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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

TAJINDER SINGH BEDI,

Defendant and Appellant.

A131676

(Contra Costa County
Super. Ct. No. 51006352)

I.

INTRODUCTION AND PROCEDURAL BACKGROUND

On December 4, 2008, Tajinder Singh Bedi was charged by complaint with committing a lewd act upon Jane Doe I (Doe I), a child under age 14 (Pen. Code, § 288, subd. (a) (Count I)), committing a lewd act upon Jane Doe II (Doe II), a child age 14-15 (Pen. Code, § 288, subd. (c)(1) (Count II)), and committing sexual battery by restraint upon Melissa F., a 22-year-old woman (Pen. Code, § 243.4, subd. (a) (Count III)). The prosecution was unable to locate Melissa F. prior to the preliminary hearing. Count III was dismissed by June 11, 2010, when appellant was charged by information with Counts I and II.

A 12-day jury trial commenced on February 15, 2011. On the first day of trial, respondent filed a motion in limine requesting the court admit the testimony of Melissa F. regarding the facts surrounding the dismissed sexual battery. On February 17, 2011, appellant filed a motion in limine seeking to exclude the Melissa F. testimony. The court heard oral arguments on the motions that same day, and granted the motion to allow the

Melissa F. testimony. During the trial, testimony was heard by the victims of the first two counts, Doe I and Doe II, and Melissa F., the alleged victim of the dismissed count. The jury found appellant guilty on both counts.

On March 24, 2011, the court sentenced appellant to the aggravated term of eight years on Count I, and one-third the midterm, equaling eight months, on Count II to be served concurrent to Count I. However, the abstract of judgment filed March 25, 2011, recorded a concurrent midterm under Count II in the erroneous amount of two years eight months, thereafter erroneously recording the total aggregate prison term imposed for the two counts as eight years eight months. The sentence was appealed, and this court directed the trial court to sentence Count II concurrently at the full midterm of two years. The lower court complied at a resentencing on January 26, 2012.

Appellant appeals both convictions, contending that Evidence Code section 1108¹ is unconstitutional and that admission of evidence of his uncharged sexual offense under section 1108 violated his right to a fair trial, due process, and equal protection of the laws under the state and federal constitutions. Appellant also argues the trial court erred in admitting that evidence under section 352. Finally, appellant requests the correction of a sentencing error. We conclude that section 1108 is constitutional, appellant's constitutional rights were not violated, and the trial court did not abuse its discretion in admitting the evidence under section 352. As to the sentencing error briefed, that error has been corrected, and is now moot. We therefore affirm the judgment.

II.

FACTUAL BACKGROUND

While working as an intern at a counseling center, appellant sexually violated two minors, Doe I and Doe II. Melissa F., an adult, testified the appellant committed a similar sexual act against her at the counseling center.

¹ All statutory references are to the Evidence Code unless otherwise indicated.

A. Count I

On Friday, January 25, 2008, Doe I's mother drove her then 13-year-old daughter to a 5:00 p.m. appointment with appellant at the counseling center. Prior to the January 25, 2008 appointment, all of Doe I's prior appointments with appellant (approximately nine) included at least one other person being present. Doe I and her mother decided this would be her first appointment alone with appellant. Doe I's mother waited in the waiting room with appellant's wife and two children.

During the counseling session Doe I and appellant spoke for approximately 20 minutes and discussed the reason for her visit. Appellant then recommended she try some yoga exercises to help her cope with her stress. Appellant took off his shoes and told her to do the same. She left her socks on to be more comfortable. Appellant closed the blinds on the office windows then instructed Doe I to kneel in front of the couch, bend over, put her hands down, place her head against her hands on the couch, and close her eyes. After doing so, she heard a noise that sounded like appellant slipping out of his jeans and walking toward her. He got on his knees behind her so that her ankles were touching his inner thighs. He then pulled the bottom of her sweat pants up, revealing her calves, which he then massaged with one hand on each calf. He lifted her feet bringing them into contact with his penis. Holding her feet with both hands, he then rubbed the bottoms of her feet around his penis. After approximately 30 seconds of rubbing, appellant gasped and got up quickly. When Doe I opened her eyes appellant had already put on his pants and was opening the blinds. She felt scared and confused, put on her shoes, and called her mother in.

