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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE ANTONIO ROSAS, Defendant and Appellant.	A129711 (San Francisco County Super. Ct. No. 202171)
In re JOSE ANTONIO ROSAS, on Habeas Corpus.	A135320

Physician Jose Rosas was convicted of sexual offenses against several of his female patients. He argues the trial court erroneously admitted the testimony of another female patient about an earlier, uncharged sexual offense, and that it failed to adequately instruct the jury on the use of that evidence. He further maintains the court improperly admitted prejudicial hearsay statements that his victims made to third parties and sentenced him to multiple prison terms for a single act. In a separate petition for writ of habeas corpus filed by Rosas in propria persona, he claims his counsel was ineffective, primarily in failing to call or adequately cross-examine a number of witnesses and potential witnesses.

Defendant's sentencing argument is correct in part, and two of the concurrent terms he challenges must be stricken because they were based on the same conduct for

which he was already convicted. In all other respects, however, there was no reversible error. We therefore modify the judgment, affirm it as so modified, and deny the petition for writ of habeas corpus.

BACKGROUND

Rosas was charged with various sexual and related offenses against five women: Claudia, Maria, Glenda, M., and A. The jury acquitted him of the charges related to M., convicted him on the charges related to A., Claudia, and Maria, and deadlocked on the charges concerning Glenda.¹ The women gave the following accounts of their encounters with Rosas.

Claudia

Claudia came to the United States from Nicaragua in 1994, when she was in her thirties. On July 8, 2002, she went to St. Luke's Hospital because she was experiencing intense back pain. Her regular doctor was unavailable, so she saw defendant instead.

Rosas first asked Claudia about her age, family and past surgeries. He told her to lie down on the table, unhook her bra and lift her blouse so he could examine her breasts. Claudia felt tense and scared. It seemed strange to her that Rosas asked her to lift up her bra and did not provide her with a gown or drape. Then, after he examined her breasts, Rosas told Claudia to lower her pants and underwear to her knees. He said she had a problem with her spine, instructed her to get on her elbows and knees with her buttocks in the air, and said he was going to conduct an anal and vaginal examination. Claudia said that her gynecologist had already done this, but Rosas said he had to do a "complete examination." He put on gloves, turned on a lamp, stuck his fingers into Claudia's vagina and touched "all sides" of her vagina. He did not touch or palpate her stomach. This continued for some minutes, far longer than any pelvic exam Claudia had experienced. It hurt, and Claudia said "ouch." Rosas responded that it must hurt when

¹ To protect their privacy, and intending no disrespect, we will refer to the patients who testified against defendant by only their first names.

she had sex because she was very tight. No doctor had ever said anything like that to her or examined her in this manner.

After what felt like a long time, Rosas took his fingers out of Claudia's vagina, changed his gloves, and put his finger or fingers in her anus. Again, this seemed to last a "long, long time." Rosas asked Claudia "whether his fingers come in from behind, whether I could feel my vagina." She did not respond. She was feeling awful and wanted to kick Rosas, but she was unable to react. Finally, Rosas removed his fingers and wiped Claudia with a tissue; Claudia felt like "a mare, like an animal." Then, with Claudia still in the same position, Rosas massaged her back. He said he was not a chiropractor, but that the massage would help her. He said he "hoped that the complete examination that he had given" her was "better than the one [her] gynecologist gave [her]." He also told her that her problem was a compressed muscle and that she should return in two weeks.

Claudia was picked up outside the hospital by her friend Maria V. and Claudia's son. Claudia was crying. As they drove away, Maria asked her what was wrong. Claudia did not want to explain what had happened in front of her son, so she lied and said the doctor had given her an injection. Then she told Maria to stop the car so they could talk. Once outside of the parked car, she told Maria what Rosas had done.

The next day Claudia reported Rosas's actions to St. Luke's. She also made a report to the police, who escorted her to San Francisco General Hospital for a sexual assault exam. The chief of medicine at St. Luke's spoke with Rosas about Claudia's complaint the following day. He told Rosas the examination had not been not in keeping with usual and customary practice, and advised him to use the conventional lithotomy position and have a chaperone present during future pelvic exams.

Maria

Maria was born in Brazil in 1936. Rosas was her family doctor. On March 21, 2005 she went to see him about shoulder pains. Rosas suggested a PAP smear. Maria told him her gynecologist in Brazil had given her a PAP smear just two years before, but she was willing to have another if it was necessary. Without providing a gown or drape, Rosas lifted Maria's blouse and bra and examined her breasts and belly. He commented that plastic surgery on both areas was well done.

