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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS DAVID TONGE,

Defendant and Appellant.

A129766

(Contra Costa County  
Super. Ct. No. 05-100114-8)

Thomas David Tonge (appellant) was convicted, following a jury trial, of two counts of committing lewd acts on a child under the age of 14. On appeal, he contends the court erred in admitting evidence of prior sex offenses under Evidence Code sections 1108 and 352.<sup>1</sup> We shall affirm the judgment.

***PROCEDURAL BACKGROUND***

Appellant was charged by information with two counts of committing a lewd act on a child under the age of 14. (Pen. Code, § 288, subd. (a).) A jury convicted him as charged and, on September 3, 2010, the trial court sentenced him to three years in state prison. Also on September 3, 2010, appellant filed a notice of appeal.

***FACTUAL BACKGROUND***

***Prosecution Case***

“Jane Doe,” who was 14 years old at the time of trial, testified that she lived in Gilroy with her mother and stepfather. Her grandmother, Terri A., lived nearby. Terri A.

<sup>1</sup> All further statutory references are to the Evidence Code unless otherwise indicated.

was previously married to appellant, who Jane grew up calling “grandpa.” She used to visit and spend the night at Terri A. and appellant’s house when they lived in Discovery Bay. On two occasions, while Jane was staying overnight at their house, appellant touched her inappropriately. Both molestations took place when she was seven years old.<sup>2</sup>

When Jane spent the night at her grandparents’ house, she always fell asleep in their bed and they would later move her to the spare room. On the night of the first molestation, she was lying in their bed and appellant lay down behind her.<sup>3</sup> He then touched her chest area both under and over her pajama top with his hand for what felt like a long time. He also touched her with his hand on the vagina area under her pajama bottoms, but over her underwear. She remembered looking at photographs of her family on the dresser while appellant lay behind her. After he stopped touching her, appellant said, “Okay, it’s now time to go to bed,” and he took her to the other room. Afterwards, she did not tell anyone about what had happened.

On the second occasion, Jane was again spending the night at her grandparents’ house in Discovery Bay. She believed she was the same age as the first time, but she was not sure. She was again in their bed when appellant touched her on her chest under her shirt and on her vagina area. She just lay still and stared at the pictures on the dresser while it happened. Appellant then walked her into the spare bedroom.

Jane felt confused by what had happened. She did not tell her parents about the touching. She loved appellant and “thought that’s what grandfathers were supposed to do.” She was also scared and worried that her grandfather might get in trouble and that

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<sup>2</sup> Jane initially testified that she was about five years old when the molestations occurred, but later realized they must have occurred when she was seven years old, based on the fact that she knew they took place during the period that appellant lived in Discovery Bay. She did not remember her exact age; but, as she put it: “I just remember I was young.”

<sup>3</sup> Jane believed her grandmother was also in the bed during one of the molestations, but she was not sure.

her family would be “torn apart.”<sup>4</sup> That was partly why she did not say anything about what had happened.

Eventually, on the last day of sixth grade, Jane confided in her best friend, Robert C., and told him that she had been “violated” by her grandfather. She later told another friend and an ex-boyfriend. She first told an adult what had happened when she was in seventh grade and about 12 years old. She was talking to an adult at school about an incident that had happened at school. She told the adult about some issues she was having at home with her mother and was referred to Child and Family Services. She had not planned to say anything about the molestation, but the last question posed by the social worker who interviewed her was whether someone had touched her inappropriately, and she told him what had happened with appellant. Jane then spoke with someone at the Children’s Interview Center about the molestation.

Terri A., Jane Doe’s maternal grandmother, testified that appellant is her ex-husband. They were married for 24 years. In 2003, they moved from Gilroy, where Jane and her mother lived, to Discovery Bay. After they moved, Jane visited them three or four times a year, sometimes without her mother. Jane had a good relationship with appellant. She called him “Grandpa” even though he was not her biological grandfather.

When Jane visited, she would fall asleep in Terri A. and appellant’s bed and, after she fell asleep, one of them would carry her to her room. Jane continued to visit them and spend the night until the summer of 2008, when she was 12 years old. She seemed happy and comfortable with appellant until that final visit, when she seemed uncomfortable with him.

On December 24, 2008, Terri A. and appellant went to the sheriff’s office and she met separately with Detective Benavides. He explained to her that officers were talking to appellant about allegations that he had molested his former wife’s niece and Jane. The

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<sup>4</sup> Jane said she was worried that “I would lose a few of my aunties and a few cousins, and our family would just be so stressed out that they wouldn’t really talk to each other anymore, and I would lose a grandfather and stuff.”

next morning, Terri A. asked appellant whether he had molested the two girls. Appellant “said he did molest the niece, but he did not molest [Jane Doe].” Terri A. filed for divorce shortly thereafter.