Doe I stood in the office with her mother and appellant while they spoke for approximately five minutes. Doe I's mother testified that appellant said he gave her daughter a small yoga lesson and everything was fine. During this conversation, she remembers her daughter looking desperate to leave and wringing her hands. Doe I recalled appellant glancing at her with a powerful stare during the conversation. Regardless, Doe I's mother thought everything was fine and offered to bring Doe I back for another session on Monday.

Doe I and her mother arrived at their home that evening, where she eventually told her mother what appellant did to her during her 5:00 p.m. session. Her mother did not believe Doe I's story but told her to talk it over with her school counselor.

On January 29, 2008, Doe I's school counselor contacted the local police department, which dispatched an officer to take a report. The police interviewed appellant shortly thereafter. Appellant claimed that during the January 25, 2008 session Doe I was not alone but with her mother, his door was open, his wife and children were in the waiting room, and he never had any physical contact with Doe I.

B. Count II

On November 15, 2008, Doe II's mother took Doe II, then 15 years old, to her second visit at the counseling center. Doe II and appellant began the session speaking as they did at her previous appointment. At some point appellant asked her if she wanted to do yoga, then instructed her to take off her shoes, kneel, and lean into the sofa. She took off her shoes but left her socks on. Then she knelt as he asked and placed her hands and her head on the sofa cushions in a way that prevented her from seeing. Appellant then knelt behind her and started massaging her calves with his hands. Staying on his knees, appellant scooted in closer to her feet. Feeling as though his penis was going to touch her feet she moved her feet forward. Appellant then scooted in closer touching his penis to her feet. In response to this, Doe II got up, put on her shoes and left the counseling room crying. Appellant did not remove or pull down the knee-length shorts he was wearing during the incident.

Doe II's mother testified that Doe II had been inside the counseling room for about 10 minutes before she came out screaming and crying and said, "he touched me." She told her mother what happened and they were getting ready to go to the police when appellant came outside of the counseling office. Appellant tried to bring Doe II's mother into his counseling room to explain what happened, but Doe II's mother responded that she believed her daughter, and that she was going to the police.

C. Melissa F.'s Testimony

On May 28, 2005, Melissa F., 22 years old at the time, arrived with her six-month-old daughter at the counseling center for a 6:00 p.m. appointment with appellant. She brought her daughter into the session. In the session, appellant first told her not to mention anything that was said between them in the room to anyone. They then discussed the reason for her visit for approximately 15 to 20 minutes. At some point during the session appellant suggested yoga as a way to relax and reduce stress. Appellant asked if Melissa F. had ever tried yoga before, she answered that she had, and he then instructed her to kneel on the couch and bend over the arm of a couch while arching her back. Appellant then began massaging her back with his hand and knelt on the couch behind her. Next, he pressed his hand downward against her back, effectively keeping her in place, and rubbed his penis against her buttocks for about 20 to 60 seconds. Realizing this was inappropriate and not a yoga exercise, she demanded that he stop. Appellant stopped. Melissa F. grabbed her daughter and walked out of the office, returning a few moments later to tell him what he had done was inappropriate. She called the police as soon as she got home.

III.

DISCUSSION

Appellant contends the trial court erred in admitting evidence regarding the uncharged sexual offense. Appellant posits that one of the grounds the trial court relied on for admitting the evidence, section 1108, is unconstitutional. Similarly, appellant claims admission of this evidence violated his rights to equal protection of the laws, due process, and fair trial under the state and federal constitutions. Finally, appellant argues this evidence should have been inadmissible under section 352.

