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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR H. DUARTE,

Defendant and Appellant.

A129683

**(Contra Costa County
Super. Ct. No. 05-100103-1)**

Defendant Hector Hugo Duarte (appellant) appeals his conviction by jury trial of two counts of rape (Pen. Code, § 261, subd. (a)(2); counts 1 & 3) and two counts of incest (Pen. Code, § 285; counts 2 & 4).¹ He contends the trial court erroneously admitted evidence of his prior sexual misconduct and denied his motion for mistrial. He also argues, and the People concede, that, pursuant to Penal Code section 654, the concurrent sentences imposed on the incest counts should be stayed. We accept the concession and otherwise affirm.

BACKGROUND

The victim, testifying at trial as Jane Doe, was born in 1988 and is appellant's daughter. She and her three brothers, M.L., H. and R., grew up in Guatemala with her

¹ The jury found not true a great bodily injury enhancement allegation (Pen. Code, § 12022.8) attached to the count 1 rape. Appellant was sentenced to 14 years in state prison.

mother (appellant's wife). Appellant lived in the United States but, approximately once a year, would visit the family in Guatemala for about a month.

Prior Sexual Misconduct Evidence

Jane Doe testified that during one of appellant's visits to Guatemala, when she was nine or 10 years old, she was watching television with him in her parents' bed. Appellant touched her vagina over her clothes and then got on top of her. He was naked from the waist down; she could feel his penis close to her vagina. He did not let her move or get off the bed. He said he was sick and "needed electricity." Her mother came into the room, hit him, and pushed him away. Jane Doe was frightened and started crying.

When Jane Doe was almost 14 years old, she, her mother, and two of her brothers moved to the United States. They lived with appellant in a one-bedroom apartment in Redwood City. When Jane Doe would sit next to appellant he would touch her leg and say it was his way to "get electricity."

When Jane Doe was 15 years old, she, her mother, and her brothers went to Guatemala to celebrate her Quinceañera; appellant stayed in California. After two months in Guatemala, Jane Doe and H. returned to the Redwood City apartment where they resided with appellant. While H. was working, appellant would touch Jane Doe's breasts underneath and outside her clothing, saying he needed electricity. She did not tell anyone, including her mother, because she was afraid they would not believe her. Appellant's touching stopped when Jane Doe's mother returned from Guatemala.

On cross-examination Jane Doe admitted that, when she told the police about the molestation incident in Guatemala, she told them only that appellant grabbed her right breast and walked away. She did not tell police that appellant had lain on top of her and touched her vagina because her mother told her that, because of her, her younger brother was going to be taken away and she did not want that to happen.

The Charged Sexual Misconduct

Jane Doe testified that when she was almost 17 years old, the family moved to a two-bedroom house in Richmond. At the end of November 2005, when Jane Doe was 17 years old, her mother and R. went to Guatemala. Jane Doe slept in her bedroom,

appellant slept in his bedroom and M.L. slept in the basement. About a week after her mother and R. left, appellant told Jane Doe he was sick and wanted her to sleep with him because he was without electricity and could not sleep unless someone was in bed with him. When Jane Doe said she did not want to do so, appellant told her that if he was unable to sleep he could not go to work and, as a result, there would be no money for food and living expenses. After appellant told M.L. that Jane Doe did not want to sleep in appellant's bed, M.L. told Jane Doe she should do so because appellant was sick. Thereafter, when she slept in appellant's bed, Jane Doe always took her teddy bear and would wear underwear under her pajamas. She would be awakened when appellant touched her breasts underneath her pajamas and said he needed electricity. She would tell him she did not like it.

About three weeks after Jane Doe began sleeping in appellant's bed, she awoke when he began touching her "private parts" under her underwear. She told him she did not want him to do that and began pulling up her underwear. He kept trying to pull down her underwear, saying he needed electricity. Eventually, he pulled her pajama pants and underwear off, laid on top of her and raped her. He held her arms to keep her from pushing him away. She did not see him put on a condom prior to raping her. At some point appellant stopped, got off of Jane Doe, and thanked her. She felt "dirty" and went to the bathroom and showered. She noticed she had vaginal bleeding. She did not tell her mother because she did not think her mother would believe her. She did not call the police because appellant told her not to tell anyone and she was afraid.

