers inside her vagina. Villatoro took N.G.'s cellphone, rings, and sunglasses, and then let her go.

N.G. ran for help and the police were called. When Los Angeles Police Officer Alonzo Howell arrived at the location, N.G. was crying and screamed that she had been raped. Nurse Sally Wilson performed a rape exam. Wilson said that N.G.'s body bore marks that confirmed her story. DNA swabs taken from N.G. were later determined to match Villatoro's DNA. Almost two years later, N.G. identified Villatoro from a photographic six-pack lineup.

N.G. testified that she became a prostitute a few months after she was raped, but denied that she was working as a prostitute when Villatoro approached her.

Beverly G.

At around 2:30 a.m. on February 3, 2008, after some unsuccessful haggling by Villatoro, prostitute Beverly G. agreed to have sex with Villatoro for $100. She got into Villatoro's car, which she first described as a burgundy colored Stratus, but later recalled was a Dodge Intrepid. Villatoro stopped the car in a residential area after driving a short distance, and then pulled out a stun gun. Villatoro activated the device so that it began to spark at the delivery end, and told Beverly not to move. He put the stun gun against Beverly's neck and screamed at her, "Don't look at me." He had both vaginal and anal intercourse with her. Whenever Beverly would look at Villatoro, he slapped her or spat at her.

When Villatoro was done, he told Beverly to get out of the car. He did not pay her. Beverly phoned her boyfriend for help. The boyfriend took her to a hospital, but she lied to the police about what happened because she had outstanding warrants for prostitution. No rape exam was performed, and therefore there was no DNA to test.

Beverly eventually told the police what happened, and in May 2008, she identified Villatoro from a photo lineup. In early 2009, Beverly found internet photos of Villatoro that caused her to remember that Villatoro had raped her once before, in 2007. During that rape, Villatoro carried pepper spray. She did not make the connection before then because the lineup photo and the internet photo differed and because Villatoro used different cars during each incident. Beverly did not report the 2007 rape when it occurred because of warrants that were out for her arrest.

C. C.

At around 2:45 a.m. on February 10, 2008, Villatoro offered a ride to C.C., who was waiting at a bus stop. Because another man had been harassing her, C.C. accepted and got into Villatoro's burgundy Intrepid. C.C. asked Villatoro to drive her to Hollywood. When she noticed they were in Santa Monica, she became nervous. She asked Villatoro to stop so she could use a restroom. Villatoro pulled the car over, handed C.C. some baby wipes, and told her to relieve herself in the grass. Villatoro watched as she did so.

When Villatoro promised to take her home, C.C. got back inside the car. Villatoro then pulled out a stun gun, triggered a spark from the delivery end of the weapon, and placed it near C.C.'s throat. He told C.C. to take off her pants, and she complied. He told her not to look at him, punched her in the face, and ordered her to cover her head with her shirt. Villatoro had vaginal intercourse with C.C., and also bit her left breast and nipple and pulled out some of her hair.

Villatoro told her to get out of the car. She did so, and then ran to get help. Santa Monica Police Officer Michael Chun arrived, and saw that C.C. was crying. She told Chun what Villatoro had done to her. C.C. was given a rape exam. The nurse who performed the exam found a bite mark and a suction injury on C.C.'s left breast. The physical findings were consistent with C.C.'s account of the incident. DNA samples taken from C.C.'s body were later found to match Villatoro's DNA.

C.C. helped the police create a composite drawing of her attacker, and in April 2008 identified Villatoro from a photo lineup. C.C. admitted that she worked as a prostitute a few years before the incident, but denied that she was doing so when she encountered Villatoro.

Kimberly J.

At around 3:00 a.m. on April 4, 2008, prostitute Kimberly J. agreed to get into Villatoro's car, which she described as burgundy Dodge. They drove for a few blocks, when Villatoro stopped the car on a dark street, told her, "Shut up or I'm going to kill you," and pulled out a stun gun. Villatoro turned the stun gun on and off a few times in order to scare Kimberly. He told her to turn around and to not look at him. He ripped off Kimberly's underwear and had vaginal intercourse with her. During the rape, he again told her to not look at him. When Villatoro finished, he took Kimberly's cell phone and jewelery and told her to get out of the car. He tried to place the stun gun against her, but she jumped out before he could do so.

Kimberly ran for help and eventually located friends who took her to a Los Angeles police station to report the rape. Kimberly was taken to a hospital for a rape examination, which was performed by Sally Wilson, the nurse who did the rape test on N.G. Wilson saw vaginal bruising, and the hymen had an abrasion and appeared to be tender. These findings were consistent with Kimberly's

account. DNA samples were taken and later testing showed that these samples also matched Villatoro's DNA.

Kimberly helped the police prepare a composite drawing of her attacker, and she too identified Villatoro from a photo lineup.[1]

A. *Additional Prosecution Evidence*

A crime alert bulletin was issued to police officers that included a description of the man who attacked all five women, and his burgundy Dodge Intrepid. On April 19, 2008, a Los Angeles police officer spotted a burgundy Intrepid that matched the description. Because the windows had an illegal tint, the officer stopped the car. Villatoro was the driver. The officer saw that Villatoro matched the description of the rapist given in the bulletin, as well as the composite drawings. Villatoro produced a California identification card with the name Juan Estrada Villalobos. After learning that there was a felony arrest warrant out for someone with that name, the officer arrested Villatoro and ascertained his real name.

A later search of Villatoro's car turned up a box of baby wipes, a condom, a bottle of perfume, three bracelets, an earring, a box cutter, and one acrylic fingernail.