A. Background

During in limine motions, the prosecution proffered the testimony of Melissa F. as evidence of a prior uncharged sexual offense. The prosecution argued that this evidence was admissible, under sections 1108 and 352, as a prior sex offense to establish appellant's sexually assaultive behavior. The prosecution also argued that this evidence

was admissible under section 1101, subdivision (b) as relevant to prove intent, modus operandi, and absence of mistake or accident. The trial court granted the motion, ruling that the testimony from Melissa F. would be admissible under sections 1101 and 1108. The trial court also exercised its discretion in favor of admission under section 352, ruling that the evidence was not inflammatory, the relevancy of the information was not outweighed by the prejudicial value, it would not be misleading, and its admission would not involve an undue consumption of time.

B. Appellant’s Constitutional Challenge to Section 1108 Lacks Merit

Evidence of a appellant’s prior offense is generally inadmissible to prove his or her conduct on a specific occasion, unless that evidence is offered to prove some fact (e.g. motive, plan, intent, or absence of mistake or accident) *other than appellant’s disposition to commit such an act*. (See § 1101.) In 1995, the Legislature enacted section 1108 to provide another exception to this general rule in sexual offense cases: “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 [s]ection 352.” (§ 1108, subd. (a); see generally *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*).

On appeal, appellant contends that California Supreme Court precedents holding that section 1108 does not violate constitutional rights to due process and a fair trial were incorrectly decided. (See *Falsetta, supra*, 21 Cal.4th 903; *People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*)). Appellant concedes that the precedents established in *Falsetta* and *Reliford* precludes this court from independently deciding the issue and raises the issue to preserve it for federal review. Indeed, “[u]nder the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. . . . The decisions of [the California Supreme Court] are binding upon and must be followed by all the state courts of California.” (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455, italics omitted.) Recognizing the clear directive of our Supreme Court, we cannot agree that these precedents were wrongly decided.

Similarly, appellant contends that appellate decisions holding that section 1108 does not violate the constitutional right to equal protection were also incorrectly decided. (See, e.g., *People v. Fitch* (1997) 55 Cal.App.4th 172, 184; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1311-1312 [holding § 1109, a similar statute, constitutional].) Appellant’s assertion lacks merit. “An equal protection challenge to a statute that creates two classifications of accused or convicted defendants, without implicating a constitutional right, is subject to a rational-basis analysis. [Citation.] [¶] [S]ection 1108 withstands this relaxed scrutiny.” (*People v. Fitch, supra*, at p. 184.) We find the holding in *Fitch* well reasoned, and agree that section 1108 is constitutionally valid.²

C. The Trial Court Did Not Abuse Its Discretion in Admitting Evidence of Appellant’s Prior Sexual Offense

Appellant next contends that the trial court abused its discretion in finding evidence regarding the Melissa F. incident admissible under section 352. Under section 1108, when a defendant is accused of a criminal sexual offense, evidence of an uncharged sexual offense is admissible to prove defendant’s disposition to commit the accused sexual offense so long as that evidence is not inadmissible under section 352.

Section 352 imposes an obligation on the admitting court to balance the relevance, or probative value of the evidence against other factors: “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.” In deciding whether to admit or exclude evidence of a defendant’s prior sex offense under

² Even if section 1108 did not apply for constitutional or other reasons, and thus rendered the evidence of appellant’s uncharged sexual offense inadmissible as character evidence under section 1101, subdivision (a), the evidence would still be relevant as evidence to prove motive, opportunity, intent, preparation, plan, or absence of mistake or accident and thus not rendered inadmissible under section 1101, subdivision (a) as explicitly provided in section 1101, subdivision (b). However, because the trial court did not err in finding the evidence admissible under section 1108, we need not discuss its admissibility under section 1101.

section 352, the trial judge “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). “ ‘The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense. . . .’ [Citation.]” (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274; see also *People v. Soto* (1998) 64 Cal.App.4th 966, 986 [finding “ ‘similarity would tend to bolster the probative force of the evidence’ ”].) “The court’s ruling under section 1108 is subject to review for abuse of discretion. [Citation.]” (*People v. Loy* (2011) 52 Cal.4th 46, 61.)