Robert C., who was 13 years old at the time of trial, testified that Jane Doe was his best friend. On the last day of sixth grade, in 2008, Jane was upset and told Robert that she needed to tell him “something important that she has never told anyone before.” She said that her grandfather had “raped her.”<sup>5</sup> She did not offer any details, but she did say she was really young when it happened, and that she was afraid and knew it was wrong at the time it occurred. When she told him, she seemed “upset, like it hurt her to tell me.” Jane later told another friend and several ex-boyfriends about the molestation.

Debra L., who was 48 years old at the time of trial, testified that her aunt had been married to appellant, who she considered her uncle when she was growing up. When she was a little girl, Debra used to visit her aunt and appellant’s house with her family. She also would spend the night there two to four times a month, without her parents or siblings. On those nights, she shared a bed with her younger cousin, Tracey. Starting when Debra was around seven years old, appellant began coming into the room when the girls were asleep. He would lay down on the bed behind Debra, against her backside. He would then use his hand to touch her breast and vagina areas. Appellant touched her in this way multiple times.

As time went on, appellant started doing other things to Debra as well. He began inserting his fingers into her vagina when she was still very young. Then, one night, he came into her cousin’s room and lay against Debra’s backside, as he normally did, “and just said that he was going to put himself inside of me and that I didn’t need to be afraid.” Appellant then put his penis in her vagina. She was “confused and scared” and “just at a loss of what to do.” As Debra got older, appellant would come into Tracey’s room at night and take Debra to the couch in the front room, where he would have sex with her.

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<sup>5</sup> Robert acknowledged that she could have used the word, “molest”; the words “rape” and “molest” meant the same thing to him.

She never told anyone what appellant was doing to her because she did not think anyone would believe her.

The molestation occurred every time Debra spent the night at appellant's house, which she did until she was about 14 to 16 years old. The last time appellant touched her she was about 16 years old and they were at her parents' home. Appellant took her to the bathroom, sat her on the side of the bathtub, and began touching her breasts and vagina. Debra "just had had enough" and she told him to stop or she would tell her father. Appellant stopped touching her.

The first time Debra told anyone what appellant had done to her she was about 25 years old. She told her aunt, who had been married to appellant, when her aunt said she knew that appellant had "taken advantage" of Debra all those years. Several years later, Debra told both her sister and her husband what had happened, without details. Then, in December 2008, Detective Benavides, who was investigating the incidents with Jane Doe, contacted her. She was very upset to have appellant's name brought up after all of these years, but she told Benavides what appellant had done to her. He asked her to call and confront appellant, and she ultimately agreed to do so. A tape recording of three phone calls Debra made to appellant was played for the jury at trial. In the calls, appellant repeatedly apologized for harming Debra.

Debra did not know that appellant had another wife after he was married to her aunt, and she did not know anyone named Jane Doe.

Contra Costa County Deputy Sheriff Antonio Benavides, who investigated this matter, was a detective assigned to the child abuse and sexual assault unit for the sheriff's office. He testified that, on December 24, 2008, he interviewed appellant. Benavides told appellant about Debra L.'s allegations and appellant angrily and adamantly denied ever doing any such things to her. Appellant acknowledged the phone call with Debra about inappropriate touching, but said he had told her things in that call that were not true, to appease her. Benavides then brought up the current allegations regarding Jane Doe, and appellant again denied any inappropriate touching.

Benavides, who was offered as an expert in the area of the behavior of sexual abuse victims, testified that victims of sexual abuse disclose their abuse for different reasons and in different ways. Some victims disclose the abuse right away while others go decades without reporting. One of the reasons for delayed disclosure is the victim feeling embarrassment or shame about the abuse. It is not uncommon for child victims of sexual abuse to disclose first to someone with whom they feel comfortable, such as a friend.

### *Defense Case*

Kristen Weiss, one of Jane's seventh grade teachers, testified that, in December 2008, she became concerned about something Jane said about an issue with her mother and therefore filed a report with Child Protective Services (CPS). Jane was interviewed by CPS and, the following day, Jane came into the classroom clearly upset and "beside herself." She yelled at Weiss, "Did you call CPS?" She also yelled out, "My grandfather is going to go to prison because of you." Weiss also testified that, in her opinion, Jane was not a truthful person.<sup>6</sup>

Appellant's daughter, Tracey, who was 43 years old at the time of trial, testified that appellant had never molested her. Tracey had also talked to her 20-year-old daughter and her nineteen-year-old son, and learned that neither of them had been molested by appellant. Tracey also asked her brothers whether appellant had ever molested them, and they said no.

