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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO ESPINOZA CONDE,

Defendant and Appellant.

D058993

(Super. Ct. No. SCE297333)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia K. Cookson, Judge. Affirmed.

A jury convicted Sergio Espinoza Conde of four counts of lewd acts on a child under the age of 14 years (Pen. Code, § 288, subd. (a));¹ three counts of forcible lewd acts on a child under the age of 14 years (§ 288, subd. (b)(1)); and one count of misdemeanor annoying or molesting a child (§ 647.6, subd. (a)(1)). As to each of the felony counts, the jury also made a true finding that Conde committed an offense

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

described in section 667.61, subdivision (c) against more than one victim. The trial court sentenced Conde to an indeterminate prison term of 105 years to life.

Conde contends that (1) the evidence of certain uncharged sexual offenses against other victims should not have been admitted under Evidence Code section 1108 to the extent that those offenses occurred in Mexico; (2) the trial court should have excluded evidence of uncharged sexual offenses pursuant to Evidence Code section 352; (3) Evidence Code section 1108 is unconstitutional because it permits evidence of uncharged sexual offenses to be admitted to prove that the defendant had the propensity to commit the charged sexual offenses; (4) CALCRIM No. 1191, which instructs the jury that uncharged crimes must be proved by a preponderance of the evidence, is erroneous because it conflicts with the beyond a reasonable doubt standard contained in jury instructions concerning circumstantial evidence; (5) we should review the psychotherapy records of Conde's victims to determine whether the trial court properly quashed subpoenas concerning those records; (6) the trial court should only have imposed two 15-years-to-life terms under section 667.61, subdivision (b) based on the jury's finding that Conde committed lewd acts against more than one victim, rather than seven such sentences; and (7) the trial court's imposition of a \$400 sex registration fee under section 290.3 was not supported by the trial court's findings or by substantial evidence. We conclude that Conde's arguments lack merit, and accordingly we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

The charges against Conde arose from his lewd acts between 2004 and 2009 against two minor female family members under the age of 14.

M. described two incidents involving Conde. The first incident occurred when she was seven years old. Conde sat next to her when she was watching television, where he rubbed her breasts and put his hand inside her underwear and touched her genitals. The incident ended when M. moved away to another room.

The second molestation described by M. occurred when she was 10 years old. While M. was watching television, Conde touched her breasts under her clothes and rubbed her thigh. The incident ended when M. said "stop it" and left the room.

J. described six incidents involving Conde, all occurring when she was between 10 and 12 or 13 years old.

During the first incident described by J., Conde took off J.'s pants and put his naked penis between her legs while she was sitting on top of him, facing away from him. In that position, Conde rubbed his penis on J.'s genitals. The incident ended when J. stood up and left. Conde threatened harm to J.'s parents if she disclosed what he had done.

During a second similar incident, Conde knelt behind J. and put his naked penis between her legs while her pants were off. Conde grabbed J.'s hand and forced J. to move it around on his penis.

J. described a third incident during which Conde put his hand inside J.'s underwear and roughly touched her genitals. During a fourth incident, Conde made J. touch his penis with her hand. During a fifth incident, Conde touched J.'s breasts under her shirt while she was watching television.

The final incident with J. occurred when Conde showed her his exposed penis while masturbating and told her that he would pay her \$100 if she let him insert his penis in her vagina. J. expressed her disgust to Conde and refused the offer.

Based on the incidents with M., Conde was charged with two counts of lewd acts on a child under the age of 14 years (§ 288, subd. (a)). Based on the incidents with J., Conde was charged with two counts of lewd acts on a child under the age of 14 years (*ibid.*); three counts of forcible lewd acts on a child under the age of 14 years (§ 288, subd. (b)(1)); and one count of misdemeanor annoying or molesting a child (§ 647.6, subd. (a)(1)).

At trial, in addition to the testimony of M. and J., the jury heard testimony from three other females who recounted incidents of molestation by Conde.

The first witness was A. — a cousin of M. and J. — who testified that when she was six years old (in the mid-2000's) she was molested by Conde when she was staying at his house in Mexico. Specifically, A. testified that during the night while she was sleeping in Conde's bed, he touched her genitals, stopping when she got up to go to the bathroom.