The police later searched the laundromat where Villatoro once worked. They spoke with employee Michael Cross, who said that when Villatoro was still working at the laundromat, he noticed that Villatoro had a stun gun. Villatoro offered to buy one of the same model for Cross for $40, and a few days later did so. The police seized the stun gun from Cross. Printed on the side was the

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[1] Kimberly's story came into evidence by way of her testimony at Villatoro's preliminary hearing after the trial court found that her refusal to testify at trial made her unavailable as a witness. The admissibility of her testimony is at issue on appeal, and we discuss it below.

following: “Storm Stun, the world’s smallest stun gun, warning, extremely dangerous, keep out of reach of children.”

John Wong, a Los Angeles police detective assigned to the case, testified about stun guns, which he said produce an electrical charge. When applied to a person’s body, a stun gun causes pain, involuntary muscle contractions, loss of body control, disorientation, loss of balance, and extreme fatigue. Police officers are trained to avoid using a stun gun near the face, neck, eyes, chest, or breasts. The weapon can cause heart attacks, burns, scarring, and central nervous system injuries. The stun gun obtained from Cross states that it put out 950,000 volts, while taser guns used by Los Angeles police officers put out only 50,000 volts.

B. *Defense Evidence*

Defense expert witness Larry Smith testified that, based upon his own research, the use of a stun gun of the type recovered in the case had not caused serious injury or death. He also reached the conclusion that the device could not cause any permanent harm after reading the literature in the field. Smith acknowledged that certain types of contact with a taser could cause various forms of physical reaction including pain. He also stated that he personally had a painful experience with a taser that left a burn mark for a week. He would not stun himself on certain areas of the body or under certain conditions for fear of serious injury.

C. *Verdict and Sentence*

A jury convicted Villatoro of five counts of rape, one each as to the five victims. He was also convicted of: one count of kidnapping to commit another crime as to N.G; and four counts of robbery, one each as to N.G., Beverly G., C.C., and Kimberly J. The jury found true allegations that Villatoro: (1) personally used a firearm during the rapes of R.I., N.G., and during the kidnap and robbery of N.G.; and (2) personally used a deadly or dangerous weapon as to all

five rapes and as to the robberies of C.C. and Kimberly J.[2] The jury acquitted Villatoro of one count of sodomy by force against Beverly G., and of one count of rape as to Beverly G. in connection with her claim that Villatoro had previously raped her in 2007. Villatoro received a combined prison sentence of 153 years to life.

On appeal, Villatoro contends: (1) a modified version of CALCRIM instruction No. 1191 improperly allowed the jury to use evidence of his guilt of one of the charged offenses as evidence of his propensity to commit the other charged offenses; (2) the CALCRIM No. 1191 instruction violated his constitutional rights because it misinstructed the jury on the burden of proof; (3) the propensity inference instruction violated his constitutional due process and equal protection rights; (4) the testimony of an expert witness about rape exams performed by other persons violated his constitutional right to confront and cross examine adverse witnesses; (5) the court erred by finding one of his accusers was unavailable to testify, thereby allowing in evidence her preliminary hearing testimony; (6) investigating police officers should not have been allowed to give hearsay evidence of statements made by some of his accusers; (7) the reasonable doubt instruction given to the jury was defective; and (8) there was no evidence that the stun gun he used on two of his victims was a deadly or dangerous weapon for purposes of a sentence enhancement.

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[2] Other allegations were charged and found true, but they are not relevant to the issues on appeal.

DISCUSSION

1. *The Modified CALCRIM No. 1191 Instruction on the Use of Propensity Evidence Was Proper*

A. Background Concerning Propensity Instructions

As a general rule, evidence of a person's character or character trait is not admissible to prove that person's conduct on a specified occasion except when offered as impeachment evidence, or to show some fact such as motive, intent, plan, or identity. The evidence may not be admitted to show the person's disposition to commit a criminal act or civil wrong. (Evid. Code, §§ 1100, 1101, subds. (a)-(c); *People v. Wilson* (2008) 166 Cal.App.4th 1034, 1046 (*Wilson*).)[3]

There is an exception to this rule in sex crime cases (§ 1108) and domestic violence cases (§ 1109). When a defendant is on trial for sex crimes, evidence of his "commission of another sexual offense or offenses" is admissible to show his propensity to commit the crimes for which he is now charged, subject to the trial court's determination whether the evidence is unduly prejudicial pursuant to section 352. (§ 1108; *People v. Falsetta* (1999) 21 Cal.4th 903, 907 (*Falsetta*).)

Nearly every reported decision interpreting section 1108 describes that provision as permitting, when proper, evidence of a defendant's *uncharged* sexual offenses. This principle is explained to juries by pattern instruction CALCRIM No. 1191, which provides: "The People presented evidence that the defendant committed the crimes _____ <*insert description of offense*[*s*]> that were not charged in this case. These crimes are defined for you in these instructions. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof

[3] All further undesignated section references in this section of our discussion are to the Evidence Code.

from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit __________ <*insert charged sex offense*[*s*]> as charged here. If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of __________ < *insert charged sex offense*[*s*]>. The People must still prove each element of the charge beyond a reasonable doubt. [¶] [Do not consider this evidence for any other purpose [except for the limited purpose of _____ <*insert other permitted purpose, e.g., determining the defendant's credibility*>].]"

Even though uncharged sex offenses may be proven by a preponderance of the evidence, section 1108 and CALCRIM No. 1191 (and its predecessor) have repeatedly been held to be both constitutional and correct statements of the law. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016; *People v. Cromp* (2007) 153 Cal.App.4th 476, 480; *People v. Fitch* (1997) 55 Cal.App.4th 172, 184-185.)

