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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KELLEY EDWARD EDLEY,

Defendant and Appellant.

D058712

(Super. Ct. No. SCN270364)

APPEAL from a judgment of the Superior Court of San Diego County,
Runston G. Maino, Judge. Affirmed.

A jury convicted Kelley Edward Edley of assault with the intent to commit rape (Pen. Code,¹ § 220, subd. (a), count 1); sexual battery (§ 243.4, subd. (a), count 2); misdemeanor sexual battery (§ 243.4, subd. (e)(1), count 4); false imprisonment by force or fear (§§ 236, 237, subd. (a), count 5); misdemeanor attempted sexual battery (§§ 664, 243.4, subd. (e)(1), count 6); three counts of possession of a controlled substance (Health

¹ Statutory references are to the Penal Code unless otherwise specified.

& Saf. Code, § 11350, subd. (a), counts 8-10); possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a), count 11); and receiving stolen property (§ 496, subd. (a), count 12). Counts 1 and 2 relate to a victim named Mary T. Counts 4 and 5 relate to a victim named N.T. Count 6 relates to a victim named Andrea E. The jury found Edley not guilty on count 3, which was assault with the intent to commit rape of N.T. (§220, subd. (a).) The court sentenced Edley to prison for five years, four months.

Edley appeals, contending substantial evidence does not support his conviction for assault with intent to commit rape of Mary and the trial court erred in instructing the jury it could consider all of the charged sex offenses to establish he had the intent to commit the other charged sex offenses. We affirm.

FACTS

Prosecution

Mary (Count 1, Assault with Intent to Commit Rape, and Count 2, Sexual Battery)

Mary met Edley and his wife when she began babysitting their then seven-month-old son, C. She lived in the same apartment complex as Edley. Mary ran a daycare business and babysat C. for three and a half years.

In 1997, Mary stopped babysitting C. because C.'s mother moved away with him after separating from Edley. In 1998, Mary moved with her husband and children to Temecula, but remained in touch with Edley, inviting him to her house on multiple occasions. Mary and Edley also would meet for lunch every other month.

In September 2001, Mary drove to Edley's apartment after work to drop off C.'s clothes and see pictures of C. She sat down on a sofa and looked at pictures of C. while talking to Edley. During their conversation, Edley made a comment about Mary's skirt and that he could see her underwear. Mary ignored the comment, and Edley got off the couch to get a drink. When Edley returned to the couch, he touched Mary's shoulder and then quickly swung her legs onto the couch, causing her to lie on her back on the couch. He got on top of her. While holding her hands above her head with one hand, Edley put his other hand under her shirt and grabbed at her breasts. He then put his hand under her skirt and grabbed her thigh and buttocks and touched her vagina through her underwear. During this encounter, Edley repeatedly tried to kiss Mary.

In response, Mary tried to fight Edley by wiggling away from him and screaming. She managed to slide off the couch, run around the couch, and repeatedly hit Edley as he tried to block her from the apartment door while holding her keys and telling her not to tell anyone about what happened. Eventually, Mary escaped the apartment. She drove home, told her husband what Edley had done to her, and the next day she told a security guard at her job. She also reported the incident to the sheriff, but could not remember the exact day she made the report.

With the help of a sheriff's detective, Mary made a controlled telephone call to Edley and demanded to know why he attacked her. Mary specifically asked Edley about his touching her breasts, trying to kiss her, and refusing to allow her to leave. Edley did not deny the accusations, but merely told Mary that he was sorry.

N. (Count 4, Misdemeanor Sexual Battery, and
Count 5, False Imprisonment by Force or Fear)

In December 2007, N. began working as a nurse at a rehabilitation facility in Carlsbad. During that time, she knew of Edley, who worked in a different part of the facility, but she had never met him.

On May 11, 2008, at about 3:00 a.m., while N. was doing her nursing rounds, Edley walked into her unit, told her that he was looking for medications, and asked her to assist him. N. followed him to a lighted office at the back of the facility. She entered the office. Edley followed her, closed the door, and turned off the light.