The second witness, P., was 25 years old at the time of trial and as a child had been cared for by Conde's then-girlfriend. P. recounted several instances of molestation

by Conde to which she was subjected from the age of six to the age of nine or 10. In one incident, when P. was six years old, Conde put his hand in P.'s pants and touched her genitals while he was with her in a car waiting for P.'s caregiver to come out of a store. In a second incident, while Conde gave P. a piggyback ride at her house, he fondled her genitals under her clothing. A third incident occurred in Conde's bedroom. While lying on the bed, Conde placed a paper boat on his exposed penis, moved P.'s hand up and down on his penis, made P. lick his penis and touched P.'s genitals. During that incident, P. saw a knife on the nightstand, and she was scared. P. estimated that when she was between six and nine or 10 years old, Conde touched her genitals 10 to 15 times. She disclosed the molestation to her parents when she was 18 or 19 years old.

The third witness, C., was 31 years old at the time of trial. When C. was a child, Conde was the boyfriend of C.'s mother. C. lived with Conde and her mother in Mexico when she was eight to 12 years old, and then lived with them for six months in California when she was 12 years old. Starting when C. was nine years old, Conde touched C.'s genitals on many instances when she was sleeping in her bed at night, sometimes inserting a finger into her vagina. Conde threatened that if C. disclosed the molestation, C.'s mother and grandmother would die. The nighttime molestation and the threats continued when C. moved with Conde to California. In some instances, Conde would also touch C.'s breasts. The last incident that C. recalled occurred when she was 12 years old in California. When C. was on her way to the bathroom, Conde threw her to the floor and tried to take off her pants. C. kicked Conde and ran away.

Conde testified at trial and denied molesting M., J., A., P. or C. The defense theory was that M., J. and A. were fabricating the accusations against Conde based on their belief that Conde had participated in getting their grandmother deported to Mexico and that claiming to be a victim of a crime would help J. obtain a visa to legally remain in the United States.

The jury convicted Conde on all counts and made a true finding for each of the felony counts that Conde committed an offense described in section 667.61, subdivision (c) against more than one victim. The trial court imposed an indeterminate prison term of 105 years to life.

II

DISCUSSION

A. *The Uncharged Lewd Acts That Occurred in Mexico Fell Within the Scope of Evidence Code Section 1108*

The trial court admitted the testimony of A., P. and C. describing Conde's uncharged lewd acts pursuant to Evidence Code section 1108. Under that provision, "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code s]ection 1101,² if the evidence is not inadmissible pursuant to

² Evidence Code section 1101, subdivision (a) provides that, with certain statutory exceptions, evidence of a person's character or trait of character, including specific instances of conduct, is inadmissible to prove that person's conduct on a specified occasion.

[Evidence Code s]ection 352."³ (Evid. Code, § 1108, subd. (a).) As used in Evidence Code section 1108, the term "sexual offense" means "a crime under the law of a state or of the United States that involved any of" a specified list of sex crimes, including, as relevant here, lewd acts against a child in violation of Penal Code section 288. (Evid. Code, § 1108, subd. (d)(1)(A).)

Conde contends that evidence of the lewd acts against A. and C. that occurred in Mexico fall outside of the scope of Evidence Code section 1108 because none of them are "a crime under the law of a state or of the United States" (*id.*, subd. (d)(1)), and thus that evidence is inadmissible propensity evidence that should have been excluded pursuant to Evidence Code section 1101, subdivision (a).⁴

This court's decision in *People v. Miramontes* (2010) 189 Cal.App.4th 1085 (*Miramontes*) considered and rejected the same argument that Conde makes here, namely that uncharged lewd acts against children that occurred in Mexico do not fall within the

³ As we will explain in more detail later in our discussion, Evidence Code section 352 permits a trial court to exclude evidence based on a weighing of the probative value and prejudicial impact of that evidence. "By subjecting evidence of uncharged sexual misconduct to the weighing process of section 352, the Legislature [in Evidence Code section 1108, subdivision (a)] has ensured that such evidence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury.'" (*People v. Falsetta* (1999) 21 Cal.4th 903, 917 (*Falsetta*).)

⁴ Conde further argues that the purported error in applying Evidence Code section 1108 beyond its intended scope was an error with constitutional dimensions. Because we conclude that the trial court did not err, we need not decide whether constitutional principles would have been implicated by any error.

scope of Evidence Code section 1108.⁵ *Miramontes* concluded that "the intended scope of Evidence Code section 1108 is broad enough to encompass admissibility of the testimony [of the child victims], which clearly describes conduct that is prohibited by California law, even though it did not take place in California. Nowhere in Evidence Code section 1108 is it required that the referenced other sexual offenses have taken place in the United States, and instead, the definitions in its subdivision (d) include descriptions of the substance of unlawful conduct involved in a prior offense, wherever it may have occurred. The principal consideration in this inquiry is whether the comparable prior, essentially similar, conduct occurred, not where it occurred, for purposes of determining if California consequences will ensue, such as its admissibility under Evidence Code section 1108." (*Miramontes, supra*, 189 Cal.App.4th at p. 1099.) As *Miramontes* explained, "[a]ssuming that the requirements of Evidence Code section 352 can be satisfied, there is no reason as a matter of law, logic or statutory construction to withhold reliable evidence of such foreign prior uncharged misconduct from a jury, where, as here, the offer of proof showed that those prior incidents 'involved conduct which satisfies all of the elements of the comparable California [sex] offense.'" (*Id.* at p. 1101, italics omitted.)