Two reported decisions have split on the issue whether a jury can be instructed that it may draw the inference of propensity to commit a charged offense from its finding that the defendant committed another of the crimes with which he was charged. The court in *People v. Quintanilla* (2005) 132 Cal.App.4th 572 (*Quintanilla*), held that the instruction applied to only uncharged offenses. The court in *Wilson, supra,* 166 Cal.App.4th 1034, approved an instruction under section 1108 that was based on other charged offenses.[4]

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4 We discuss these decisions in more detail below.

Relying on the holding in *Wilson,* the trial court in this case gave the jury a modified version CALCRIM No. 1191 that told the jury it could consider evidence of a charged offense for determining Villatoro's propensity to commit the other charged crimes. However, unlike the unmodified version of CALCRIM No. 1191, the modified instruction told the jury that the prosecution had to prove all the offenses for all purposes under the beyond-a-reasonable-doubt standard: "If you decide that the defendant committed one of these charged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit the other charged crimes of rape or sodomy, and based on that [decision] also conclude that the defendant was likely to and did commit the other offenses of rape and sodomy charged. [¶] If you conclude that the defendant committed a charged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove the defendant is guilty of another charged offense. The People must still prove each element of every charge beyond a reasonable doubt and [must] prove it beyond a reasonable doubt before you may consider one charge as proof of another charge."[5]

Relying primarily on *Quintanilla, supra,* 132 Cal.App.4th 572, Villatoro contends the modified CALCRIM No. 1191 instruction was improper because: (1) Section 1108 contemplates that evidence of only uncharged offenses is admissible, subject to a section 352 analysis, and no such analysis occurred here;

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5 This is the version of the instruction that was read to the jury. The last sentence of the written version of the instruction, which was included in the clerk's transcript, states: "The People must still prove each element of every charge beyond a reasonable doubt and must prove it beyond a reasonable doubt before you may consider one charge as proof of specific intent of another charge." The written version's apparent limitation of the other charged offense evidence to proof of Villatoro's specific intent was not argued to the jury by the prosecutor, and we therefore disregard it when evaluating the instruction.

(2) no standard of proof was given for the jury's consideration of a charged offense that it might later use as evidence of his propensity to commit the other charged offenses; and (3) the instruction did not tell the jury that despite the inferences it could draw from its finding that a charged offense occurred, Villatoro still retained his presumption of innocence. As a result, he contends, his constitutional due process and equal protection rights were violated.[6]

B. The *Quintanilla* Decision

Quintanilla involved a domestic violence case and the admissibility of evidence of other domestic violence incidents by the defendant pursuant to section 1109. That section is substantially similar to section 1108, and performs the same purpose in domestic violence trials. (*Wilson, supra,* 166 Cal.App.4th at pp. 1046-1047.) The trial court in *Quintanilla* approved an instruction that told the jury it could consider evidence of charged domestic violence incidents to determine the defendant's propensity to commit the other charged offenses. Although the instruction told the jury that the prosecution had to prove each charged offense beyond a reasonable doubt, it also said that for purposes of drawing the propensity inference, the prosecution's burden of proof was the preponderance of the evidence standard.

The *Quintanilla* court held that the instruction was improper because: (1) section 1109 contemplated that the trial court would weigh the other crimes evidence to determine whether it was unduly prejudicial under section 352, an analysis that would never come into play with charged offenses; and (2) the instruction was confusing because it required the jury to engage in mental

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[6] Respondent contends that any claim of instructional error was waived because Villatoro never objected to the instruction. Because Villatoro claims that his trial counsel's failure to object amounted to ineffective assistance of counsel, we will reach the issue on its merits in order to forestall a habeas corpus petition on that ground. (*People v. Thurman* (2007) 157 Cal.App.4th 36, 43, fn. 5.)

gymnastics by first evaluating a charged offense under the preponderance-of-the-evidence standard for purposes of drawing the propensity inference, and then evaluate it under the beyond-a-reasonable-doubt standard before convicting the defendant of that offense. (*Quintanilla, supra,* 132 Cal.App.4th at pp. 579-582.)[7]

C. The *Wilson* Decision

The jury in *Wilson, supra,* 166 Cal.App.4th 1034, was given a modified version of CALCRIM No. 1191 that was substantially identical to the instruction given here, with two exceptions: It told the jury it could, but did not have to, consider the evidence of other charged crimes to determine that the defendant was likely to "*and did have the requisite specific intent for other charged offenses,*" and concluded by telling the jury to consider the evidence for only "the limited purpose of determining the specific intent of the defendant in certain charged offenses." (*Id.* at p. 1045, italics added.)

The *Wilson* court believed *Quintanilla* was incorrect because: (1) section 1108 does not distinguish between charged and uncharged offenses, and refers merely to evidence of other sex offenses; (2) in cases involving multiple victims, allowing the jury to consider the propensity evidence in this way serves the legislative purpose of section 1108, which was to overcome the difficulties in proving sex offense cases because they usually occur in private and often come down to credibility contests between the victim and the accused; (3) the policy considerations that usually militate against propensity evidence are not implicated where multiple offenses are charged in the same case, due to the fact that the defendant does not face an unfair burden of mini-trials to defend against the uncharged offenses; and (4) the defendant does not face the burden of

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[7] The United States Supreme Court granted certiorari for *People v. Quintanilla, sub nom. Quintanilla v. California* (2007) 549 U.S. 1191. Judgment was vacated and the case was remanded to the Court of Appeal for further consideration in light of *Cunningham v. California* (2007) 549 U.S. 270. On remand, the Court of Appeal filed an unpublished opinion on July 31, 2007.

undue prejudice from the admission of other offenses because he is already required to defend against all of the charges. (*Wilson, supra,* 166 Cal.App.4th at pp. 1047, 1052.)