When N. turned around with her back to a counter, Edley walked up to her, put his hands on the counter to each side of her, then grabbed both her wrists, and tried to kiss her on her lips. As she moved her head away from him, he put his hand down her shirt and touched the skin of her breast. N. pushed Edley's hand away, told him to stop, and tried to get away from him. She felt trapped. At some point, Edley let go of N.'s wrists and tried pushing his hand down the front of her pants, but she was able to push his hand away before his hand got into her pants. Although N. told Edley to stop, he responded by saying, "Come on." She did not scream.

N. eventually was able to free herself from Edley's grasp, and she left the office. Later, as she was at the facility's elevator and going on break, Edley spoke to N. and asked her if she was returning. When she said yes, Edley responded, "Maybe we should get a room and have sex." She told him no and walked into the elevator. She did not do

anything to report what Edley had done to her that night because she did not know what to do. She did not see Edley the rest of that night.

When N. returned to work the following night, she told two girls with whom she was friends and worked at the facility about what Edley had done. Later that morning, she told some of her family members, who also worked at the facility, what had happened. She later reported and described Edley's actions to the police including the fact that Edley commented to her about his penis. She cried when giving her report to the police.

Andrea (Count 6, Misdemeanor Attempted Sexual Battery)

On January 13, 2009, Andrea, a nursing student, was taking a night class at a vocational school to become a registered nurse. Edley was her teacher. That night, Edley selected her and another student, Sasha, to stay after class to help Edley put away the instructional dummies and bed sheets. When Sasha left the classroom, Andrea had her back to Edley. Edley then told her that she looked good for having three children and walked up behind her left side, inserted his hand down the inside of her pants over her underwear, and moved it toward her vagina. She grabbed his hand, demanded to know what he was doing, and pulled his hand from her pants. He asked her not to tell anyone what had happened because he would get in trouble. She immediately left the classroom and told two female classmates what Edley had done and stayed with those classmates. Andrea was shocked.

Later that evening, Andrea received two text messages from a telephone number she did not recognize. The telephone number belonged to Edley. She had not received

any calls from Edley prior to that night. She reported Edley's actions to the police the following day.

Defense²

Estela Alarcon worked at the rehabilitation facility and knew both Edley and N. She testified that several times she saw N. walking with her arm around Edley. She also heard N. say Edley was a "good catch" because he was a teacher and making good money.

On cross-examination, Alarcon stated that she thought Edley was handsome and liked him as a person. She also acknowledged telling a defense investigator that N. would bring her "party clothes" to work, change into her "sexy clothes" in the bathroom, and go out partying and drinking with other people. She also said N. flirted with Edley all the time. She testified that she felt N.'s family members, who worked at the facility, had mistreated Alarcon since February 2010. She admitted that she talked to the defense investigator about the time she was being mistreated by N.'s family. She admitted she did not witness Edley attack N.

² Because the facts regarding Edley's convictions on the drug related charges are not issues on appeal, we omit those facts in this opinion.

DISCUSSION

I

SUBSTANTIAL EVIDENCE SUPPORTS EDLEY'S CONVICTION FOR ASSAULT WITH THE INTENT TO COMMIT RAPE

Edley asserts the evidence was insufficient to support his conviction for assault with the intent to commit rape against Mary. We disagree.

We apply a substantial evidence standard of review to assess the sufficiency of the evidence. We review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We ask whether, after viewing the evidence in the light most favorable to the judgment, any rational trier of fact could have found the allegations to be true beyond a reasonable doubt. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

"The essential element of [assault with intent to commit rape] is the intent to commit the act against the will of the complainant. The offense is complete if at any moment during the assault the accused intends to use whatever force may be required." (*People v. Davis* (1995) 10 Cal.4th 463, 509 (*Davis*), citing *People v. Meichtry* (1951) 37 Cal.2d 385, 388-389 (*Meichtry*).) "[I]f there is evidence of the former intent and acts attendant to the execution of that intent, the abandonment of that intent before

consummation of the act will not erase the felonious nature of the assault." (*Davis, supra*, at pp. 509-510, citing *People v. Soto* (1977) 74 Cal.App.3d 267, 278-279.)

"Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) " '[A] jury may infer a defendant's specific intent from the circumstances attending the act, the manner in which it is done, and the means used, among other factors.' [Citation.]" (*People v. Park* (2003) 112 Cal.App.4th 61, 68.)

Here, the jury reasonably could conclude Edley possessed the intent to rape Mary. He made sexual comments to Mary about her skirt and underwear. After getting a glass of water, Edley returned to the couch where he quickly "slid" Mary to her back on the couch and got on top of her. Edley held Mary's hands over her head while he tried to kiss her and slid his hands under her shirt and up her skirt. He touched Mary's breasts, the top of her vagina, and her thighs and buttocks. Mary was screaming and struggling against Edley the entire time. She thought Edley was going to rape her.

Contrary to Edley's assertion, there is no requirement that he try to remove Mary's clothes or his own to prove his intent to commit rape. Nor is there any requirement that he verbalize his intent. The test for determination of intent to commit rape does not require proof of particular conduct. (*Meichtry, supra*, 37 Cal.2d at p. 389.) It may be inferred from the fact and circumstances surrounding the crime. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1130.) Here, we are satisfied Edley's conviction of assault with the intent to commit rape was supported by substantial evidence.

Edley acknowledges his "boorish" behavior, but likens it to the "persuasions, caresses and embraces of a seducer." (See *People v. Mullen* (1941) 45 Cal.App.2d 297, 300 (*Mullen*)). We struggle with this analogy. Edley's actions did not consist of caresses or embraces. He forced Mary on her back on the couch, got on top of her, held her hands above her head, and then aggressively groped her while trying to kiss her over Mary's attempts to fight him off. We cannot, as Edley urges us to do, characterize these acts as mere persuasion. Edley tried to take what he wanted by brute force. The art of seduction may include many forms, but attempting to overpower an unwilling victim is not one of them.

Undoubtedly, Edley believes his position is supported by *Mullen, supra*, 45 Cal.App.2d 247. Edley is wrong. *Mullen* only reflects the archaic and offensive view that a "man may generously employ all [the] arts [of seduction] with force" and not be guilty of assault with intent to commit rape, as long as he eventually "abandon[s] his prey." (*Id.* at p. 300.) This has not been the state of the law for more than a century. (See *People v. Trotter* (1984) 160 Cal.App.3d 1217, 1223.) We do not revive it here.

In summary, based on Edley's conduct with Mary, we conclude the jury reasonably could have found Edley had the intent to commit rape. The fact that Edley did not complete the act or ultimately allowed Mary to leave his apartment is legally insignificant. (See *Davis, supra*, 10 Cal.4th at pp. 509-510.)

II

EDLEY WAS NOT PREJUDICED BY THE GIVING OF THE PROPENSITY INSTRUCTION

Edley next argues the court committed reversible error by instructing the jury with a modified instruction based on CALCRIM No. 1191. Although we determine the court should not have given the instruction absent weighing the evidence under Evidence Code section 352, we conclude any error was harmless.

A. The Propensity Instruction

In a motion in limine, the prosecutor requested the court to instruct the jury on propensity evidence with a modified CALCRIM No. 1191 instruction based on Evidence Code sections 1101 and 1108. After hearing argument, the court took the motion under submission.

After the prosecution rested its case-in-chief, the prosecutor renewed his motion that the jury be instructed with a modified CALCRIM No. 1191 instruction. The court, however, did not rule at that time. Later, the court heard further arguments on the prosecutor's motion. Relying on *People v. Quintanilla* (2005) 132 Cal.App.4th 572 (*Quintanilla*),³ Edley's trial counsel argued the Evidence Code contemplated only prior uncharged crimes to be considered by the jury as evidence of a defendant's propensity to

³ The United State Supreme Court granted certiorari for *People v. Quintanilla sub. nom. (Quintanilla v. California)* (2007) 549 U.S. 1191.) Judgment was vacated and the case was remanded to the Court of Appeal for further consideration in light of *Cunningham v. California* (2007) 549 U.S. 270. On remand, the Court of Appeal filed an unpublished opinion.

commit sex crimes. The prosecution countered that the proposed instruction was permitted under *People v. Wilson* (2008) 166 Cal.App.4th 1034 (*Wilson*). Based on its reading of *Wilson*, the court ruled in favor of the prosecution.

