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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN C. GOMEZ,

Defendant and Appellant.

A132726

(San Francisco City & County  
Super. Ct. No. 00213958/10000058)

Defendant was convicted of forcible sexual penetration after he assaulted a woman who was walking alone late at night in San Francisco. At trial, the court admitted evidence of an uncharged rape committed by defendant less than four months earlier in the same area of the city. Defendant contends the trial court erred in admitting evidence of the rape. We affirm.

**I. BACKGROUND**

Defendant was charged in an amended information with one count of forcible sexual penetration. (Pen. Code, § 289, subd. (a)(1)(A).)

About 11:20 p.m. on December 31, 2009, the victim left a party at a residence at 20th and Folsom Streets in San Francisco and began walking alone on 20th Street. Near the corner with Shotwell Street, she stopped and began to “fiddle” in her purse. Suddenly, a man, whom the victim identified as defendant, came from behind, wrapped his arms around her, and put his right hand up her skirt. As the victim grabbed the assailant’s arm and attempted to pull it away, they stumbled to the ground, landing face-

to-face. Shortly after they fell, the victim felt defendant's finger enter her vagina three or four times.

W. Leung was walking on 20th Street that night with several friends. While in the block between Shotwell and South Van Ness Streets, he heard the victim's cries for help. Looking across 20th Street, he saw two people on the ground, one on top of the other. When Leung and his friends began to yell and cross the street, the person on top stood up quickly and ran off. Leung began to chase the man, who began heading north on South Van Ness Street. As Leung gained on the man, he turned left onto 19th Street. After one block, he turned left again onto Capp Street. When Leung turned the same corner, the man had disappeared. At that point, Leung was approached by two police officers.

Around midnight that night, San Francisco Police Officer Gustavo Castaneda was standing near his police car on Capp Street with two other officers. He heard a commotion from the direction of 19th Street and turned to look as a man ran around the corner and cowered beneath a parked truck. Within a "couple of seconds," Leung rounded the corner. After Castaneda spoke with Leung, he detained the man under the truck, whom Castaneda identified as defendant. They then drove to 20th and South Van Ness Streets, where they spoke with the victim. Upon seeing defendant in a "cold show," the victim said he "look[ed] like" the person who assaulted her.

DNA testing of tissue samples taken from defendant's hands were suggestive but inconclusive. The victim's DNA was characterized as a "possible minor contributor" to the sample from defendant's left hand, while data from his right hand was insufficient to permit the technician to draw a conclusion.

Prior to trial, the prosecutor had successfully moved in limine under Evidence Code<sup>1</sup> section 1108 to permit the introduction of evidence of an uncharged rape committed by defendant. As the incident was later described at trial, the victim in the uncharged incident, J.A., had parked her car behind her boyfriend's house on South Van

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

Ness Street on the night of September 26, 2009. Around 2:00 a.m. the next morning, J.A.'s boyfriend walked her to the car. She had been drinking heavily. Her next memory was waking up in the passenger seat of her car and finding "a stranger . . . laying on top of me," having vaginal intercourse with her. At trial, J.A. identified the stranger as defendant. When she realized what was happening, J.A. asked defendant to stop and begged him to leave the car. Instead, he "pulled me to the middle of the seats, and started choking me, and I just—I felt like I was going to pass out." After more ineffective pleading, she stopped resisting. Defendant eventually ejaculated inside her and left the car. DNA testing of a rape kit confirmed defendant as her attacker.

In granting the motion, the trial court reasoned the two acts were similar in execution, since "[b]oth [victims] . . . were women who were alone at night in . . . . [¶] . . . [¶] [a] similar area of the city. . . . [T]here was vaginal penetration in both instances. . . . [The uncharged incident] is not more inflammatory than the [present] incident. . . . It's a difference in how the penetration occurred, but both women suffered vaginal penetration. [¶] The uncharged conduct . . . is four months—a little shy of four months earlier than the [charged] incident." The court concluded the uncharged incident would not require an undue consumption of time or create a substantial danger of undue prejudice or confusion and noted a limiting instruction would be given.