Rosas then had Maria lower her pants and underwear and put her feet up in stirrups for the examination. He touched her clitoris very lightly with his bare hand. Then he put on gloves, put his finger or fingers in her vagina, and moved them around and back and forth inside of her. It was very uncomfortable. Maria was "shocked" and "dying of shame."

Rosas then told Maria to lie face down on her knees and forearms with her buttocks in the air. She complied because he was her doctor, and she trusted him. Rosas inserted a finger or fingers in her vagina and moved them around and back and forth as before. This lasted at least two minutes, and it was painful. Maria was "in a state of shock." After Rosas touched her "many times," Maria turned onto her side, put her legs together and said "no." Rosas's gloves were "full of blood." Maria said "that's not right." Seeing that she was upset, Rosas checked her pulse and told her everything was fine. He did not use a speculum, perform a PAP smear or collect any samples for laboratory analysis.

Maria was "very scared" as she left Rosas's office. When she arrived home she was cramping and there was blood on her underwear. The next morning, still in some pain, she went to St. Luke's emergency room to find out what had happened to her. She asked to see a female gynecologist, but because none were available she agreed to meet with Dr. Marc Snyder. Maria asked Dr. Snyder to conduct a gynecological examination, but told him she would not explain why she wanted the exam until he finished. This

examination was notably different than Rosas's. Maria was covered with a cloth, a nurse put her in the standard lithotomy position on the examination table, and Dr. Snyder sat in front of her as two nurses held her hands to calm her. Unlike Rosas, he used a speculum to look in her vagina and did not insert his fingers. It was over very quickly.

Maria then told the doctor about her experience with Rosas the previous day. Dr. Snyder brought in a female gynecologist, Dr. Nicol, who also briefly examined Maria. Dr. Nicol noted a two centimeter laceration in the posterior of Maria's vulva, blood clots, and bruises on both sides of her periurethral area. This was highly unusual and would not be caused by an ordinary pelvic examination, particularly since Maria's vagina was able to accommodate a normal-size speculum. Dr. Nicol opined it would require the insertion of three or four fingers to cause this type of injury.

After some initial reluctance, Maria agreed to make a police report and was given a sexual assault (or "SART") examination. The nurse practitioner who conducted the exam noted four areas of injury in Maria's vaginal area, including bruises, redness, and a laceration.

St. Luke's suspended Rosas's medical privileges pending investigation of Maria's complaint. On March 24, during an interview with San Francisco Police Inspector Frank Lee, Rosas wrote a letter of apology to Maria. He wrote: "I want to apologize for the inappropriate exam, and I feel very sorry that you felt humiliated at this time. I am crying the same that you. I learned from what happened that I am going to be a better person from today. I want you to forgive me for what I have caused. I want you to be as before and give me the lesson of my life. Sincerely, Jose Rosas."

Dr. William Miller, the chairman of St. Luke's Department of Medicine, was involved in the hospital's internal investigation of Maria's complaint. On March 27, Rosas asked to meet with Dr. Miller and said he wanted to provide information he had previously withheld. Rosas told Dr. Miller that the reason Maria's examination had taken so long was " 'because it had become a sexual experience' " for her, and then for him,

and that he had continued the exam to bring her to orgasm. Dr. Miller asked why Rosas had not stopped the exam when he perceived it was becoming sexual. Rosas responded, “ ‘I don’t know what came over me. I just lost my mind.’ ” Dr. Miller also asked about the earlier matter with Claudia. Rosas denied that it had also been sexual and said it was a different situation because he had not known Claudia as long. Dr. Miller then read Rosas his notes of the interview and Rosas affirmed they were correct.

Rosas was later arrested. The police issued a press release about the charges against him in an effort to locate other possible victims.

A.

A. was born in Guatemala in 1940. Rosas treated her for stomach pains in 2006. In May 2007 she made an appointment with him because she was having intense headaches. Rosas said her blood pressure was very high, that she was too tense, and that he needed to examine her. He had A. unbutton her blouse and examined her breasts. Without providing her with a gown, Rosas told her to remove her pants and underwear. When she asked if this was necessary, Rosas insisted it was and that she would feel better after he examined her ovaries.