The court instructed the jury with the prosecution's modified CALCRIM No. 1191 as follows:

"The People presented evidence that the defendant committed the sexual offenses of assault with intent to commit rape on September 27, 2001; sexual battery by restraint on September 27, 2001; and assault with intent to commit rape on May 11, 2008; sexual battery on May 11, 2008, and sexual battery⁴ on January 13, 2009. These crimes are defined for you in these instructions. ¶¶ If you decide that the defendant committed the charged offense, you may, but are not required to, conclude that from that evidence that the defendant was disposed or inclined to have a requisite specific intent for other charged crimes, and based on that decision also conclude that the defendant was likely to and did have the requisite specific intent for the other charged crimes. If you conclude that the defendant committed a charged crime, that conclusion is only one factor to consider along with all of the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the other charged crimes. The People must still prove each element of each charge beyond a reasonable doubt. ¶¶ Do not consider this evidence for any other purpose except for the limited purpose of determining the specific intent of the defendant in certain charged offenses."

B. The Law Regarding Propensity Jury Instructions

Generally, evidence of prior criminal acts is inadmissible to show a defendant's disposition to commit such acts. (Evid. Code, § 1101, subd. (a).) There is an exception to this rule in sex crime cases (Evid. Code, § 1108) and domestic violence cases (Evid.

⁴ The charges were actually attempted sexual battery (§§ 664, 243.4, subd. (e)(1), count 6) and simple battery (§ 242, count 7) based on Edley's attack of Andrea on January 13, 2009. The prosecution dismissed the battery charge.

Code, § 1109). When a defendant is on trial for sex crimes, evidence of his "commission of another sexual offense or offenses" is admissible to show his propensity to commit the crimes for which he is now charged, subject to the trial court's determination whether the evidence's 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. (Evid. Code, § 1108; *People v. Falsetta* (1999) 21 Cal.4th 903, 907 (*Falsetta*) [holding Evid. Code, § 1108 is constitutional]; see also Evid. Code, § 352.)

CALCRIM No. 1191,⁵ based on Evidence Code section 1108, is the jury instruction that explains how the jury can use propensity evidence. Like Evidence Code section 1108, California courts have found CALCRIM No. 1191 (and its predecessor

⁵ CALCRIM No. 1191 provides: "The People presented evidence that the defendant committed the crimes _____ <insert description of offense [s]> that were not charged in this case. These crimes 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 offenses. 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 offenses, 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 offenses, 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 each element of the charge 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>].]"

CALJIC No. 2.50.01) constitutional. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016; *People v. Cromp* (2007) 153 Cal.App.4th 476, 480; *People v. Fitch* (1997) 55 Cal.App.4th 172, 184-185.) CALCRIM No. 1191, however, pertains to sexual offenses that have not been charged as crimes in the underlying trial. Here, we are concerned about "charged crimes." These are sexual offenses that are the same as those being charged against the defendant in the trial.

Two reported cases have addressed propensity instructions regarding charged crimes. In *Quintanilla, supra*, 132 Cal.App.4th at page 582, the court held Evidence Code section 1109 could not pertain to charged crimes, and therefore, a propensity instruction could not be given in regard to charged crimes. *Quintanilla* involved a domestic violence case and the admissibility of evidence of other domestic violence incidents by the defendant pursuant to Evidence Code section 1109. That section is substantially similar to Evidence Code section 1108, and performs the same purpose in domestic violence cases. The trial court instructed the jury that it could consider evidence of charged domestic violence incidents to determine the defendant's propensity to commit the other charged crimes. (*Id.* at pp. 579-581.) The instruction informed the jury that the prosecution had to prove each charged offense beyond a reasonable doubt, but for purposes of drawing the propensity inference, the prosecution's burden of proof was only a preponderance of the evidence. (*Id.* at p. 581.)