However, even though the *Wilson* court was not persuaded that *Quintanilla* was correctly decided, it chose not to answer that "broader question" because the instruction at issue in *Wilson* was substantially narrower, and therefore distinguishable, from the instruction given in *Quintanilla*. These differences were: (1) instead of the preponderance of the evidence standard given in *Quintanilla*, the jury in *Wilson* was told that it had to determine the truth of all the charges, for all purposes, under the beyond-a-reasonable-doubt standard, thereby posing no risk the jury would be confused or misled; (2) as approved in *Reliford, supra,* 29 Cal.4th at p. 1013, the jury was told that it could, but was not required to, make the inference authorized by section 1108; (3) the jury was instructed that the inference by itself was not enough to find the defendant guilty of the other charged offenses; (4) the instruction limited use of the inference to proof that the defendant had the specific intent to commit a charged offense; and (5) before giving the modified instruction, the court weighed the evidence under section 352 before deciding to let the jury consider it as circumstantial evidence to prove one or more of the other charged offenses. (*Wilson, supra,* 166 Cal.App.4th at pp. 1052-1053.)

D. <u>The Modified Propensity Instruction Was Proper</u>

Although Villatoro does not expressly say so, we believe he contends the instruction in *Wilson* was proper, if at all, because it allowed the jury in that case to use evidence of some charged offenses only to determine the defendant's specific intent when committing other charged offenses, as permitted by section 1101. As a result, section 1108 was no longer relevant because the evidence was properly admitted for another purpose under section 1101. Because the instruction given in the present case allowed the jury to use the evidence not just to establish

defendant's intent but also on the propensity issue, Villatoro contends *Wilson* is inapplicable. As we now discuss, section 1108 authorized the modified CALCRIM No. 1191 given here even though the instruction did not limit the other crimes evidence to the issue of intent and instead permitted the jury to draw an inference of guilt as to other charged counts if it found defendant guilty of a related charged offense.

We begin by noting, as mentioned earlier, that the unmodified version of CALCRIM No. 1191, and its predecessor, CALJIC No. 2.50.01, have repeatedly been held to be both constitutional and correct statements of the law. Therefore, to the extent the modified instruction given in this case mirrors or overlaps CALCRIM No. 1191, we hold that it was proper.

We agree with nearly all of *Wilson*'s dicta concerning the propriety of using charged offenses to prove the defendant's propensity to commit other charged offenses. As the *Wilson* court noted, section 1108 never mentions uncharged offenses. Instead, it says that evidence of "another sexual offense or offenses" is admissible in sex offense cases. In a case with multiple victims of multiple sex offenses, allowing the jury to use a charged offense that it first found true beyond a reasonable doubt as evidence on the propensity issue furthers the legislative purpose of section 1108 because it eases the victim's burden of waging a credibility contest with the accuser. And because Villatoro had to defend all the charges anyway, he faced no additional burden by having to engage in mini-trials, as often occurs when evidence of uncharged offenses is admitted. Finally, as in *Wilson,* the instruction given here clearly required the prosecution to prove each offense beyond a reasonable doubt, even those that the jury might later use as propensity evidence. Despite Villatoro's contentions to the contrary, there was

nothing confusing or misleading about the instruction on the burden of proof or anything else.[8]

Nor is his contention that the jury was somehow misled on the presumption of innocence well taken. Jury instructions must be read as a whole when evaluating them for error. (*People v. Smith* (2008) 168 Cal.App.4th 7, 13.) The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights. We assume that jurors are intelligent and capable of understanding and correlating all the instructions they were given. (*Ibid.*)

The modified version of CALCRIM No. 1191 given here told the jury the prosecution bore its burden of proof beyond a reasonable doubt. Elsewhere, the jury was instructed with CALCRIM No. 220 on the meaning of that standard of proof, including the admonition that the defendant is presumed innocent, and that only proof beyond a reasonable doubt could overcome that presumption. A reasonable juror would read these instructions together and conclude that Villatoro was presumed innocent, even when applying CALCRIM No. 1191.

Where we part company with *Wilson* is its assumption that a section 352 analysis was not required because evidence of the other charges would be allowed in any event. Just because evidence concerning the other charged offenses will necessarily be allowed at trial does not, however, automatically justify an instruction allowing the jury to use that evidence to draw an inference that the defendant had the propensity to commit any of the other charged offenses.

We start our analysis with a brief review of how section 352 generally operates in the context of propensity evidence. One of the factors affecting the

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8 Thus, the instruction actually benefits defendants because, unlike the use of uncharged offenses, which may be proved by a preponderance of the evidence, the jury is clearly told that all offenses must be proven beyond a reasonable doubt, even for purposes of drawing the propensity inference. Villatoro's trial counsel admitted as much when the instruction was discussed.

probative value of an uncharged sex offense is its similarity to the charged offenses. Other factors to be considered in weighing the probative value/prejudicial effect of an uncharged act include the degree by which the evidence of the uncharged act is independent of the charged offense, the amount of time between those acts, the nature and relevance of the uncharged acts, the degree of certainty of its commission (including any resulting conviction), the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, 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 inflammatory details surrounding the offense. (See *Falsetta*, *supra*, 21 Cal.4th at p. 917; *People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274.)

Although the appellate discussion of the competing probative and prejudicial factors has usually arisen in the context of the admissibility of *uncharged* offenses, we believe that the analysis has relevance when the trial court determines whether the jury is permitted to use evidence of one *charged* offense on the defendant’s propensity to commit another *charged* offense. Even where a defendant is charged with multiple sex offenses, they may be dissimilar enough, or so remote and unconnected to each other, that the trial court could apply the criteria of section 352 and determine that it is not proper for the jury to consider one or more of the charged offenses as evidence that the defendant likely committed any of the other charged offenses. In those situations a modified CALCRIM No. 1191 instruction should not be given, or it may be appropriate to give only a modified version of CALCRIM 375 (evidence of uncharged offense to prove identity, intent, common plan, etc.). (See *Quintanilla*, *supra*, 123 Cal.App.4th at p. 586 (conc. opn. by Pollak, J.).)