The next thing A. knew, Rosas “had already put his finger inside of me.” It did not feel like a normal examination. Rosas was “touching everything inside of me, but that was hurting, he was doing it really hard.” When she said it hurt, Rosas told her to hold his hand so she “wouldn’t feel it so much.” Rosas “was moving [his finger] in the same way that a man moves it when he’s masturbating a woman.” This went on for much longer than any pelvic exam A. had experienced before. Then Rosas told A. to turn over so he could check her spine. When she complied he kissed her buttocks, put his chin in the middle of her buttocks just below her lower back and moved it back and forth. Then he told A. that everything was fine, and that “doctors sometimes have to do things to help their patients.” He said A. was “a very ardent woman” and hugged her after she got dressed. A. felt embarrassed and “really terrible.”

A. left Rosas's office and went straight to her job in Pacific Heights to prepare for a dinner party her employer was hosting that night. "I overcame the feelings that I was having and I went to do what I had to do. I had to do my duty." She did the shopping and cooked and served the dinner, trying to "erase from my mind what was happening to me . . . I had to concentrate on what I had to do." The party ended around 10:30 or 11:00 that night. A. did not feel strong enough to drive all the way to her home in Contra Costa County, so she drove to her friend Raquel C.'s house in Daly City to spend the night. While she was driving A. spoke to another friend, Rhina O., on the phone for about an hour.

When A. arrived at Raquel's she felt too ashamed to say what had happened. She had difficulty sleeping, and the next morning she called Rhina, who insisted she report what Rosas had done. Eventually A. agreed, and after work she and Rhina went to the police. After she spoke with police officers A. was taken to San Francisco General Hospital for a SART examination, still wearing her clothes from the previous day. DNA testing indicated a high likelihood that a substance collected from the inside of A.'s underwear was Rosas's saliva.

Rosas phoned A. several times the following weekend, but she did not answer his calls. On June 2 he called Raquel C., who was a former patient. He said he had been unable to reach A. and asked Raquel to locate her for him. Raquel agreed to call her. About 20 minutes later Rosas called back and explained that A. had left his office upset or angry a few days earlier. He said it was urgent that he talk to A. "because he had done something that wasn't right. That there had been a misunderstanding. And that [A.] had gone to file a complaint with the police, and that wasn't good for him. Because he was just now coming out of a trial due to some people who had accused him unfairly. And that he could give her some monetary compensation or help her financially in whatever way she wanted. And that if she didn't want to talk to him that she could talk to his lawyer, that they could reach an agreement. And that he would do whatever she wanted."

Raquel discussed the call with A., who said she wanted nothing to do with Rosas or his lawyer.

Rosas called Raquel again a couple of days later and asked whether she had spoken to A. When Raquel told him what A. had said he “begged” her to ask A. to contact his attorney. He said he was “very sorry.” He wanted to apologize, and would do whatever A. wanted. Rosas asked Raquel to try to “convince [A.] so that they could reach an agreement.”

Glenda

Glenda was born in El Salvador in 1980. In 2004 she went to see Rosas because she was experiencing headaches. Rosas gave her a referral for an MRI and told her to return to his office to go over the results. When she returned, Rosas told her the MRI did not show anything was wrong and that he needed to examine her. Glenda told him that she had had a pelvic examination and PAP smear the previous month, but he said as her doctor he had to examine her. Rosas told Glenda to lower her pants and reached for the waist of her pants to unbutton them, so she unbuttoned them herself. She felt embarrassed and “dirty,” but she continued with the exam “because he was the doctor.”

Rosas did not give Glenda a robe or drape. After she lowered her clothing to her knees, Rosas stuck his fingers in her vagina “really hard” for three or four minutes. He did not use a speculum. Glenda complained it was painful. Rosas said her ovaries were hurting, and that he wanted to “do [her] front.” He said that doctors “aren’t just doctors, we’re friends,” and that Glenda could tell him her problems. Glenda felt “horrible” and “dirty.” When the exam was over she left the office quickly and never went back.

Glenda drove home to Daly City, where she lived with her sister Sonja. She was crying and felt awful. She told Sonja she had only gone to Rosas for her test results, but that he “touched me down there.” Sonja suggested she call the police, but Glenda thought that they would not believe her.

In 2005, Sonja told Glenda she had seen on the news that other women had complained about Rosas. About four days later Glenda told her boyfriend what had happened, and with his encouragement she reported her experience with Rosas to the police.

M.