The next night Jane Doe wanted to sleep in her bedroom, but appellant told her he could not sleep alone and M.L. told her she had to sleep in appellant's bed. About a week after the rape, after Jane Doe had fallen asleep in appellant's bed, she was awakened by him touching her stomach and vagina. She unsuccessfully tried to remove his hand and keep him from pulling her pants down. He got on top of her and raped her. He did not use a condom and held her arms while she struggled to get away. When she said she did not "want to," he said he needed electricity. When he finished, he thanked her. She again ran to the bathroom and showered.

Both rapes occurred in December 2005. Jane Doe did not get her menstrual period at the end of the month as she usually did. About a week after her missed period, appellant asked her if she had gotten her period; she said no. M.L.'s girlfriend, G.M., bought Jane Doe a home pregnancy test. Jane Doe took the test and the result was positive. After finding out she was pregnant, Jane Doe told a few friends at school about appellant's actions and her pregnancy. Because she was afraid, she asked them not to tell anyone. She also told M.L., who became very angry. M.L. said he was going to "do something" to appellant, but did not.

At some point, Jane Doe was called into her school counselor's office, questioned about her pregnancy, and told that school personnel knew what appellant had done. Jane Doe did not know how the school personnel found out. School personnel then called the police and social workers. When the police arrived, Jane Doe told them what had happened. After talking with the police and social workers, Jane Doe was not allowed to go home; she went to live with a foster family in Pacifica. After about six weeks, she went to live with a cousin in San Bruno and had to go to court. Subsequently, Jane Doe suffered a miscarriage and was hospitalized for removal of the fetus. At approximately the end of 2007, appellant called her and told her to drop the charges against him. Jane Doe testified that her relationship with her family has changed and is "bad" because her family does not believe her allegations about appellant.

On cross-examination, Jane Doe said she was upset that appellant did not go to her Quinceañera in Guatemala despite promising to go. She said when the family moved to the United States her parents were very strict. She also said she had a Guatemalan boyfriend and dated him in November and December of 2005.

Dr. Mary Jacobson, an expert in obstetrics and gynecology, testified she treated Jane Doe on February 10, 2006, for a "missed abortion," meaning "a pregnancy that has stopped growing . . . , but the products of the conception are still within the uterus." An ultrasound determined that the age of the fetus was between 7 weeks 6 days, and 9 weeks 6 days. The products of conception were removed by suction dilation and curettage and tissue samples were obtained for paternity testing.

David Stockwell, an expert in the area of DNA analysis, testified that, based on various tests performed on the fetal samples, there was a maternal relationship between the fetal cells and Jane Doe and there was a parent-child relationship between Jane Doe and appellant. Stockwell could not rule out appellant as the father of the fetus. After performing a statistical analysis using Hispanic community statistics, Stockwell opined that appellant was 110 million times more likely to be the father of the fetus than a random man from the Hispanic community. Stockwell also performed an incest index statistical analysis which supported the hypothesis that appellant was the father of the fetus.

The Defense

Testifying in his own defense, appellant denied ever having sex with or raping Jane Doe, and said, “You [would] have to be very muddy in your head to do something like that.” He said that after his wife left for Guatemala, he never asked Jane Doe to sleep in his room. He also said that in 2005 he was not sick and never said he needed electricity. He admitted he had had two surgeries due to a work-related accident which injured his arms and elbow, but said he was otherwise healthy.

Appellant stated, at the end of 2005 or early 2006, he and Jane Doe argued when she told him she was pregnant with her boyfriend’s baby. He grabbed her and threw her against the wall. In response, Jane Doe told him he’d be “sorry for it.” He denied ever touching her breasts or vagina in Guatemala and denied ever touching her breasts in Redwood City. Appellant testified he requested a DNA test and provided samples after he found out about Jane Doe’s allegations concerning him.