The Court of Appeal determined the instruction was improper because: (1) Evidence Code section 1109 required the trial court to weigh the other crimes evidence under Evidence Code section 352, which would not occur with charged offenses; and (2)

the instruction was confusing because it involved two different burdens of proof. (*Quintanilla, supra*, 132 Cal.App.4th at pp. 582-583.)

In *Wilson, supra*, 166 Cal.App.4th at pages 1052 and 1053, the court reached the opposite conclusion as the court in *Quintanilla, supra*, 132 Cal.App.4th 572, and concluded a propensity instruction could be given for charged crimes. In *Wilson*, after the trial court weighed the evidence under Evidence Code section 352, it instructed the jury with a modified version of CALCRIM No. 1191.⁶ (*Wilson, supra*, at pp. 1044-1045.) Disagreeing with *Quintanilla*, the Court of Appeal determined the modified instruction was proper because: (1) Evidence Code section 1108 did not only apply to uncharged offenses; (2) the instruction allowed the use of propensity evidence consistent with the legislative purpose of Evidence Code section 1108; (3) there is no risk of several mini-trials for the defendant to defend any uncharged offenses; and (4) there is no undue prejudice to the defendant because he is already required to defend against all charges. (*Wilson, supra*, 166 Cal.App.4th at p. 1052.) While the trial court engaged in a weighing of the evidence under Evidence Code section 352 prior to giving the propensity instruction, the Court of Appeal did not address the necessity of such a weighing in determining the instruction was proper.

More recently, the Court of Appeal again addressed the use of a propensity instruction in regard to charged crimes and concluded such instruction was proper. (See *People v. Villatoro* (2011) 194 Cal.App.4th 241, 254, review granted July 20, 2011,

⁶ The instruction given in *Wilson, supra*, 166 Cal.App.1034 was substantially similar to the instruction given here. (See *id.* at pp. 1044-1045.)

S192531 (*Villatoro*.) The instruction at issue was broader than the instruction in *Wilson*, *supra*, 166 Cal.App.4th 1034, in that it was not limited to using the propensity evidence to find the defendant had the specific intent for the other charged offenses. (*Villatoro*, *supra*, at p. 253.) In determining the propensity instruction was proper, the court stressed the importance of the trial court weighing the propensity evidence under Evidence Code section 352. (*Villatoro*, *supra*, at pp. 256-257.)

However, our Supreme Court granted review in *Villatoro* so we may no longer rely on it. (See *Villatoro*, *supra*, 194 Cal.App.4th 241, review granted July 20, 2011, S192531.) In granting review, the court limited the issue as follows: "Was the modification of CALJIC No. 1191, which told the jurors they could consider evidence of a charged offense in determining defendant's propensity to commit the other charged offenses (see Evid. Code, § 1108), reversible error when the court also informed the jurors that all charged offenses must be proved beyond a reasonable doubt?"

C. Analysis

Relying primarily on *Quintanilla*, *supra*, 132 Cal.App.4th 572, Edley argues the court committed reversible error when it gave a modified CALCRIM No. 1191 jury instruction, which permitted the jury to consider charged sex crimes as evidence of Edley's propensity to commit the other charged sex crimes. Edley contends Evidence Code section 1108, on which CALCRIM No. 1191 is based, is not applicable to charged crimes because the charged crimes preclude any weighing of the evidence under Evidence Code section 352. In other words, he asserts a trial court cannot instruct the jury under CALCRIM No. 1191 if the other sexual offenses are charged crimes.

The People counter that the modified CALCRIM No. 1191 instruction was proper for the reasons set forth in *Wilson, supra*, 166 Cal.App.4th 1034. The People, however, do not address the trial court's apparent failure to weigh the evidence under Evidence Code section 352. Seemingly, they interpret *Wilson* as concluding such a weighing is unnecessary because there can be no undue prejudice arising from the admission of the charged crimes when the defendant must already defend against all the charges. (*Wilson, supra*, at p. 1052.)