M. was born in El Salvador in 1951. In 2001 she went to see Rosas because she had the flu. Rosas first checked M.'s ears, nose and throat. Then he told her to lie face down on his table, lowered her pants and, without asking permission or telling her what he was going to do, inserted a finger into her anus. M. said, "What's going on?" Rosas withdrew his finger and told her she had hemorrhoids. M. pulled her pants up and the examination ended. M. has never had hemorrhoids and was not experiencing any anal discomfort before the examination.

At a subsequent appointment with her gynecologist, Dr. Alvarado, M. mentioned that she had not felt comfortable when Rosas examined her. Dr. Alvarado said M. had a right to tell her doctor she didn't like something if it didn't feel right, and that she could change doctors. Later M. saw a television news report about Rosas. The next day she went to Dr. Alvarado's office and told the doctor's assistant, Sylvia, that she was considering contacting the police about Rosas. She ultimately decided against it because "in our country, we're not accustomed to doing that sort of thing." A few days after M. spoke with Sylvia, investigators from the police and medical board came to her home and questioned her about Rosas.

The Defense Case

Rosas's wife and office manager, Norma Watanabe, testified that A. appeared "normal" when she left the clinic after her appointment with Rosas. Ana Guillen, Rosas's medical assistant between July 2001 and October 2006, testified that none of Rosas's patients ever complained of inappropriate behavior. Dr. Alvarado testified that in February 2002 M. commented that her examination with Rosas had been different and

uncomfortable because he had her lie face down, but Dr. Alvarado did not think the information triggered her duties as a mandatory reporter. In 2004 Dr. Alvarado diagnosed M. with a minor case of internal hemorrhoids.

Three of Rosas's long-term female patients praised him as a doctor and member of the community and testified that he never touched them inappropriately. Lillian Paloma went to Rosas for medical care in December 2004 after Glenda, a colleague of Paloma's husband, referred her to him. Around Christmas that year Glenda asked Paloma how her appointment with Rosas had gone, but she never told Paloma or her husband that Rosas had acted inappropriately with her.

The Verdict

The jury found Rosas guilty of unlawful sexual penetration of Maria and A. with an on-bail allegation as to A., unlawful touching as to A., four lesser included misdemeanor assaults against Claudia, one lesser included misdemeanor assault against Maria, and attempting to prevent and dissuade a witness as to A. Rosas was acquitted of unlawful sexual penetration, assault and simple battery as to M., elder abuse as to A., sexual penetration and sexual assault by means of force likely to produce great bodily injury as to Claudia, and assault by means of force likely to produce great bodily injury as to Maria. The jury deadlocked on the sexual penetration as to Glenda, and that count was subsequently dismissed. Rosas was sentenced to a total prison term of ten years and eight months. He filed a timely notice of appeal and subsequently filed a petition for a writ of habeas corpus, which we have consolidated with this appeal.

I. Admission of Uncharged Conduct Evidence Under Evidence Code Section 1108

Rosas contends the trial should have excluded testimony about a prior uncharged sexual offense against another female patient, Au. Q., because it was unduly prejudicial. He also contends the court "amplified the error" by failing to instruct the jury on the proper consideration of evidence of uncharged crimes. Neither contention is persuasive.

A. Factual Background — Au.

Prior to trial, the prosecutor moved to admit evidence of an uncharged sexual offense against Au. under Evidence Code sections 1108 and 1101, subdivision (b).² Defense counsel argued the evidence was cumulative, would cause undue delay, and was unduly prejudicial. The court ruled the evidence was admissible under sections 1108 and 352.

Au. was born in 1937 and had lived in the United States for about 18 years. She went to see Rosas for stomach problems in 2002. Rosas examined her and set up an appointment for her to return for a PAP smear. Au. asked for a referral to a gynecologist, but Rosas said that he would do the exam.

At her next appointment, Rosas gave Au. a gown to change into and had her lie on her back with her legs in stirrups. Before he did the PAP smear Rosas asked Au. how long it had been since she last had sex. She told him that her husband was no longer alive. At the beginning of the procedure Rosas used a speculum, but then he removed it, inserted his finger into her vagina and kept it in her for ten or fifteen minutes, moving it “around and sometimes [he] would stick it in and out.” He did not touch Au.’s stomach while he was doing this. This lasted for what “felt like a long time.” What Rosas was doing did not feel normal, and Au. felt very bad and very embarrassed. After the examination, Rosas told Au. she had a “urine issue.” She never went back for her test results.

Au. told no one what had happened until her daughter learned about the charges against Rosas from the newspaper. Au. then confided in her daughter about her own experience with Rosas, and decided to go to the police.

² Unless otherwise noted, further statutory references are to the Evidence Code.