M.L. and his girlfriend, G.M., testified they neither saw Jane Doe sleep in appellant’s bedroom nor saw appellant sleep in Jane Doe’s bedroom. M.L. denied telling Jane Doe she had to sleep with appellant or encouraging her to do so. Appellant’s wife testified she never saw appellant touch Jane Doe inappropriately and never walked into the bedroom and saw appellant on top of Jane Doe.

San Mateo County Deputy Sheriff Patricia Raffaelli testified that, in January 2006, she assisted in an interview with Jane Doe. When Raffaelli asked Jane Doe about the

incident that occurred in Guatemala when she was 11 years old, Jane Doe said appellant had grabbed her breasts; she never said appellant tried to rape her, get on top of her, or touch her vagina. Jane Doe also told Raffaelli this was the only incident that occurred in Guatemala, and further said that the only other prior uncharged incident occurred in Redwood City in June 2003, shortly after her Quinceañera, when appellant touched her breasts over her clothing.

Rebuttal

Richmond Police Detective Daniel Sanchez testified, when appellant came to the police department and gave a statement, Sanchez requested that he provide a DNA sample; appellant did not ask to take a DNA test. Subsequently, after charges against appellant were filed and Sanchez went to the family home to serve appellant with the arrest warrant, Jane Doe's mother said appellant had gone back to Guatemala and she was planning to join him there.

Surrebuttal

Appellant testified he had not been hiding from the police for the last four years. Instead, when he went to Guatemala for a month, he was unaware that Sanchez had tried to contact him.

DISCUSSION

I. The Prior Uncharged Sexual Misconduct Evidence Was Properly Admitted

Appellant contends the court erred in admitting evidence of his prior uncharged sexual acts against Jane Doe under Evidence Code section 1108.² He argues the evidence was not probative of his propensity to commit the charged offenses, had no value as corroboration of Jane Doe's account, and any probative value was outweighed

² All undesignated section references are to the Evidence Code.

Section 1108, subdivision (a) provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

by its prejudicial effect under section 352.³ He also contends the erroneous admission of the evidence violated his due process rights to a fair trial.

The prosecutor filed an in limine motion pursuant to section 1108 seeking to admit evidence of two uncharged incidents of appellant's sexual assaults of Jane Doe. In the first incident, committed in Guatemala when Jane Doe was 11 years old, appellant walked up to Jane Doe, grabbed her breast, and walked away. In the second incident, committed in the United States when she was 15 years old, Jane Doe was lying on the couch watching television when appellant seated himself next to her, put his hand on her breast, then rubbed both her breasts and squeezed one of her breasts. The prosecutor argued the proffered evidence was probative of appellant's propensity to sexually assault Jane Doe. Appellant moved in limine, pursuant to sections 1101, subdivision (a) and 352, to exclude any evidence of his prior criminal acts or uncharged misconduct.

In ruling both prior instances of sexual misconduct admissible the court stated: “[I]n this case, you have the same victim and the time period is not remote. It is within six years and two years of the charged offenses. The consumption of time, it sounds like it wouldn't take very much time, and I don't think it would confuse the issues. [¶] The Legislature has allowed this type of evidence for propensity to come in, and it is different from basic 1101 type of evidence. And so I am going to allow . . . both incidents when she was 11 and when she was 15. It is relevant, as it explains their relationship and their past conduct. And so I think the jury should know their entire history, and they'll have to decide how much they believe the daughter. But the type of evidence is allowed for by the Legislature. So the court will allow it, as well.”