And even where multiple sex offenses are charged that pass muster under section 352, in some cases those charges might also be joined with unrelated or

tangentially related offenses that do not. In short, before the jury can be instructed that its finding of guilt on a charged offense allows it to draw the propensity inference as to other charged offenses, the relationship between those offenses must be sufficient to justify drawing that inference.

Villatoro contends that the trial court's failure to conduct a section 352 analysis is yet another flaw in the instruction. The record does not include an express statement by the trial court that it undertook that analysis in deciding to give CALCRIM No. 1191. However, even though the record must affirmatively show that the trial court undertook the section 352 analysis, an express statement that it did so is not required. Instead, we may infer an implicit weighing by the trial court on the basis of record indications such as arguments by counsel or comments by the trial court that touch on the issues of prejudice and probative value. (*People v. Padilla* (1995) 11 Cal.4th 891, 924, overruled on another point in *People v Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

When the trial court discussed the modified version of CALCRIM No. 1191, it said the instruction was based on *Wilson, supra,* 166 Cal.App.4th 1034. As noted, the instruction given closely tracks the instruction approved by the *Wilson* court. A critical distinction that allowed the *Wilson* court to approve the instruction was the section 352 analysis conducted by the trial court in that case. (*Id.* at p. 1053.) The trial court's express reliance on a key case in this area, considered in light of the entire record, allows us to infer that the trial court gave the instruction because it found that all the requirements of the holding in *Wilson,* including a section 352 analysis, had been satisfied.

We alternatively hold that even if the trial court did not conduct a section 352 analysis, such analysis would have necessarily resulted in the admission of the evidence for the propensity inference. Thus any error was harmless. Although the five victims' accounts of what happened had minor differences, they were strikingly similar in several critical respects. Each victim was lured or forced into Villatoro's car, then driven to a darkened residential area where they were forced

to submit to sex acts at the point of various weapons. At the end of each incident, he told the victim to get out of his car. Villatoro's DNA was found on the four victims who were tested, and none of the victims knew each other. Therefore, the evidence was highly probative of Villatoro's propensity to commit such crimes, and instructing the jury that it could use that evidence for that purpose without an express ruling under section 352 was not prejudicial. (*Padilla, supra,* 11 Cal.4th at p. 925.)

We also observe that Villatoro did not raise a section 352 objection with the trial court. (*Brown v. Smith* (1997) 55 Cal.App.4th 767, 791 [section 352 analysis required when objection is made].) Nor does he make any argument on appeal, by way of either analysis or citation to applicable authorities, concerning why the charged offenses were not admissible under section 352 for purposes of section 1108. (*People v. Beltran* (2000) 82 Cal.App.4th 693, 697, fn. 5.) Accordingly, Villatoro has waived the issue.[9]

Finally, Villatoro contends CALCRIM No. 1191 was improper because it told the jury it could "conclude" he was guilty under the propensity inference, instead of using the term "infer." An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action. (§ 600, subd. (b).) It is "a conclusion as to the existence of a material fact that a jury may properly draw from the existence of certain primary facts." (*Blank v. Coffin* (1942) 20 Cal.2d 457, 460; *Grover v. Sharp & Fellows Contracting Co.* (1944) 66 Cal.App.2d 736, 742.) Accordingly, the two terms are interchangeable in this context, and we therefore reject this contention.

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9 See footnote 6, *ante.*

2. *Allowing Nurse Wilson to Testify About Rape Exams She Did Not Perform Did Not Violate the Confrontation Clause*

Sally Wilson, who performed the rape exams on N.G. and Kimberly, testified about the results of those exams, as well as the rape exams that other nurses conducted of C.C. and R.I. Wilson was a sexual assault nurse examiner and the clinic coordinator at the Santa Monica-UCLA Rape Treatment Center. She was a qualified expert, had personally conducted as many as 600 sexual assault examinations, and had reviewed the reports of the sexual assault exams performed on C.C. and R.I. by nurses she supervised. The rape exams did not document any lab analysis or reach any scientific conclusions. Instead, they recorded what the victims said and what the nurses observed.

Under the Sixth Amendment to the United States Constitution, a defendant in a criminal trial has the right to confront and cross-examine adverse witnesses. The essence of a confrontation clause violation is the use of a hearsay declarant's testimonial statements. Testimonial statements are those that in purpose, form, and setting, are akin to testimony given by a witness at trial. (*People v. Cage* (2007) 40 Cal.4th 965, 984-987.) Relying on *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___, 129 S.Ct. 2527 (*Melendez-Diaz*), Villatoro contends that his Sixth Amendment right to confront the witnesses against him was violated because he was not allowed to cross-examine the other two nurses.

We first hold that the issue was waived because no confrontation clause objection was made at trial. *Melendez-Diaz* was decided five months before the start of Villatoro's trial. Therefore, the law was not unsettled at that time. (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2534, fn.3; *People v. Burgener* (2003) 29 Cal.4th 833, 869.) We alternatively conclude on the merits that no confrontation clause violation occurred. We begin by examining the relevant state and federal authorities.

A. The *Geier* Decision

The defendant in *People v Geier* (2007) 41 Cal.4th 555, was convicted of murder and rape based in part on DNA evidence tested by Cellmark. The analyst who performed the testing did not testify at trial. Instead, a lab director who cosigned the report did, and, based on the results and her review of the case file, testified that in her expert opinion the incriminating DNA matched that of the defendant. Geier contended his constitutional right to confront and cross-examine adverse witnesses was violated because the lab analyst did not testify. Our Supreme Court disagreed.