B. Analysis

Under section 1101, evidence of a prior crime is generally inadmissible to prove a defendant's disposition to commit a similar crime. Under section 1108, however, "[i]n 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." (§ 1108.) *People v. Falsetta* (1999) 21 Cal.4th 903 explains the critical role of section 352 in safeguarding against the admission of unduly prejudicial evidence of other sexual offenses: "By reason of section 1108, trial courts may no longer deem 'propensity' evidence unduly prejudicial per se, but must engage in a careful weighing process under section 352. Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Id.* at pp. 916–917.)

We review the denial of a motion to exclude evidence pursuant to section 352 for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 213.) "We will not overturn or disturb a trial court's exercise of its discretion under section 352 in the absence of manifest abuse, upon a finding that its decision was palpably arbitrary, capricious and patently absurd." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

There was no abuse of discretion here. Although not identical to the charged offenses in every particular, Rosas's behavior with Au. was markedly similar to his digital penetration of the other victims. In all of these cases, Rosas sexually assaulted his

female patient without a chaperone in the examination room under the false pretense that he had to do a pelvic exam that the patient neither requested nor needed. All of the women were Spanish-speaking emigrants to the United States; most of them were older and had sought Rosas out because he was able to converse with them in Spanish. In most case he kept a finger or fingers inside the victim's vagina and/or anus for significantly longer than necessary for a pelvic exam and groped the victim. He did not palpate the victim's stomach during the procedure. Au.'s experience happened little more than a year before the assault on Claudia and just over six months after the incident involving M. (See *People v. Harris* (1998) 60 Cal.App.4th 727, 739 [staleness of prior conduct is an appropriate factor to consider in a section 352 analysis].) Her testimony was not more inflammatory than that of the other victims.

Section 1108 does not require “ ‘exacting requirements of similarity between the charged offense and the defendant's other offenses’ ” [Citation.] Such a requirement was not added to the statute because ‘doing so would tend to reintroduce the excessive requirements of specific similarity under prior law which [section 1108] is designed to overcome, . . . and could often prevent the admission and consideration of evidence of other sexual offenses in circumstances where it is rationally probative.’” (*People v. Soto* (1998) 64 Cal.App.4th 966, 984.) Here, the uncharged offense involving Au. was remarkably similar to the charged offenses. The trial court reasonably found the presumption in favor of admitting Au.'s testimony was not outweighed by any potential undue prejudice.

II. Failure to Instruct on Uncharged Acts

Rosas contends the trial court committed prejudicial error when it instructed the jury with a modified version of the standard instruction on evidence of uncharged sex offense evidence (CALCRIM No. 1191) that addressed the use of evidence of other *charged* offenses, rather than the unmodified instruction that addresses evidence of

uncharged offenses. We conclude Rosas waived the alleged error and, in any event, that no prejudice resulted from the omission.

A. Background

In its trial brief, the prosecution argued that each of Rosas's sexual offenses was relevant as propensity evidence and cross-admissible to "assist the jury in making a full credibility assessment of each victim and . . . give the jury a true picture of who [Rosas] is and how he hides under the cover of his profession." Accordingly, the prosecutor asked to be permitted to argue section 1108 and its related jury instruction, CALCRIM No. 1191.³

Rosas proposed that the court instead give a modified version of CALCRIM No. 1191 that related solely to the charged, not uncharged, offenses. After an off-the-record court session with counsel addressing the instructions, the court gave a modified version of CALCRIM No. 1191 that was nearly identical to Rosas's proposal. It stated: "If you

³ The standard instruction states: "The People presented evidence that the defendant committed the crime[s] of _____ <insert description of offense[s]> that (was/were) not charged in this case. (This/These) crime[s] (is/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 offense[s]. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offense[s], 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 offense[s], 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 (the/each) (charge/ [and] allegation) 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>].]"

decide that defendant committed a charged offense, you may, but are not required to conclude from that evidence that the defendant was disposed or inclined to have the requisite specific intent for other charged offenses. 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 to prove by itself that defendant is guilty of the other charged offenses. The People must still prove each element of every charge beyond a reasonable doubt. [¶] Do not consider this evidence for any other purpose than the limited purpose of determining specific intent . . . of the defendant in certain charged offenses.” No instruction was given, however, on how the jury was to consider the uncharged offense against Au.