In general, character or disposition evidence is inadmissible to prove a defendant's conduct on a specified occasion. (§ 1101, subd. (a).) Section 1108 creates an exception, permitting the trier of fact to consider a defendant's prior uncharged sex offenses as

³ Section 352 provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

propensity evidence. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911-912 (*Falsetta*); *People v. Pierce* (2002) 104 Cal.App.4th 893, 897.) In enacting section 1108, the Legislature determined that “evidence of uncharged sex offenses is so uniquely probative in sex crimes prosecutions that it is presumed admissible without regard to the limitations of . . . section 1101. [Citations.]” (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 405.) Section 1108 requires a trial court to engage in a section 352 balancing analysis before admitting evidence of prior sex offenses. (*People v. Wilson* (2008) 44 Cal.4th 758, 797; *People v. Hernandez* (2011) 200 Cal.App.4th 953, 965 (*Hernandez*.) The trial court enjoys broad discretion in conducting the section 352 balancing in determining whether the probative value of the propensity evidence is substantially outweighed by the possibility of prejudice or misleading the jury. (*Hernandez*, at p. 966; *People v. Branch* (2001) 91 Cal.App.4th 274, 282 (*Branch*.) We reverse the court’s ruling only if the exercise of discretion was “ ‘arbitrary, whimsical, or capricious as a matter of law.’ ” (*Branch*, at p. 282.)

Appellant contends the proffered uncharged sexual misconduct evidence was not substantially similar to the charged rape counts and, therefore, is not probative. Under section 1108, there is no requirement that the uncharged and charged offenses be so similar that evidence of the prior acts would be admissible under section 1101. “ ‘It is enough the charged and uncharged offenses are sex offenses as defined in section 1108.’ [Citation.]” (*Hernandez, supra*, 200 Cal.App.4th at p. 966.)⁴ However, “the probative value of ‘other crimes’ evidence is increased by the relative similarity between the charged and uncharged offenses.” (*Falsetta, supra*, 21 Cal.4th at p. 917.) Where, as here, the uncharged and charged acts involve appellant’s sexual misconduct against his minor daughter, the uncharged evidence is at least probative of his sexual interest in his daughter and of his propensity to commit sexual misconduct when left alone with her. And, in the factual context of this case, any dissimilarities between the charged and

⁴ Appellant does not dispute that evidence of his prior lewd touching constitutes a sex offense pursuant to section 1108.

uncharged incidents go to the weight of the evidence, not its admissibility. (*Hernandez*, at p. 967; *People v. Mullens* (2004) 119 Cal.App.4th 648, 660.) Even if appellant's assertion that the uncharged evidence involved only occasional, superficial and equivocal conduct were true, the assertion goes to the weight, not the admissibility, of the evidence.⁵

Appellant also argues that the uncharged sexual misconduct evidence against Jane Doe is not probative because it does not corroborate her testimony regarding the charged sexual misconduct. In support, he cites several cases for the proposition that “[w]here the sole evidence of uncharged sexual conduct is the uncorroborated testimony of the prosecutrix herself, it is inadmissible since it contributes nothing to a determination of her credibility on the charged offenses and is highly prejudicial.” (*People v. Scott* (1978) 21 Cal.3d 284, 297, citing *People v. Stanley* (1967) 67 Cal.2d 812, 817; accord, *People v. Smittcamp* (1945) 70 Cal.App.2d 741, 745-751.)

First, none of the cases cited by appellant concern the admissibility of evidence under section 1108. Second, in *People v. Ewoldt* (1994) 7 Cal.4th 380 (*Ewoldt*), which concerned the admissibility of uncharged misconduct under section 1101, our Supreme Court stated, “Certainly, uncorroborated testimony by the complaining witness concerning the defendant’s uncharged misconduct may have less probative value than testimony that is corroborated or testimony provided by a third party, and the probative value of this evidence must be considered by the trial court in conducting the weighing process mandated by . . . section 352. There will be circumstances, however, in which

⁵ Appellant cites *People v. Earle* (2009) 172 Cal.App.4th 372, 399 (*Earle*) for the proposition “a propensity to commit one kind of sex act cannot be supposed without further evidentiary foundation, to demonstrate a propensity to commit a *different act*.” Appellant’s reliance on *Earle* is misplaced. That case considered cross-admissibility under section 1108 in deciding whether an indecent exposure charge was properly joined with a sexual assault charge. (*Id.* at pp. 380-381.) Given the unrelated nature of the charges, the *Earle* court concluded that only expert testimony could show that a defendant’s commission of indecent exposure showed a propensity to commit sexual assault. (*Id.* at pp. 397-398.) We need not decide whether *Earle* was correctly decided, because it is distinguishable.

the uncorroborated testimony of the complaining witness concerning the defendant's uncharged misconduct will be admissible.” (*Ewoldt*, at pp. 407-408.)