After examining disparate state and federal authority on the issue of whether scientific test reports were testimonial for purposes of the confrontation clause, the *Geier* court concluded a statement was testimonial only if three requirements were all met: (1) it was made to a law enforcement officer or by a law enforcement officer or agent; (2) it describes a past fact related to criminal activity; and (3) it will possibly be used at a later trial. (*Geier*, *supra*, 41 Cal.4th at p. 605.) The *Geier* court found the second point determinative. Even though the analyst was working for the police and could reasonably anticipate the use of her test results at trial, those results "constitute[d] a contemporaneous recordation of observable events rather than the documentation of past events." (*Ibid*.) As a result, when the analyst recorded the results, she was not acting as a witness and was not testifying. (*Id.* at pp. 605-606.)

Ultimately, it was the circumstances under which the analyst's reports and notes were made that led the *Geier* court to conclude they were not testimonial and therefore did not violate Geier's confrontation rights. First, they were generated as part of a standardized scientific protocol conducted pursuant to her employment at Cellmark. Even though the prosecutor hoped to obtain evidence against Geier, the analyst's work product was part of her job, and was not intended to incriminate him. Second, to the extent the analyst's notes and reports recount the procedures

used, they were not accusatory because DNA analysis can lead to either incriminatory or exculpatory results. Finally, the accusatory opinions that the DNA evidence matched Geier "were reached and conveyed not through the nontestifying technician's laboratory notes and report, but by the testifying witness, [the lab director]." (*Geier*, *supra*, 41 Cal.4th at p. 607.)

B. <u>*Melendez-Diaz*</u>

The defendant in *Melendez-Diaz*, *supra*, 129 S.Ct. 2527, was convicted in Massachusetts state court of selling cocaine. A substance in the defendant's possession that was believed to be cocaine was sent to a lab for analysis, and the lab test confirmed it was cocaine. At trial, as permitted by Massachusetts law, a sworn affidavit known as a certificate of analysis was allowed in evidence in order to prove that the substance tested positive as cocaine. The analyst who performed the test did not testify at trial. The certificate said nothing more than that the substance was found to contain cocaine. At the time of trial, the defendant did not know what tests the analyst performed, whether those tests were routine, or whether interpreting their results required the exercise of judgment or skills the analyst did not possess.

The *Melendez-Diaz* court held that the affidavits fell within the core class of testimonial statements – such as depositions, prior testimony, declarations, and affidavits – whose admission violates the confrontation clause. (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2531-2532.) Therefore, the analysts were witnesses and their affidavits were testimonial, meaning that the defendant had a right to "confront" them at his trial unless the analysts were unavailable for trial and the defendant had a previous opportunity to cross-examine them. (*Id.* at p. 2532.) In short, "[t]he Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence . . . was error." (*Id.* at p. 2542, fn. omitted.)

C. *Geier*, Not *Melendez-Diaz*, Applies to This Case

Respondent contends *Melendez-Diaz* is limited to the use of affidavits to prove the results of scientific lab tests, permitting Wilson to testify under *Geier*. We agree.[10]

We are bound to follow *Melendez-Diaz* in cases involving similar facts. (*Austin v. Wilkinson* (N.D.Ohio 2006) 502 F.Supp.2d 660, 671; *People v. Superior Court* (*Williams*) (1992) 8 Cal.App.4th 688, 703.) At issue in *Melendez-Diaz* was the prosecution's ability to prove a substance was cocaine by way of an ex parte affidavit devoid of any details apart from the unsupported conclusion that unspecified test results showed it was cocaine. The court held that for purposes of the confrontation clause, the affidavits were the same as depositions, declarations and other testimonial statements. (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2531-2532.) It did not reach the issue decided in *Geier*, *supra*, 41 Cal.4th 555, or the issue raised here – whether an expert witness in the area of rape examination tests and results can render her own independent opinion during a trial based on the results of rape examinations conducted by other nurses she supervised, subject to full cross-examination by the defendant.

Nor did the *Melendez-Diaz* court hint, much less suggest, that its reasoning would extend to these circumstances. Instead, Justice Scalia, writing for the majority, framed the question before the court as "whether those [drug analysis] affidavits are 'testimonial,' rendering the affiants 'witnesses' subject to the

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10 The California Supreme Court recently granted review in five Court of Appeal decisions that took divergent views on this issue. (*People v. Benitez* (2010) 182 Cal.App.4th 194 [106 Cal.Rptr.3d 39], review granted May 12, 2010, S181137; *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047 [98 Cal.Rptr.3d 390], review granted Dec. 2, 2009, S176213; *People v. Gutierrez* (2009) 177 Cal.App.4th 654 [99 Cal.Rptr.3d 369], review granted Dec. 2, 2009, S176620; *People v. Dungo* (2009) 176 Cal.App.4th 1388 [98 Cal.Rptr.3d 702], review granted Dec. 2, 2009, S176886; and *People v. Lopez* (2009) 177 Cal.App.4th 202 [98 Cal.Rptr.3d 825], review granted Dec. 2, 2009, S177046.)

defendant's right of confrontation under the Sixth Amendment." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2530.) Its holding was limited to a determination that the "Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits . . . ." (*Id.* at p. 2542, fn. omitted.) Even though Justice Thomas joined in the 5-4 majority vote, he wrote a separate concurring opinion stating his belief that the confrontation clause extended to only core testimonial statements, while clarifying that he joined the majority solely because the affidavits at issue fell within that class. (*Id.* at p. 2543 (conc. opn. of Thomas, J.).)[11]

In short, *Melendez-Diaz* did not overrule *Geier* and its holding has no application here. *Geier* is controlling authority on this issue which we are obligated to follow. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we hold that under *Geier*, having Wilson testify instead of the other two nurses, did not violate the confrontation clause. Vigorous cross-examination of Wilson ensured Villatoro's Sixth Amendment rights.