Quintanilla, supra, 132 Cal.App.4th 572 and *Wilson, supra*, 166 Cal.App.4th 1034 represent the split in the appellate courts on the issue of whether a jury can consider charged sex crimes as evidence of a defendant's propensity to commit the other charged sex crimes. The California Supreme Court has granted review of the issue and is currently considering it. (*Villatoro, supra*, 194 Cal.App.4th 241, review granted July 20, 2011, S192531.)

We will neither attempt to resolve the split among the districts nor resolve the issue while it is pending before the Supreme Court. For purposes of our discussion, we will presume the propensity instruction here based on CALCRIM No. 1191 could have been proper if the court complied with the requirements of Evidence Code section 1108.

"[T]he Legislature enacted [Evidence Code] section 1108 to expand the admissibility of disposition or propensity evidence in sex offense cases." (*Falsetta, supra*, 21 Cal.4th at p. 911.) Evidence Code section 1108, subdivision (a) states: "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 [Evidence Code] Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352."

In determining that Evidence Code section 1108 was constitutional, our high court noted this section only allowed propensity evidence for a limited purpose (evidence of other sex crimes to prove propensity to commit another, charged sex offense) and trial court's will engage in a "careful weighing process under [Evidence Code] section 352" (*Falsetta, supra*, 21 Cal.4th at p. 917), to determine if the evidence's probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*Id.* at pp. 916-917; see also Evid. Code, §§ 352, 1108.) The court set out factors for trial courts to consider in the weighing of the evidence under Evidence Code section 352, which include the offense's "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." (*Falsetta, supra*, at p. 917.) The court determined the trial court's weighing the evidence under Evidence Code section 352 was critical in concluding Evidence Code section 1108 constitutional. (*Falsetta, supra*, at p. 917 ["In summary, we think the trial court's discretion to exclude propensity evidence under

[Evidence Code] section 352 saves [Evidence Code] section 1108 from defendant's due process challenge."].)

Falsetta, supra, 21 Cal.4th 903, however, did not deal with charged crimes, but instead, uncharged offenses. Charged crimes are different than uncharged offenses because Evidence Code section 352 is not going to prevent the admission of evidence of charged crimes. The prosecution will present evidence of all charged offenses and the defendant must defend against such evidence. Nevertheless, it does not logically follow that evidence admitted to prove a charged crime would automatically be admitted also to prove the defendant's propensity to commit another charged crime. Evidence Code section 1108 does not draw a distinction between uncharged and charged sexual offenses. Further, there is nothing in the legislative history that leads us to believe the Legislature intended to make this distinction.

Evidence Code section 1101, subdivision (a) prohibits the admission of criminal acts to show a defendant's propensity to commit other criminal acts. Evidence Code section 1108, subdivision (a), provides an exception to this rule for "another sexual offense or offenses." Thus, if any evidence is going to be admitted to prove a defendant's propensity to commit the charged sex crime, it must comply with the requirements of Evidence Code section 1108. To this end, the trial court must weigh the evidence under Evidence Code section 352, even if it is evidence of a charged crime, before it can decide to admit the evidence to prove a defendant's propensity to commit the charged sexual offenses.

Here, the trial court gave the modified CALCRIM No. 1191 instruction based on *Wilson, supra*, 166 Cal.App.4th 1034 and Evidence Code section 1108. In *Wilson*, however, the trial court engaged in a weighing of the propensity evidence under Evidence Code section 352 and found the evidence was " 'more probative than prejudicial' and 'necessary.' " (*Wilson, supra*, at p. 1045.) Evidence Code section 1108 clearly requires the trial court to weigh the propensity evidence. (See Evid. Code, § 1108, subd. (a).) However, we do not find any indication in the record that the court weighed the propensity evidence prior to allowing the jury to infer Edley's propensity to commit the other charged crimes.