Appellant, who was 68 at the time of trial, testified that he had sexually abused his step-niece, Debra L., beginning when she was about 10 or 11 years old. At the time, appellant was depressed and lonely due to both problems in his marriage and having an autistic son. His abuse of Debra ended in 1976 when she was about 14 years old. He told her they had to stop and she felt the same way. "I felt terrible, and I feel terrible to this day."

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<sup>6</sup> On rebuttal, Eugene A., Jane's second cousin, who had known Jane since she was born and had spent a lot of time with her, testified that he knew her to be honest.

Appellant further testified that, in the interview with Detective Benavides, he admitted fondling Debra's breasts and genitals, but he denied touching Jane. He was truthful when he admitted molesting Debra and when he denied molesting Jane.

On cross-examination, appellant acknowledged that, when he began molesting Debra, he would go into his daughter Tracey's room when everyone was asleep, would lay down next to Debra in the bed, and would rub her chest and her vagina.<sup>7</sup> He did this about every other time Debra spent the night at his home. For the first six months of the molestation, he did not do anything else to her. After that, he began putting his fingers inside her vagina and, about six months later, began rubbing his penis against her vagina. He never actually put his penis inside her vagina.

Appellant also acknowledged that, when Jane was a very young child and spent the night with him and Terri A. in Discovery Bay, Jane would sleep in their bed. But he denied having any sexual urges toward her or touching her sexually.

### ***DISCUSSION***

Appellant's sole contention on appeal is that the trial court erred in admitting evidence of prior sexual offenses under sections 1108 and 352, arguing both that section 1108 is unconstitutional and that the court abused its discretion.

#### ***A. Trial Court Background***

The prosecutor moved, pursuant to sections 1101, subdivision (b), and 1108, to introduce evidence of appellant's prior sexual abuse of Debra L. Defense counsel moved to exclude this same evidence.

The trial court refused to admit the evidence under section 1101, subdivision (b), stating: "I just don't—I don't think it fits. I think it's just too far a stretch." But the court found the evidence admissible under section 1108, explaining: "[Section] 1108, though, I think, although there is a longer time frame between the two incidents, I think that this is what [section] 1108 was designed to incorporate. I have done a [section] 352 analysis of this and balanced the rights of the defendant to not be prejudiced by highly

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<sup>7</sup> Appellant said he did not remember Tracey being in the bed too.

inflammatory material. But in this case there are some striking similarities between the old incident and the current incident, alleged incident, in that the alleged molest started at age five or six. Both involved a position of trust with a relative, a close relative. Both were done in the home, and at the, allegedly at the, defendant's home in a place of, potentially of, both safety and secrecy. And, at least from what I'm being told, the behavior starts out very similar with both alleged victims. With one it continues; with the other, it doesn't, for whatever reason. Those similarities are striking. And the fact that there is time, there's a time span, in between I don't think is particularly significant, given the nature of the alleged offense. That may have to do with access to a child in that particular circumstance, another child who is of the right age or the right circumstance, and access to that child. But I think [section] 1108 is—was designed to present this type of evidence in front of a fact finder if, in fact, the circumstances were similar. And I'm finding striking similarities between these two, at least from what's in front of me now.

“So I am going to allow the [section] 1108 evidence. . . . [W]ith those similarities I think it makes it highly probative, and it outweighs the prejudicial value. So after a [section] 352 analysis I'm going to allow that testimony.”

### **B. Legal Analysis**

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.”

In *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), the California Supreme Court found that section 1108, which permits introduction of propensity evidence in cases alleging the commission of sexual offenses, does not violate a defendant's due process rights. While acknowledging the general rule against admitting such evidence due to its great potential to unduly prejudice the defendant, the court held that, “in light of the substantial protections afforded to defendants in all cases to which section 1108 applies, we see no undue unfairness in its limited exception to the historical rule against propensity evidence.” (*Falsetta*, at p. 915.)

The “substantial protections” to which the *Falsetta* court referred consist of the requirement that the court “engage in a careful weighing process under section 352.<sup>[8]</sup> Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant’s other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]” (*Falsetta, supra*, 21 Cal.4th at p. 917; accord, *People v. Harris* (1998) 60 Cal.App.4th 727, 737-741 (*Harris*); cf. *People v. Loy* (2011) 52 Cal.4th 46, 63 (*Loy*) [concluding that, even if defendant’s claim was true that prior sex offenses “ ‘bore no similarity to’ ” the crime for which defendant was on trial, “this circumstance, although relevant to the trial court’s exercise of discretion, is not dispositive”].)