We alternatively conclude that even if error occurred, it was harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.) Among the factors we consider are: the importance of the witness's testimony to the prosecution's case; whether that testimony was cumulative; whether there is evidence to corroborate or contradict the witness on material points; the extent of cross examination allowed by the trial court; and the overall strength of the prosecution's case. (*Ibid.*)

Wilson's testimony was both cumulative of, and corroborated by, R.I.'s and C.C.'s testimony about their encounters with Villatoro. Furthermore, a videotape of R.I.'s injuries that was taken at the hospital was also placed in evidence, as was

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11 We observe that the United States Supreme Court denied a petition for certiorari in *Geier* just four days after deciding *Melendez-Diaz*. (*Geier*, *supra*, 41 Cal.4th 555, cert. den. Jun. 29, 2009, No. 07-77770, *sub nom. Geier v. California* (2009) ___ U.S. ___ [129 S.Ct. 2856].)

the DNA evidence linking Villatoro to both C.C. and R.I. Wilson was cross examined at length about the procedures for preparing the exam reports, as well as about apparent inconsistencies in the reports prepared about R.I. and C.C.

Although Wilson's evidence corroborated C.C.'s and R.I.'s accounts of what happened, given the highly similar nature of the attacks on the other three victims, Wilson's testimony was not the strongest part of the prosecution's case. Instead, the fact that five victims with no known connection among them came forward over a three-year time span to claim that Villatoro raped them under very similar circumstances was the linchpin of a very strong prosecution case. On this record, we conclude that even if the trial court erred by admitting Nurse Wilson's testimony as to the rape exam reports prepared on C.C. and R.I., the error was harmless beyond a reasonable doubt.

3. *No Error In Admitting Kimberly's Preliminary Hearing Testimony*

Kimberly appeared at trial, but refused to testify. The court questioned her outside the presence of the jury, and warned her about her uncooperative affect, stating: "Let's have her get up on the witness stand and tell us that she does not want to testify. [¶] Would you face the clerk and raise your right hand. All right. Kimberly, . . . if you don't want to testify, I'm going to honor – I have to –your desire not to testify. Don't stand with that kind of posture. Nobody is going to give you a hard time. You can cooperate and not have that kind of attitude. Face the clerk and raise your right hand. Raise your right hand."

When questioned by the prosecutor, Kimberly said she did not want to testify, was refusing to testify, and that there was nothing the prosecutor or the court could do to get her to testify, not even if the court fined her.

Defense counsel then questioned Kimberly. She said nothing could be done to make her more comfortable, even if she were allowed to sit behind a screen. When defense counsel asked why she testified at the preliminary hearing,

Kimberly said she had to because she was in jail at the time. The fact that she was in jail had no effect on her testimony, she said.

The court asked Kimberly whether she would refuse to answer any questions, and she said "yes." She did testify truthfully at the preliminary hearing, she said. The prosecutor asked the court to find that Kimberly was unavailable to testify, thereby permitting the use of her preliminary hearing testimony. Defense counsel objected that the court had the option of imposing a fine or ordering Kimberly to perform community service. The court disagreed: "I heard her testimony, and I observed her. She was very defensive and insolent. Her body posture was very antagonistic. Until I ordered her, she wouldn't even look at the clerk to take the oath. She put her hand down as soon as the clerk started administering the oath, and I had to yell at her to get her to put her hand up. I'm making a finding that she not only stated nothing would be done to make her testify, but it's clear from her body language she's extremely antagonistic and defensive. And I think it's clear that nothing would induce her to testify."

When a witness is present in court but refuses to testify, she may be found unavailable as a witness. (§ 240; *People v. Smith* (2003) 30 Cal.4th 581, 623-624.) Former testimony by an unavailable witness is allowed in evidence if the party against whom it is offered was a party to the action where the testimony was given and was offered the opportunity to cross-examine the witness at that proceeding with an interest and motive similar to that which he has at the current hearing. (§ 1291, subd. (a)(2).) Villatoro contends the trial court erred in admitting Kimberly's preliminary hearing testimony because: (1) it did not take sufficient steps to get her to testify before declaring she was unavailable; and (2) his lawyer's motive and interest when he cross-examined Kimberly at the preliminary hearing was geared towards discovery of her version of events, while his motive and interest at trial was to impeach her.

As to the first, because Kimberly was a sex assault victim, incarceration following a contempt citation was not an option for the trial court when trying to

convince her to testify. (Code Civ. Proc., § 1219, subd. (b).) Although Villatoro contends the trial court could have imposed a fine or ordered community service, or otherwise taken more steps to persuade Kimberley to testify, the court need not take such steps if "it is obvious that such steps would be unavailing." (*People v. Smith, supra,* 30 Cal.4th at p. 624, quoting *People v. Sul* (1981) 122 Cal.App.3d 355, 364-365.) The trial court observed Kimberley's demeanor, affect, and responses and found that there was nothing it could do to get her to testify. The record supports this conclusion, and we therefore affirm the finding. (*People v. Alcala* (1992) 4 Cal.4th 742, 778-780 [using substantial evidence standard to affirm trial court finding that witness was unavailable].)

As for the supposed differences in motivation and interest when cross-examining Kimberly at the preliminary hearing, we have read the transcript of Kimberley's cross- and recross-examination at that hearing. Although defense counsel was asking Kimberley to describe what happened, he was also probing her credibility and looking for ways to impeach her.[12] The motives and interests in cross-examination need be only similar, not identical. (*People v. Valencia* (2008) 43 Cal.4th 268, 293-294.) On this record, we conclude that the motive and interest animating defense counsel's cross-examination of Kimberly at the preliminary hearing was sufficiently similar to the motive and interest he would have had at trial to satisfy section 1291 and permit the use of the preliminary hearing testimony. (*People v. Wharton* (1991) 53 Cal.3d 522, 589-590.)