Appellant argues the prior offense was highly dissimilar to the present offenses and cites two differences. First, appellant emphasizes the victim in the uncharged offense was a 22-year-old woman, not a minor. In *People v. Escudero* (2010) 183 Cal.App.4th 302, 306, 308, evidence of the defendant’s prior sexual offenses against a woman in her 30’s was admissible to prove propensity to commit a lewd and lascivious act against a seven-year-old girl. Finding the evidence admissible, the Third District explained, “persons with deviant sexual urges do not always limit their sex crimes to victims of the same age group. Thus, evidence of a defendant’s sex offenses against adult women is probative to the question of the defendant’s guilt of committing sex crimes against a young girl.” (*Id.* at p. 306; cf. *People v. Soto, supra*, 64 Cal.App.4th at p. 991 [finding that victims of uncharged crimes being within the same age range (four to six years apart) is notable when considering passage of time between prior and current offenses].) Here, the age difference between the victims is nine years, not as great as the 23-year difference in *Escudero, supra*, at pages 306, 308. Therefore Melissa F.’s age is not a significant distinction.

Next, appellant attempts to distinguish the prior offense from the present offense citing that appellant massaged Melissa F.'s back, then rubbed his penis on her buttocks, rather than massaged her calves, then rubbed his penis on her feet as he did with the victims in the charged offenses. This too is a distinction with no material difference. "Many sex offenders are not 'specialists', and commit a variety of offenses which differ in specific character. [Citation.]" (*People v. Soto, supra*, 64 Cal.App.4th at p. 984.)

In this case, the trial court properly determined that the behavior described by Melissa F. was "very similar and consistent" with the behavior described by the victims of the charged offenses. Just as in each of the two charged offenses, appellant brought a young woman into his office, instructed her to get into a yoga position on or against his couch, knelt behind her, massaged her, then rubbed his penis against a clothed area of her body for a minute or less. Also contributing to its probative value we note that the Melissa F. offense was not remote, occurring just under two years eight months before the first offense. (*People v. Regalado* (2000) 78 Cal.App.4th 1056, 1059 [finding evidence of a lewd act five years prior to the present charge "not remote in time"].)

In any case, because section 1108 allows evidence of any sexual offense as defined in section 1108, subdivision (d)(1) no matter how dissimilar to prove propensity, section 352 does not require that charged and uncharged offenses be similar in order to have sufficient probative value. (See *People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41.)

Melissa F.'s testimony was also relevant for purposes of section 352 balancing to determine the credibility of the victims. In enacting section 1108, the Legislature was persuaded that: "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; accord, *Falsetta, supra*, 21 Cal.4th, at pp. 911, 912.) Because the testimony of Doe I and Doe II was the only direct source of evidence incriminating

appellant, the jury's assessment of their credibility was crucial. Recognizing this, the defense challenged the accuracy of the victims' perceptions and memories and introduced prior inconsistent statements. However, Melissa F.'s testimony of a similar prior offense supported the testimony of the Doe I and Doe II, and was thus relevant and used in accordance with the Legislature's intentions. (See generally *ibid.*; see also *People v. Walker* (2006) 139 Cal.App.4th 782, 797.)

“Against this substantial probative value on material and contested issues, we must weigh the danger of undue prejudice to defendant, of confusing the issues, or of misleading the jury.” (*People v. Kipp* (1998) 18 Cal.4th 349, 372, 375.) In weighing prejudice it has been observed that “ ‘all evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is ‘prejudicial.’ ” [Citations.]” (*People v. Walker, supra*, 139 Cal.App.4th at p. 806.) However, the prejudice contemplated by section 352 is that “ ‘which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, “prejudicial” is not synonymous with “damaging.” ’ [Citations.]” (*People v. Callahan* (1999) 74 Cal.App.4th 356, 371.) Here, Melissa F.'s testimony was highly probative as to key issues in the case, and therefore did not create the *undue* prejudice section 352 was designed to exclude. (See *People v. Hollie, supra*, 180 Cal.App.4th at p. 1277.) “A trial court should not exclude highly probative evidence unless the undue prejudice is unusually great. [Citation.]” (*People v. Walker, supra*, at p. 806.)