In addition to establishing that appellant's interest in Jane Doe was sexual and not purely parental, the uncharged misconduct is also relevant to establish why Jane Doe did not tell her mother of appellant's charged misconduct: her mother had been ineffective in dealing with appellant following the first uncharged incident in Guatemala.

Finally, appellant contends the probative value of the propensity evidence is substantially outweighed by its prejudicial effect. He argues, in essence, the fact that the prior uncharged acts did not result in a conviction increased the likelihood of confusing the jury because it had to determine whether the uncharged offenses took place. “This risk, however, is counterbalanced by instructions on reasonable doubt, the necessity of proof as to each of the elements of [the charged offense], and specifically that the jury ‘must not convict the defendant of any crime with which he is not charged.’ ” (*People v. Frazier* (2001) 89 Cal.App.4th 30, 42.) Here, the proffered uncharged conduct involved two discrete acts against Jane Doe, and the jury was properly instructed on the elements of the charged offenses, reasonable doubt, and the proper use of the prior sexual misconduct evidence.

Appellant also argues that the “trial within a trial” required the jury to determine collateral issues, including Jane Doe's relationship with her mother and brothers and “the motivations and expectations of the parties and the character of the family as such.” The short answer is that trial on the current charges involved the same issues regarding Jane Doe's relationship with her mother and brothers.

Appellant further argues the prior uncharged sexual acts evidence was inflammatory. He concedes that acts of lewd fondling are less egregious than forcible rape. However, he asserts the prosecution sought to put his father-daughter relationship with Jane Doe on trial and admission of the prior acts served to paint him as “a sexual pervert who repeatedly over time abused his parental position and repeatedly used his daughter as an object of lust, culminating, at last, in successful forcible rapes.” We disagree. That damaging inferences may be drawn from appellant's prior uncharged

misconduct against Jane Doe does not make that evidence unduly prejudicial.

“[E]vidence is unduly prejudicial under section 352 only if it ‘ “ ‘uniquely tends to evoke an emotional bias against the defendant as an individual and . . . has very little effect on the issues’ ” ’ [citation], or if it invites the jury to prejudge ‘ “ ‘a person or cause on the basis of extraneous factors’ ” ’ [citation]. ‘Painting a person faithfully is not, of itself, unfair.’ [Citation.]” (*People v. Johnson* (2010) 185 Cal.App.4th 520, 534.)

Finally, with no citation of authority, appellant argues that given the prosecution’s reliance on the expert testimony regarding the DNA tests establishing his paternity, there was no “necessity” to admit the prior acts evidence. However, as appellant argues in his briefing, the DNA evidence was not definitive as to appellant’s paternity and, therefore, did not obviate the need to admit the uncharged prior misconduct against Jane Doe to establish his propensity to commit the charged offenses against her.

We conclude appellant has failed to establish that the court abused its discretion in ruling admissible, under section 1108, the proffered evidence of his prior uncharged sexual acts against Jane Doe.

II. *The Motion for Mistrial Was Properly Denied*

Next, appellant contends the court abused its discretion in denying his motion for a mistrial.

After the completion of Jane Doe’s testimony and during cross-examination of Raffaelli, appellant moved for a mistrial on the ground that Jane Doe’s testimony regarding his prior sexual misconduct toward her was inconsistent with the statements she had previously made to the police and with the evidence proffered by the prosecution in its section 1108 in limine motion. Defense counsel stated that Jane Doe’s testimony regarding appellant’s prior sexual misconduct was “new” to defense counsel and the prosecutor and was “far more inflammatory than anyone had contemplated. That bell was rung. Now there’s a mad scramble to try to diffuse it because it’s clearly inconsistent with what [Jane Doe] had said in the past, and I think the 1108 analysis would have changed.” The prosecutor agreed that Jane Doe’s testimony presented new

information.⁶ Defense counsel also argued that Jane Doe’s testimony that appellant attempted to rape her when she was nine or 10 years old was more inflammatory than the proffered evidence and suggested he had pedophilic tendencies.