After reading the 1191 instruction to the jury, the trial court asked, “Counsel, was that adequate?” The prosecutor responded, “I think that’s it, Judge.” The trial court then asked defense counsel, “Do you have any issue with that?” Defense counsel responded “No.” In his closing argument the prosecutor argued that the similarities between all of the victims’ encounters with Rosas, including Au.’s, evidenced a pattern of conduct “like his signature.” The court subsequently stated that, except as otherwise noted on the record, it had given all requested instructions without objection. The court specifically noted, without objection, that it gave the modified version of CALCRIM No. 1191.

B. Analysis

The People assert Rosas forfeited his claim that the court erred by not giving the jury the standard instruction because he failed to request it and asked instead for the modified version. We agree. Rosas argues the court had a *sua sponte* duty to give the unmodified instruction and the failure to do so was structural error. But the law is clear that the trial court has no such general duty to instruct on the jury’s proper consideration of the evidence for a particular purpose. “We have long since held that ‘in general, the trial court is under no duty to instruct *sua sponte* on the limited admissibility of evidence of past criminal conduct.’ ” (*People v. Padilla* (1995) 11 Cal.4th 891, 950, overruled on

another point in *People v. Hill* (1998) 17 Cal.4th 800, 823 fn. 1; *People v. Jennings*, *supra*, 81 Cal.App.4th at p. 1316.)

Rosas nevertheless argues it was error not to give the instruction, relying principally on *People v. Willoughby* (1985) 164 Cal.App.3d 1054. But *Willoughby* holds that the trial court has a *sua sponte* duty to give the instruction only in “extraordinary” cases. (*Id.* at p. 1067.) It explains: “[A]lthough *People v. Collie* [citation] holds there is no *sua sponte* duty to instruct on the limited admissibility of evidence of previous offenses by a defendant (in *Collie* the defendant was charged and convicted of first degree murder of his wife and evidence was received of previous assaults by defendant on his wife), *Collie* recognizes that there may be the ‘extraordinary case’ in which evidence of past offenses play such a dominant part in the case against the accused that it would be highly prejudicial without a limiting instruction. In this situation, the evidence ‘might be so obviously important to the case that *sua sponte* instruction would be needed to protect the defendant from his counsel’s inadvertence [in failing to request a limiting instruction].” (*Id.* at p. 1067; accord, *People v. Carter* (2003) 30 Cal.4th 1166, 1197–1198.) This is not such a case. Au. was but one of a number of former patients who testified that defendant similarly molested them, and her testimony was not more “dominant” in the case or prejudicial than that of the other complainants.

People v. Frazier (2001) 89 Cal.App.4th 30 is also inapposite. In a prosecution for molesting a nine-year-old girl, the prosecution introduced section 1108 evidence of three uncharged molestations. (*Id.* at p. 33.) The error identified by the appellate court was the trial court’s *misinstruction* that jurors could convict defendant of the charges based solely on their determination, by a preponderance of the evidence, that he had committed the uncharged sexual offenses, and no other instruction effectively countered this misstatement of law.⁴ The instruction required reversal because it allowed the jury to

⁴ The instruction given stated: “ ‘Evidence has been introduced for the purpose of showing that defendant engaged in a sexual offense on one or more occasions other than

convict without proof beyond a reasonable doubt of every element of the charged offenses. The holding in *Frazier* has nothing to do with whether there is a general sua sponte duty to instruct on the use of uncharged crimes evidence. That question has been answered in the negative.

Rosas's alternate claim that defense counsel was ineffective for failing to request the unmodified CALCRIM No. 1191 is also unpersuasive. In light of the extensive testimony concerning the charged crimes and the limiting instruction that was given on its proper use, it is at best highly speculative that the absence of an instruction specifically addressed to the single *uncharged* offense would have made a difference in the outcome. The jurors were instructed they could consider evidence of a charged offense to find Rosas had the requisite specific intent for another charged offense, but that such evidence was insufficient by itself to prove him guilty of any other charged offenses. The same instruction also reminded the jury that the prosecution had to prove each element of every charge beyond a reasonable doubt. In this context, it is inconceivable the jury would somehow have believed the evidence of the single *uncharged* offense was, in contrast, sufficient to convict Rosas. Since the likelihood of the jury's using the evidence for an improper purpose was so minimal under the facts of this case, Rosas cannot show prejudice so as to prevail on his claim of ineffective assistance of counsel. (See *People v. Bunyard* (1988) 45 Cal.3d 1189, 1226.)

that charged in this case. . . . If you find the defendant committed a prior sexual offense, you may but are not required to infer that the defendant had a disposition to commit sexual offenses. If you find the defendant had this disposition, you may, but are not required to infer that he was likely to *and did commit* the crimes of which he is accused." The jury was further instructed that it could find the defendant committed the prior offenses based on a preponderance of the evidence, and the court omitted the then-current standard instruction's cautionary language that "if you find by a preponderance of the evidence that the defendant committed prior sexual offenses, *that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes.*" (*People v. Frazier*, *supra*, 89 Cal.App.4th at pp. 34–35.)