Other factors relevant to assessing the prejudicial effect of other crimes evidence include the evidence's inflammatory effect on the jury and whether or not the defendant was convicted of the uncharged offense. (*People v. Hollie, supra*, 180 Cal.App.4th at p. 1277.) Absence of a conviction on a prior offense increases the danger the jury might have been “inclined to punish defendant for the uncharged offenses, regardless whether it considered him guilty of the charged offenses, and increased the likelihood of ‘confusing the issues’ [citation], because the jury had to determine whether the uncharged offenses

had occurred.” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405; *People v. Spector* (2011) 194 Cal.4th 1335, 1390.)

The trial court also correctly decided that the prior incident was not inflammatory. The evidence of the unwanted sexual touching of Melissa F., an adult, was not inflammatory compared to similar unwanted sexual touches committed against the teenage girls. (See *People v. Hernandez* (2011) 200 Cal.App.4th 953 [holding evidence of defendant’s uncharged sex offenses against his daughters, minors during most of offenses, not so inflammatory to render it inadmissible at trial for continuous sexual abuse of his granddaughter, a child under the age of 14 years].) On the other hand, here appellant was not convicted of the sexual offense committed against Melissa F. and the jury was aware that the offense was uncharged, creating a risk the jury would use the evidence to punish appellant for that uncharged offense. However, review of counsel’s arguments and the jury instructions leaves us satisfied that the jury was not led to punish appellant for the uncharged act nor are we persuaded that they were misled or confused. The trial court properly instructed the jury to use the Melissa F. testimony only for proper, limited purposes and “[w]e presume jurors ‘generally understand and follow instructions.’ [Citation.]” (*People v. Myles* (2012) 53 Cal.4th 1181, 1212.)

Finally, we find no abuse of discretion in the trial court’s finding that admission would not involve an undue consumption of time. This single witness provided testimony about one highly relevant incident and demanded relatively little of the court’s time. (*People v. Castain* (1981) 122 Cal.App.3d 138, 142.)

In arguing error, appellant relies on *People v. Harris* (1998) 60 Cal.App.4th 727. There, the court found the prior offense was “totally dissimilar to the current allegations” and concluded that “[t]he lack of any significant probative value on a disputed issue weighs strongly in favor of excluding this evidence.” (*Id.* at pp. 740-741.) Unlike *Harris*, here the offenses were “very similar” and highly probative to crucial issues in the case. Additionally, our Supreme Court distinguished *Harris* aptly in *People v. Loy*, and its reasoning applies to this case. “[T]he Court of Appeal [in *Harris*] found an abuse of discretion in admitting evidence under section 1108. But *Harris*’s facts were entirely

different from those here. There, the prior offense was forcible and the evidence of it was ‘inflammatory *in the extreme*.’ [Citation.] The charged sexual offenses were, by contrast, not forcible but involved breaches of trust. Thus the charged offenses were ‘of a significantly different nature and quality than the violent and perverse attack on a stranger that was described to the jury.’ [Citation.] Moreover, ‘[t]he facts of the prior conduct were redacted to a point that the jury must have come away with a misleading impression of what happened. . . .’ [Citation.] The prior offense occurred 23 years before the charged offenses, a factor the Court of Appeal found weighed in favor of exclusion. [Citation.] Those circumstances do not exist here. Nothing in *Harris* compels the conclusion that the court abused its discretion in admitting the evidence here.” (*People v. Loy, supra*, 52 Cal.4th at p. 64, italics added.) We reach the same conclusion based on the facts and circumstances of this case.

D. Sentencing

As noted above, the January 26, 2012 resentencing granted appellant the relief requested in appellant’s opening brief on the sentencing error previously brought to our attention. Therefore, this issue is now moot.

**IV.
DISPOSITION**

The judgment is affirmed.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.