The *Falsetta* court concluded that “the trial court’s discretion to exclude propensity evidence under section 352 saves section 1108 from defendant’s due process challenge. . . . ‘This [section 352] determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. [Citation.] *With this check upon the admission of evidence of uncharged sex offenses in prosecutions for sex crimes, we find that . . . section 1108 does not violate the due process clause.*’ [Citation.]” (*Falsetta, supra*, 21 Cal.4th at pp 917-918.)

Recently, in *Loy, supra*, 52 Cal.4th 46, 62, our Supreme Court reaffirmed section 1108’s constitutionality. In so doing, the court explained the value of this evidence: “Evidence of previous criminal history inevitably has some prejudicial effect.

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<sup>8</sup> 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.”

But under section 1108, this circumstance alone is no reason to exclude it.

‘[S]ection 1108 affects the practical operation of [Evidence Code] section 352 balancing “because admission and consideration of evidence of other sexual offenses to show character or disposition would be no longer treated as intrinsically prejudicial or impermissible. Hence, evidence offered under [section] 1108 could not be excluded on the basis of [section] 352 unless “the probability that its admission will . . . create substantial danger of undue prejudice” . . . substantially outweighed its probative value concerning the defendant’s disposition to commit the sexual offense or offenses with which he is charged and other matters relevant to the determination of the charge. As with other forms of relevant evidence that are not subject to any exclusionary principle, *the presumption will be in favor of admission.*’ ” (Historical Note, 29B pt. 3, West’s Ann. Evid. Code [(1998 pocket supp.)] foll. § 1108, p. 32.)’ [Citation,] italics added.)” (Loy, at p. 62.)

In *People v. Johnson* (2010) 185 Cal.App.4th 520, 532, footnote 9, a panel of this division further discussed the particularly probative nature of prior sexual offense evidence in sex offense prosecutions: “The legislative history of section 1108 suggests an underlying psychological abnormality that makes such evidence especially probative: ‘The propensity to commit sexual offenses is not a common attribute among the general public. Therefore, evidence that a particular defendant has such a propensity is especially probative and should be considered by the trier of fact when determining the credibility of a victim’s testimony.’ (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 882, (1995-1996 Reg. Sess.) as amended July 18, 1995, p. 8.) Another legislative analysis noted, ‘ “In child molestation actions a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant—a sexual or sado-sexual interest in children—that simply does not exist in ordinary people.” ’ (Sen. Com. on Crim. Proc., Analysis of Assem. Bill No. 882, (1995-1996 Reg. Sess.) as amended May 15, 1995, p. 6.)”

Here, appellant first argues that section 1108 is unconstitutional, although he acknowledges that the California Supreme Court upheld section 1108 against a

constitutional challenge in *Falsetta, supra*, 21 Cal.4th 903, 915 and *Loy, supra*, 57 Cal.4th 46, 62. Assuming this claim is not forfeited due to appellant’s failure to object on this ground in the trial court (see, e.g., *People v. Kennedy* (2005) 36 Cal.4th 595, 612, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459), it is nonetheless without merit. As appellant acknowledges, we are bound by our Supreme Court’s holdings in *Falsetta* and *Loy* that section 1108 does not violate due process. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)<sup>9</sup>

Appellant also argues that the court should have excluded evidence of appellant’s prior sexual offenses pursuant to section 352. In particular, he asserts that the abuse against Debra L. was too dissimilar to the allegations in the present case. We disagree and find, as did the trial, court that, there were “striking similarities” between the two molestations. (See *Falsetta, supra*, 21 Cal.4th at p. 917.) In both cases, the abuse occurred when the victim—a female relative by marriage of approximately seven years of age—spent the night at appellant’s home. In both cases, appellant came into the room in which the child was sleeping, lay down behind her, and rubbed her chest and vagina area with his hand. It is true that the Debra L. abuse eventually escalated after a period of time, while—for whatever reason—the abuse of Jane ceased after only two incidents. That does not, however, negate the nearly identical circumstances in which appellant began his abuse of both girls. The evidence of such similar conduct was clearly relevant to support Jane’s credibility and to demonstrate that appellant committed the charged offenses. (See *Falsetta, supra*, 21 Cal.4th at p. 911 [observing that enactment of section 1108, to permit admission of propensity evidence in sex offense cases, was based