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12 For instance, counsel questioned Kimberley about: differences between her statement to the police and a security video camera as to the time she encountered Villatoro; whether she refused to identify a friend because the friend and she were both prostitutes;(CT 24- 25)~ her agreement to have sex with Villatoro for money; that she knew Villatoro had put his penis, not his fingers, inside her vagina because she had a lot of experience and knew the difference; that a detective told her the model name of the car she said belonged to Villatoro; and that she had sustained juvenile petitions for theft and for loitering for prostitution.

4. *Testimony By Police And Nurse Witnesses About Victim Statements Were Properly Admitted As Prior Consistent Statement*

After the victims were impeached on cross-examination in certain respects, the prosecutor questioned Nurse Wilson and certain of the investigating police officers in order to confirm the victims' statements about what happened to them. Los Angeles Police Officer Chun testified about comments C.C. made to him. Officer Howell, Detective Wong, and Nurse Wilson testified about comments made to them by N.G. Detective Cadena testified about statements made to him by R.I., and Officer Choub testified in response to questions and answers from Kimberly's preliminary hearing testimony to the effect that a detective identified the model of Villatoro's car.

Villatoro contends that all of these were hearsay. However, at trial, he objected to only the testimony of Officer Chun regarding C.C.'s statements and of Detective Wong regarding N.G.'s statements. Therefore, he has forfeited his objections to all the other evidence. (§ 353; *People v. Kennedy* (2005) 36 Cal.4th 595, 612, overruled on another point in *People v Williams* (2010) 49 Cal.4th 405, 459.) The trial court allowed the testimony as proof of prior consistent statements by those two victims. (§§ 791, 1236.)

A prior consistent statement is admissible as a hearsay exception if it is offered after admission into evidence of an inconsistent statement used to attack the witness's credibility and the consistent statement was made before the inconsistent statement, or when there is an express or implied charge that the witness's testimony was recently fabricated or influenced by bias or improper motive, and the statement was made before the allegations of fabrication, bias, or improper motive. (§§ 791, 1236; *People v. Kennedy, supra,* 36 Cal.4th at p. 614.)

Villatoro contends that no inconsistent statements were offered in evidence, or that any motive to fabricate on the part of the victims arose before the supposedly consistent statements were made to the police. However, even though Villatoro cites to the pages in the record where the disputed testimony occurred, he

does not point out any individual portions of the examination of the victims or the police witnesses and discuss or analyze why and how the trial court's ruling violated sections 791 and 1236. We therefore deem the issue waived. (*People v. Beltran, supra,* 82 Cal.App.4th at p. 697, fn. 5.)

Alternatively, we hold that even if error occurred, it was harmless. All the officers did was reiterate the two victims' versions of events. Given the strikingly similar versions told by five different, unrelated, victims about incidents occurring over a three-year span, combined with the DNA evidence linking Villatoro to four of the victims, we hold under any applicable standard of review that admission of the corroborating evidence was harmless.

5. *Burden of Proof Instruction*

Villatoro contends that the CALCRIM No. 220 instruction that defines the reasonable doubt standard was constitutionally infirm because: (1) it did not allow the jury to consider the absence of evidence; (2) it told the jury to impartially consider and compare the evidence because it suggests the defendant must produce evidence; and (3) it did not direct the jury to find each element of an offense beyond a reasonable doubt. As respondent points out, these contentions have been rejected by numerous courts of appeal. (*People v. Riley* (2010) 185 Cal.App.4th 754, 768-769; *People v. Henning* (2009) 178 Cal.App.4th 388, 406; *People v. Wyatt* (2008) 165 Cal.App.4th 1592, 1601; *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1268-1269.) We will not replow the same field, and accept as well reasoned the holdings of those and other similar decisions.

6. *Sufficient Evidence Supports the Finding That the Stun Gun Was a Deadly or Dangerous Weapon*

Villatoro used a stun gun during the rapes of Beverly, C.C., and Kimberly. Based on this, the jury found true allegations that he used a deadly or dangerous weapon, leading the court to impose sentences of 25 years to life. (Pen. Code,

§ 667.61, subds. (a)(e)(3).) Villatoro contends there was insufficient evidence that the stun gun he used qualified as a deadly or dangerous weapon because his expert testified the weapon was incapable of inflicting severe harm, and because he did not actually stun his victims.

As to the latter contention, the mere fact that Villatoro displayed the stun gun in a menacing manner to produce fear of harm is sufficient evidence that he "used" the weapon. (Pen. Code, § 12022; *People v. Wims* (1995) 10 Cal.4th 293, 302-303, overruled on another point in *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

As for whether the stun gun was a deadly or dangerous weapon, this was a proper subject for expert testimony. (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1333 [without infliction of injury by stun gun, expert testimony was required to show it was capable of inflicting great bodily injury in prosecution for felony elder abuse].) Here, there was such testimony. Detective Wong testified that stun guns are capable of causing injury or death. Such weapons cause pain, involuntary muscle contractions, and may cause heart attacks, blindness, or burns. Although the defense expert opined that the stun gun Villatoro used was of low intensity that could not cause a serious injury, Wong testified that the weapon put out far more voltage than those issued to the police. Furthermore, the defense expert conceded that the stun gun could cause painful burns and that if used on the head, neck, or genitals, could cause serious injury. This evidence was more than enough to support the jury's finding that Villatoro used a deadly or dangerous weapon.

DISPOSITION

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.