In denying the motion for mistrial, the court stated, “[a]s to the argument that the new information from the victim as to the 1108 conduct, which was more than had been described in the past, the court’s analysis would have been the same. The probative value substantially outweighed the prejudicial effect, and the . . . testimony wasn’t that she was raped as an 11 year old, but it was an act of child molest that was serious.”

“A trial court should grant a motion for mistrial ‘only when “ ‘a party’s chances of receiving a fair trial have been irreparably damaged’ ” ’ [citation], that is, if it is ‘apprised of prejudice that it judges incurable by admonition or instruction’ [citation]. ‘Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.’ [Citation.] Accordingly, we review a trial court’s ruling on a motion for mistrial for abuse of discretion. [Citation.]” (*People v. Avila* (2006) 38 Cal.4th 491, 573.)

A. *Undue Surprise*

Appellant argues one basis for his mistrial motion was that the change in Jane Doe’s testimony prejudiced his right to a fair trial, including his right to examine witnesses and to “strategize a defense unembarrassed by undue surprise.” Appellant’s argument lacks merit. “*In limine* rulings are not binding.” (*People v. Mattson* (1990) 50 Cal.3d 826, 850.) They are “subject to reconsideration upon full information at trial.” (*People v. Turner* (1990) 50 Cal.3d 668, 708; *People v. Jennings* (1988) 46 Cal.3d 963,

⁶ In a footnote in his opening brief, appellant takes issue with the prosecutor’s statement, noting that the record contains a portion of a police report in which Jane Doe told a police investigator that appellant would tell her and her mother that doctors told him his hand shook because he was losing electricity, he needed to replenish the electricity and the only way to do so was to get it from a “blood relative female.” However, appellant fails to mention that this police report was attached to *his* April 2010 pretrial motion to dismiss for violating his right to a speedy trial. Thus, this information was known by the defense at the time of the prosecutor’s May 2010 section 1108 in limine motion.

975, fn. 3 [party should renew in limine motion during trial because “until the evidence is actually offered, and the court is aware of its relevance in context . . . , the court cannot intelligently rule on admissibility”].)

When Jane Doe began her trial testimony by recounting the incidents of appellant’s prior sexual misconduct toward her, appellant did not seek reconsideration of the court’s section 1108 ruling. Instead, defense counsel tactically attempted to impeach Jane Doe’s credibility by cross-examining her about the dates of appellant’s alleged prior misconduct and eliciting her concession that she failed to tell the police that during the first uncharged incident appellant touched her vagina over her clothes and that appellant’s wife entered the room and hit and pushed appellant away. Defense counsel also elicited Jane Doe’s concession that she told police the first and only uncharged incident occurred when she was 11 years old and appellant grabbed her breast and then walked away. Defense counsel also tactically attempted to impeach Jane Doe’s credibility by eliciting testimony from Raffaelli that Jane Doe’s statements to the police alleged prior uncharged misconduct by appellant that was inconsistent with Jane Doe’s trial testimony.

Following the court’s mistrial ruling, and during closing argument, defense counsel highlighted the inconsistencies between Jane Doe’s trial testimony and her statements to the police, and focused on the defense that Jane Doe lied. As defense counsel stated, “this [was] a he said/she said case,” in which the jury ultimately found against appellant and in favor of Jane Doe.

Appellant could have, but chose not to seek reconsideration of the court’s section 1108 ruling at the earliest opportunity. And, as we discuss, *post*, in ruling on the mistrial motion, the court made clear that under section 1108, the probative value of Jane Doe’s actual testimony was not outweighed by its prejudicial effect.