Defendant was found guilty and sentenced to a prison term of eight years.

## II. DISCUSSION

Defendant contends the trial court committed prejudicial error in admitting evidence of the uncharged rape.

The law governing admission of evidence of uncharged sexual crimes under section 1108 was well summarized in *People v. Hernandez* (2011) 200 Cal.App.4th 953:

"Character or disposition evidence is generally inadmissible to prove a defendant's conduct on a specified occasion. [Citation.] Section 1108 creates an exception: '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.' [Citations.]

In enacting section 1108 the Legislature recognized the “serious and secretive nature of sex crimes and the often resulting credibility contest at trial,” and intended in sex offense cases to relax the evidentiary restraints imposed by section 1101 ‘to assure that the trier of fact would be made aware of the defendant’s other sex offenses in evaluating the victim’s and the defendant’s credibility.’ (*People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*)). By its terms, section 1108 requires a trial court to engage in a section 352 analysis before admitting evidence of prior sex offenses.

“In *Falsetta*, our Supreme Court upheld the constitutionality of section 1108 against a due process challenge, concluding that the weighing process of section 352 would be a sufficient safeguard against undue prejudice from such propensity evidence. In reaching this conclusion the court established the criteria for courts to consider when ruling on the admissibility of evidence of prior sexual offenses. [Citation.] The factors to be considered in conducting the analysis depend on the unique facts and issues of each case. [Citations.] Several factors are particularly significant in a section 1108 case. They are: ‘(1) whether the propensity evidence has probative value, e.g., whether the uncharged conduct is similar enough to the charged behavior to tend to show the defendant did in fact commit the charged offense; (2) whether the propensity evidence is stronger and more inflammatory than evidence of the defendant’s charged acts; (3) whether the uncharged conduct is remote or stale; (4) whether the propensity evidence is likely to confuse or distract the jurors from their main inquiry, e.g., whether the jury might be tempted to punish the defendant for his uncharged, unpunished conduct; and (5) whether admission of the propensity evidence will require an undue consumption of time. [Citation.] A trial court balances this first factor, i.e., the propensity evidence’s probative value, against the evidence’s prejudicial and time-consuming effects, as measured by the second through fifth factors.’ ” [Citations.]

“The ‘determination as to whether the probative value of such evidence is substantially outweighed by the possibility of . . . unfair prejudice or misleading the jury is “entrusted to the sound discretion of the trial judge who is the best position to evaluate the evidence.” [Citation.]’ [Citation.] We review rulings under section 352 for abuse of

discretion. [Citation.] ‘A trial court’s exercise of its discretion under section 352 “ ‘must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.’ ” ’ ” ( *People v. Hernandez, supra*, 200 Cal.App.4th at pp. 965–966.)

We find no abuse of discretion in the trial court’s carefully considered decision to admit evidence of the rape. Beyond merely demonstrating defendant’s propensity to commit sexual crimes, the evidence was particularly probative because, as the trial court noted, defendant’s commission of the rape resembled the charged crime in several respects. Both crimes were committed in the middle of the night in the same neighborhood within a few months of each other. Both occurred in an apparently opportunistic manner against women whom defendant found alone. Both featured assault by vaginal penetration. Given the similarity, the crimes did not merely prove defendant’s propensity to commit a violent sexual offense ( *People v. Earle* (2009) 172 Cal.App.4th 372, 397); they also suggested an identity of the perpetrator and a common design. This type of similarity supports admission, even if the degree of similarity is insufficient to qualify the evidence for admission under section 1101. ( *People v. Loy* (2011) 52 Cal.4th 46, 63; *People v. Hernandez, supra*, 200 Cal.App.4th at p. 966.) The risk of confusion or undue prejudice was mitigated by the trial court’s appropriate limiting instruction.