If the trial court had weighed the propensity evidence here, we have doubts it would have given the modified CALCRIM No. 1191 instruction as broadly as it did. The charged sex crimes involve three different woman, each with a different relationship with Edley, and the attacks occurred over an eight-year span. More importantly, the charged sex crimes require very different intents. For example, attempted sexual battery requires (1) an intent to and (2) a direct but ineffectual act in an attempt to, touch an intimate part of the body (contact with the victim's skin) of a victim unlawfully restrained (by force or fear), without the victim's consent, for the purpose of sexual arousal, sexual gratification, or sexual abuse. (§§ 664, 243.4.) In contrast, assault with the intent to commit rape requires a specific intent to and an unlawful attempt to have sexual intercourse by force, violence or fear of bodily injury, without consent of the victim. (§ 220, subd. (a).) It does not logically follow that proof a defendant committed attempted sexual battery or

even sexual battery on multiple occasions would necessarily establish the defendant's specific intent to rape someone.⁷

Here, considering all the factors surrounding the charged crimes and the three victims, we determine the probative value of the charged crimes as propensity evidence to prove Edley's disposition to commit assault with the intent to commit rape is substantially outweighed by the substantial danger of undue prejudice. That said, the evidence should still have been admitted to prove the charged crimes, but the jury should not have been instructed that it could consider the other charged sex crimes to prove the charged crimes of assault with the intent to commit rape.

We do not have similar misgivings about using the charged crimes of attempted sexual battery or sexual battery to prove the other charged crimes of sexual battery or attempted sexual battery. Based on the record, it is clear Edley restrained two victims and touched their "intimate part[s]" against their will for sexual gratification. For the third victim, Edley attempted to do so. As such, had the trial court weighed the evidence under Evidence Code section 352, we are confident it would have concluded the charged crimes concerning attempted sexual battery or sexual battery could be used to show

⁷ For the same reasons, we reject the People's argument that the modified CALCRIM No. 1191 instruction was proper under Evidence Code section 1101, subdivision (a) because the instruction only allowed the jury to use the propensity evidence to find Edley had the specific intent to commit the charged crimes. The intent to commit sexual battery is not the same as the specific intent to commit rape. Thus, the evidence of sexual battery or attempted sexual battery is of little value in proving Edley's intent to commit assault with the intent to commit rape. (Cf. *People v. Dixon* (1999) 75 Cal.App.4th 935, 942-943 [explaining the differences between assault with the intent to commit rape and attempted sexual battery].)

Edley possessed the disposition to commit the other charged crimes of sexual battery or attempted sexual battery.

D. Forfeiture and Harmless Error

Edley did not raise an Evidence Code section 352 objection with the trial court. (See *Brown v. Smith* (1997) 55 Cal.App.4th 767, 791 [Evid. Code, § 352 analysis required when objection is made].) Nor does he make any argument on appeal, by way of either analysis or citation to relevant authorities, concerning why the charged offenses were not admissible under Evidence Code section 352 for purposes of Evidence Code section 1108. (*People v. Beltran* (2000) 82 Cal.App.4th 693, 697, fn. 5.) Instead, Edley simply argues a propensity instruction can never be given based on a charged offense. As such, he has forfeited this issue.

However, even if Edley had not forfeited this issue, we determine that the court's error in giving the propensity instruction allowing the jury to consider the charged crimes to show Edley's propensity to commit assault with the intent to commit rape was harmless under *Chapman v. California* (1967) 386 U.S. 18. Here, the jury convicted Edley of assault with the intent to commit rape of Mary (count 1). On appeal, Edley challenged the sufficiency of the evidence as to this crime. As we discuss above, we determine substantial evidence supports this conviction based on Mary's testimony only. Moreover, we are satisfied that this evidence was overwhelming and any rational jury would consider Edley guilty as charged in count 1.

In addition, the jury did not convict Edley of assault with the intent to commit rape of N. (count 3). The fact the jury did not convict Edley for count 3 shows it made a

conscious and logical decision to disregard the propensity evidence where it did not apply. Therefore, we conclude the error was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

McINTYRE, J.

AARON, J.