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<sup>9</sup> Appellant claims that section 1108 also violates equal protection and that the appellate courts that have found otherwise were wrong. (See *People v. Brown* (2011) 192 Cal.App.4th 1222, 1233, fn. 14, and cases cited therein; see also *Falsetta, supra*, 21 Cal.4th at pp 918-919 [citing with approval, *People v. Fitch* (1997) 55 Cal.App.4th 172, 184, which held that section 1108 does not violate equal protection].) Again assuming this issue is not forfeited (see *People v. Kennedy, supra*, 36 Cal.4th at p. 612), we agree with the appellate courts that have found that section 1108 does not violate equal protection, and will not address appellant’s conclusory statement on this point.

on Legislature's determination that "the need for this evidence is "critical" given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial"; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [use of prior victim's testimony as propensity evidence was "highly relevant" to defense's attempts to paint victims of current offenses "as either liars or terribly mistaken in their reports that [defendant] molested them"].) Moreover, the fact that the two victims had no prior knowledge of each other's similar stories further strengthens the value of this evidence. (Cf. *People v. Johnson, supra*, 185 Cal.App.4th at p. 533 [evidence that prior assaults came from independent sources reduced danger of fabrication and therefore weighed in favor of admissibility under section 1109].)

In addition, although appellant is correct that remoteness is a factor in determining admissibility (see *Falsetta, supra*, 21 Cal.4th at p. 917), "substantial similarities between the prior and the charged offenses balance out the remoteness of the prior offenses. [Citation.]" (*People v. Branch* (2001) 91 Cal.App.4th 274, 285 ("*Branch*") [no abuse of discretion in admitting 23-year-old prior offense evidence against defendant where conduct in both current and prior cases was "remarkably similar"].) Here again, given the striking similarities between the prior and charged offenses, the evidence relating to Debra L. is extremely probative in showing appellant's propensity to commit the charged offenses. These similarities thus "balance out the remoteness." (*Ibid.*; compare *Harris, supra*, 60 Cal.App.4th at pp. 740-741 [prior offense evidence was "so totally dissimilar to the current allegations" that it had no "significant probative value" and should have been excluded under section 352].)

With respect to other factors appellant discusses, including the inflammatory nature of the prior offenses, the consumption of time of the prior offense evidence, and the possibility that the jury would punish appellant for the prior offenses by convicting him of the charged offenses (see *Falsetta, supra*, 21 Cal.4th at p. 917), in the totality of the circumstances, we agree with the trial court that the extremely strong probative value of the Debra L. evidence far outweighed any danger of undue prejudice. Although the prior offenses were more inflammatory than the present offenses in terms of the

escalation of the touching over a long period of time, we do not believe they were excessively prejudicial, given the remarkable similarities. (See *Loy, supra*, 52 Cal.4th at p. 62 [while evidence of a defendant’s prior criminal history “inevitably has some prejudicial effect[,] . . . this circumstance alone is no reason to exclude it”]; compare *Harris, supra*, 60 Cal.App.4th at p. 738 [where defendant was charged with nonviolent sex offenses against women he knew, prior offense evidence involving a wholly dissimilar vicious sexual attack on a stranger 23 years earlier was “inflammatory *in the extreme*”].)

In addition, there is no evidence to support appellant’s hypothesis that the jury likely convicted him of the present offenses to punish him for committing the prior uncharged offenses. (See *Branch, supra*, 91 Cal.App.4th at p. 284; *People v. Hernandez* (2011) 200 Cal.App.4th 953, 969.) Nor is there any evidence that the jury was confused by the admission of the prior offense evidence. The jury was instructed with CALCRIM No. 1191, which told it to consider the evidence of the uncharged crimes only for the purpose of showing that appellant “was disposed or inclined to commit sexual offenses” and that its conclusion that appellant committed the uncharged offenses was “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 the charged offenses].” We presume the jurors understood and followed this instruction. (See *People v. Jones* (2011) 51 Cal.4th 346, 371; *People v. Hernandez, supra*, 200 Cal.App.4th at p. 969.)

In sum, the similarity of the current and prior offenses, the fact that Jane and Debra did not know each other, and the relevance of the prior incidents to the jury’s determination of Jane and appellant’s credibility render this evidence extremely probative of appellant’s propensity to sexually abuse young female relatives. (See *Branch, supra*, 91 Cal.App.4th at pp. 283-284; see also *Loy, supra*, 52 Cal.4th at p. 61 [“The Legislature has determined that this evidence is ‘particularly probative’ in sex cases”].) The trial court did not abuse its discretion when it concluded that the danger of undue prejudice did not substantially outweigh the probative value of the prior sexual offense evidence in

proving appellant's disposition to commit the charged offenses. (See *Loy, supra*, 52 Cal.4th at p. 62; *Falsetta, supra*, 21 Cal.4th at pp. 917-918.)

***DISPOSITION***

The judgment is affirmed.

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Kline, P.J.

We concur:

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Haerle, J.

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Richman, J.