B. *Reconsideration of the Section 1108 Ruling*

Appellant contends, in denying the motion for mistrial, the court, in essence, reconsidered its section 1108 in limine ruling in light of Jane Doe’s actual testimony and its ruling thereon was an abuse of discretion. He appears to argue that Jane Doe’s trial testimony regarding appellant’s prior uncharged misconduct was inflammatory and

prejudicial under section 352. He asserts Jane Doe’s testimony that, while in Guatemala when she was nine or 10 years old, appellant touched her vagina over her clothes, got on top of her while he was naked from the waist down, said he was sick and “needed electricity,” and she could feel his penis close to her vagina, was “positively lurid.” He also asserts the allegation of “electrical leeching” united all the episodes of his sexual misconduct against Jane Doe into a “course of conduct of pseudo-medical sexual exploitation.”

We conclude there was no abuse of discretion in the court’s ruling that the probative value of Jane Doe’s testimony was not outweighed by its prejudicial effect. Although her testimony regarding appellant’s prior uncharged acts against her when she was in Guatemala was more inflammatory than that originally proffered by the prosecution, the acts are less inflammatory than the charged acts. Following Jane Doe’s cross-examination and Raffaelli’s testimony, the jury was in a position to reject Jane Doe’s testimony as not credible. Finally, as we noted previously, the jury was properly instructed on the elements of the charged offenses, reasonable doubt, and the proper use of the prior sexual misconduct evidence.⁷

Appellant has failed to demonstrate that the court abused its discretion in denying his motion for mistrial.

III. *Sentencing Issues*

Appellant contends the court violated Penal Code section 654 in sentencing him concurrently on his convictions of incest in counts 2 and 4; instead both counts should have been stayed. The People agree.

⁷ Appellant also argues that Jane Doe’s testimony included allegations of “complicity” by her mother and brothers, which confused the issues at trial because it portrayed a “pitiable picture of an entire family and an indifferent mother” who conspired with appellant in a “seamless course of conduct” against a “helpless, exploited, sexual totem.” Since appellant failed to raise this argument below it is waived. (See *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8 [argument raised for first time on appeal is waived].)

In sentencing appellant to a 14-year state prison term the court imposed an eight-year upper term on the count 1 rape conviction plus a six-year consecutive midterm on the count 3 rape conviction. It also imposed concurrent three-year upper terms on the count 2 and 4 incest convictions.⁸ The People concede that the evidence established only two acts of forcible rape between appellant and Jane Doe. As to each act, appellant had only one criminal objective, that is, the intent to have sexual intercourse with his daughter. Thus, the multiple punishment on the incest counts was unauthorized.⁹

Section 654, subdivision (a) provides in pertinent part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

We agree with the parties that the concurrent sentences imposed on the incest counts were not supported by substantial evidence and should be stayed pursuant to Penal Code section 654.

The People also note that because the court expressly found that appellant’s offenses involved “great violence,” the abstract of judgment erroneously states that the six-year term imposed on the count 3 rape is “consecutive 1/3 non-violent.” The People assert the abstract of judgment should be amended to indicate the term imposed on count 3 is “consecutive full term.” Appellant does not urge otherwise. We agree with the People’s assertion and order the abstract of judgment modified.

⁸ In its oral pronouncement of sentence and in a portion of its sentencing minute order, the court erroneously referred to the rape counts as counts 2 and 4 and to the incest counts as counts 1 and 3. However, elsewhere in that minute order the court refers to each of the counts by their correct count number, which conforms to the information and the abstract of judgment.

⁹ Appellant did not raise a Penal Code section 654 claim below and the trial court did not address it at sentencing. The claim is not waived despite appellant’s failure to raise it below. (*People v. Hester* (2000) 22 Cal.4th 290, 295; *People v. Le* (2006) 136 Cal.App.4th 925, 931.)

DISPOSITION

Pursuant to Penal Code section 654, the judgment is modified to reflect a stay of the sentences imposed on counts 2 and 4. The court is directed to modify the abstract of judgment to reflect the staying of the sentences on counts 2 and 4, and to reflect that the six-year term on count 3 is a “consecutive full term.” So modified, the judgment is affirmed. The court is further directed to send a copy of the modified abstract of judgment to the California Department of Corrections and Rehabilitation.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.