III. Hearsay Testimony About Victims' Statements to Third Parties

Over objection, the trial court admitted testimony about complaints made by the victims to third parties under hearsay exceptions for fresh complaints and excited utterances. Rosas contends that this was prejudicial error. We disagree.

“Evidence Code section 1240 excepts from the hearsay rule a statement that ‘(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [(c)] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.’ [(c)] To be admitted under this exception, ‘ ‘(1) there must be some occurrence startling enough to produce . . . nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.’ ” ” ” (*People v. Loy* (2011) 52 Cal.4th 46, 65.) The basis for this exception is that “such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous.” (*Idaho v. Wright* (1990) 497 U.S. 805, 820; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1266.) We review the trial court’s admission of statements under this hearsay exception for abuse of discretion. (*People v. Loy, supra*, 52 Cal.App.4th at p. 65; see *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1103.)

There were several times during trial when Rosas argued inadmissible hearsay was admitted to prove his conduct toward the victims. Claudia’s friend Maria V. testified that Claudia was upset, shaking and crying when Maria picked her up right after her appointment with Rosas. Claudia seemed so upset that Maria asked her if she had cancer. At first Claudia would not say why she was upset because her young son was in the car

with them. But Maria pulled over almost immediately and Claudia confessed that she felt Rosas had raped her. Claudia was shaking and “crying and crying and crying” as they drove home, and once they arrived she told Maria in detail about what had happened at the clinic. This was a sufficient foundational showing for the court’s determination that Claudia’s statements to Maria were made “ ‘ ‘ ‘before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance.’ ” ’ ” (*People v. Loy, supra*, 52 Cal.4th at p. 65.)

The same holds true for Sonja L.’s testimony about statements by her sister, Glenda, when Glenda returned home from her appointment with Rosas. Glenda drove straight home after her appointment and told Sonja what Rosas did to her while still extremely upset and shaken. She was lying down in a fetal position, “crying, crying, very angry.” In light of her experience at the appointment and her highly emotional state when she spoke to Sonja upon returning home, it was within the court’s discretion to admit the testimony.

Hearsay statements testified to by A.’s friend Rhina O. give us somewhat more pause, but we conclude that here, too, the court was within the broad bounds of its discretion. As we described, A. went to her job after her appointment with Rosas and worked until late at night. On her way home she called Rhina from her car and told her what Rosas had done. A. was “very, very sad, very upset, very nervous,” and crying. She felt so ashamed “ ‘I can’t even face my family. I feel like I just want to go jump off the bridge.’ ”

Rosas objected that too much time elapsed between A.’s exam and her phone conversation with Rhina for her statements to qualify as excited utterances. But the court reasonably allowed Rhina’s testimony. Despite the hours that passed between the assault and the phone call, the testimony established that A. was still extremely agitated and distressed when she spoke to Rhina. “When the statements in question were made and

whether they were delivered directly or in response to a question are important factors to be considered on the issue of spontaneity. [Citations.] But . . . “Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance.*” (*People v. Poggi* (1988) 45 Cal.3d 306, 319 [statements made 30 minutes after attack satisfied requirements for spontaneous utterance exception].) Moreover, the trial court is afforded particularly broad discretion when determining whether a statement was made while the declarant was still under the influence of the upsetting event. (*Id.* at pp. 318–319 [court’s discretion “is at its broadest when it determines whether this requirement is met”].) We cannot say the admission of Rhina O.’s testimony was beyond the boundaries of that discretion.⁵

We do not reach the merits of Rosas’s remaining claim directed at Drs. Nicol and Snyder’s testimony regarding what Maria told them the morning after her assault because Rosas has forfeited it for appeal. Defense counsel specifically stated that he had “no objection” to the admission of these statements under the excited utterance exception “as long as the foundation is laid in terms of the time, the emotional level of Maria and any other factors that are conditioned on [section] 1240.” At no time during the course of the