We do not find the grounds for prejudice suggested by defendant to outweigh this probative value as a matter of law. The rape was a more serious crime, but we do not agree, as defendant argues, that it was sufficiently more inflammatory to create a risk of undue prejudice. These were both disturbing crimes of predatory sexual violence. In both, defendant used surprise against a vulnerable victim to gain the upper hand and violence to penetrate each. While the rape featured a greater degree of violence and penetration by defendant’s genitals, rather than his finger, this did not make the crime *substantially* more inflammatory.<sup>2</sup>

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<sup>2</sup> Defendant faults the trial court for “fail[ing] to consider excluding inflammatory but irrelevant details” of the uncharged crime. Because defendant’s trial counsel did not request the testimony be limited in this manner and made no objection to the introduction

Nor was evidence of a strong case introduced to bolster a weak case. While the evidence supporting defendant's commission of the rape was certainly strong, we find the evidence against defendant in this case to have been equally persuasive, for reasons discussed below.

Evidence of the uncharged crime did not dominate the trial in a manner that would have been misleading or confusing for the jury. The uncharged crime was proven through the testimony of the victim, two investigating officers, the nurse who performed the rape examination, and the technician who performed DNA analysis. Because the technician and one of the investigators also testified about their work in connection with the charged crime, their testimony regarding the uncharged crime involved little additional trial time. The testimony regarding the rape was sufficiently limited and distinct from that of the charged crime to have prevented any prejudice.

It is true, as defendant argues, the risk of prejudice was greater because there was no testimony indicating defendant had been convicted of the uncharged crime. As the Supreme Court explained in *People v. Balcom* (1994) 7 Cal.4th 414, uncharged crimes that have not resulted in a conviction create a greater risk of prejudice because the jury must decide for itself whether, in fact, the defendant actually committed the uncharged crime and can be tempted to convict the defendant to ensure his punishment for the uncharged crime. (*Id.* at p. 427.) The risk of prejudice from the former sexual assault was minimal here. The determination of defendant's guilt of the rape was not complex, since DNA evidence was strong and the circumstances were uncomplicated. While the possibility of prejudice from a desire to punish was present, as it always will be when there has been no conviction of the uncharged crime, the trial court did not abuse its discretion in concluding the probative value of the uncharged crime evidence outweighed that risk.

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of these details during J.A.'s testimony, the trial court was never asked to consider excluding these details. The court was under no sua sponte duty to limit testimony regarding the uncharged crime in this manner.

Even if admission of this evidence was error, it was not prejudicial under either the federal constitutional or state law standards. (See, respectively, *Chapman v. California* (1967) 386 U.S. 18 [error harmless beyond a reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable likelihood of a more favorable verdict].) Contrary to defendant's claim, the evidence against him on the charged crime was strong. Leung witnessed the assault in progress. In what amounts to visual chain-of-custody evidence, Leung had continuous sight of the assailant until he turned the corner of Capp Street. Officer Castaneda spotted him at precisely this point and watched him hide beneath the truck, where he was found and arrested. Although, as defendant notes, the DNA evidence was equivocal, it was consistent with defendant's identity as the assailant. Given the strength of the testimonial evidence, conclusive DNA evidence was unnecessary to create a solid case for guilt.

While we do not believe admission of the uncharged rape evidence violated defendant's right to due process by creating a fundamentally unfair trial, we need not decide this issue. Because admission of the evidence was harmless beyond a reasonable doubt, any violation of due process would not require reversal. (*People v. Bunyard* (2009) 45 Cal.4th 836, 848, fn. 4.)

Defendant also contends the admission of propensity evidence violated his right to due process as a matter of law. As he acknowledges, this legal issue was decided against him in *Falsetta, supra*, 21 Cal.4th at page 917, a holding recently reaffirmed in *People v. Loy, supra*, 52 Cal.4th at pages 60–61. We are bound by those decisions.

### **III. DISPOSITION**

The judgment of the trial court is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Dondero, J.