⁵ It is not clear from defendant’s briefs whether he also takes issue with the testimony of A.’s friend Raquel and, if he does, the legal and factual basis for his claim. “We are not required to search the record to ascertain whether it contains support for [defendant’s] contentions. [Citation.] Further, it is established that ‘ . . . an appellate brief “should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.’ [Citation.] [¶] . . . This court is not inclined to act as counsel for . . . appellant and furnish a legal argument as to how the trial court’s rulings . . . constituted an abuse of discretion.’ ” (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545–546.) Error in admitting Raquel’s testimony, if any, has therefore been waived. (*Ibid.*)

trial did Rosas object to the adequacy of the foundational facts or ask that the prosecutor be required to lay additional foundation before the hearsay testimony could be admitted. Accordingly, he may not challenge its admission on appeal. (§ 353, subd.(a); see *People v. Morris* (1991) 53 Cal.3d 152, 190–191 [motion in limine made before trial judge can finally determine the evidentiary question in its appropriate context does not preserve evidentiary objection].)

IV. Sentencing Error

Rosas was convicted of four counts of misdemeanor assault against Claudia and was sentenced to concurrent terms on each. He contends his conduct amounted to a single assault, and, therefore, that the verdicts on three of these convictions violate constitutional prohibitions against double jeopardy. The People agree that sentences for two of the offenses were improperly imposed, but maintain there was no error as to the third. We agree.

A. Background

With respect to Claudia, Rosas was charged with two counts of sexual penetration with a foreign object (counts two and three) and two counts of aggravated assault (counts four and five). Counts two and four were based on Rosas’s manual penetration of Claudia’s vagina, while counts three and five were based on anal penetration. The jury acquitted Rosas of these charges, but found him guilty of the lesser included offense of simple misdemeanor assault on each count. The court imposed concurrent six-month sentences on each conviction.

B. Analysis

The double jeopardy provisions of our state and federal constitutions generally prohibit multiple punishments for the same offense. (*North Carolina v. Pearce* (1969) 395 U.S. 711, 717, overruled on another point in *Alabama v. Smith* (1989) 490 U.S. 794, 798-802; Cal. Const. art., I, § 15.) Similarly, Penal Code section 654 prohibits multiple punishments for a single act or course of conduct: “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.” (Pen. Code, § 654, subd. (a).) The People correctly assert the court properly imposed separate concurrent terms for counts two and three, i.e., assaults based on the penetration of Claudia’s vagina and anus, respectively. The terms imposed on these counts violate neither the constitutional nor statutory prohibitions because the counts were based on two separate acts: the assault that occurred when Rosas digitally penetrated Claudia’s vagina, and the assault that occurred when he penetrated her anus. (See, e.g., *People v. Harrison* (1989) 48 Cal.3d 321, 335–338.) “[I]t is defendant’s intent to commit a number of separate base criminal acts upon his victim, and not the precise code section under which he is thereafter convicted, which renders section 654 inapplicable.” (*Id.* at pp. 337–338; *People v. Trotter* (1992) 7 Cal.App.4th 363, 366–368 [application of *Harrison* rule not limited to sex offenses].) Rosas’s conduct became more egregious with each assault, and each posed a separate and distinct risk to Claudia. Moreover, the two assaults were not spontaneous or uncontrollable, but rather were separated by a “period[] of time during which reflection was possible.” (*People v. Trotter, supra*, at p. 368.) Accordingly, the imposition of sentence for each of those two counts is not an impermissible double punishment for the same offense.

Under the same principles, as the People acknowledge, counts four and five were based on the same conduct as counts two and three, and, therefore, Rosas cannot validly be sentenced on all four. The proper procedure is to stay execution of sentence for all but one conviction arising from each act. (*People v. Pearson* (1986) 42 Cal.3d 351, 360, 361.) Accordingly, the sentences on counts four and five must be stricken and execution of sentence on those counts stayed. The stays shall become permanent on Rosas’s completion of his sentences on counts two and three.

DISPOSITION

The petition for writ of habeas corpus does not state a prima facie case for relief based on ineffective assistance of counsel, and is therefore denied. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474–475; *People v. Pope* (1979) 23 Cal.3d 412, 425; *Strickland v. Washington* (1984) 466 U.S. 668, 693-694.) The sentences imposed on counts four and five are stricken and execution of sentence thereupon stayed, with those stays to become permanent upon Rosas’s completion of the terms imposed on counts two and three. As so modified, the judgment is affirmed.

Siggins, J.

We concur:

McGuinness, P.J.

Jenkins, J.