We perceive no reason to depart from the well-reasoned decision in *Miramontes*, and accordingly we apply its holding to this case. Based on *Miramontes*, the lewd acts

⁵ Conde acknowledges this court's holding in *Miramontes, supra*, 189 Cal.App.4th 1085, but explains that he "nevertheless raises the argument because *Miramontes* was erroneously decided, and the California Supreme Court has not decided the issue."

that A. and C. described as occurring in Mexico were within the scope of Evidence Code section 1108 if those acts would have constituted a sex offense in California. Here, the molestation that A. and C. described occurring in Mexico clearly would have constituted lewd acts against a child under the age of 14 in violation of section 288, subdivision (a) if they occurred in California, and Conde does not contend otherwise. Accordingly, the evidence of those acts fell within the scope of Evidence Code section 1108, and — like the other uncharged lewd acts described at trial — were admissible unless the trial court was required to exclude them under Evidence Code section 352.

B. *The Trial Court Did Not Abuse Its Discretion in Concluding That Evidence Code Section 352 Did Not Require Exclusion of the Uncharged Lewd Acts*

The next issue is whether, as Conde claims, the evidence of Conde's molestation of A., P. and C. should have been excluded under Evidence Code section 352.

Under Evidence Code section 352, the trial court 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." (*Ibid.*) Here, the trial court considered and rejected Conde's motion to exclude the testimony of A., P. and C. under Evidence Code section 352. A trial court's Evidence Code section 352 ruling is reviewed for abuse of discretion, and "[w]e will not find that a court abuses its discretion in admitting such other sexual acts evidence unless its ruling "'falls outside the bounds of reason'" and "the court has exercised its discretion in a manner that has resulted in a miscarriage of justice." (*Miramontes, supra*, 189 Cal.App.4th at p. 1098.)

"The weighing process under Evidence Code section 352 'depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules.'" (*Miramontes, supra*, 189 Cal.App.4th at p. 1097.) When considering whether to exclude evidence of another sexual offense under Evidence Code section 352, "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." (*Falsetta, supra*, 21 Cal.4th at p. 917.) "[T]he probative value of 'other crimes' evidence is increased by the relative similarity between the charged and uncharged offenses, the close proximity in time of the offenses, and the independent sources of evidence (the victims) in each offense," and "the prejudicial impact of the evidence is reduced if the uncharged offenses resulted in actual *convictions* and a prison term, ensuring that the jury would not be tempted to convict the defendant simply to punish him for the other offenses, and that the jury's attention would not be diverted by having to make a separate determination whether defendant committed the other offenses." (*Ibid.*) Further, in evaluating whether to admit evidence of other sexual offenses, the court should consider "'whether "[t]he testimony describing defendant's uncharged acts . . . was no stronger and no more inflammatory than the testimony

concerning the charged offenses." (*Miramontes, supra*, 189 Cal.App.4th at p. 1097.)

"The 'prejudice' referred to in Evidence Code section 352 applies to evidence 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.'" (*Id.* at p. 1098.)

The evidence of the lewd acts perpetrated by Conde on A., P. and C. was highly probative to the main disputed issue in this case, which was whether M. and J. were fabricating their allegations against Conde. The evidence of similar lewd acts committed by Conde against A., P. and C. served to bolster the credibility of the allegations made by M. and J. because it gave rise to an inference that Conde had a propensity to commit lewd acts against young girls and acted accordingly with respect to M. and J. (See *Miramontes, supra*, 189 Cal.App.4th at p. 1102 [evidence of uncharged sex offenses against other children had probative value because the defendant claimed that the victims of the charged crimes were not credible and the allegations were fabricated].)

Further, "uncharged prior offenses that are very similar in nature to the charged crime logically will have more probative value in proving propensity to commit the charged offense." (*People v. Hernandez* (2011) 200 Cal.App.4th 953, 966 (*Hernandez*); see also *Falsetta, supra*, 21 Cal.4th at p. 917 ["the relative similarity between the charged and uncharged offenses" increases the probative value].) Here, the molestation described by A., P. and C. was very similar in nature to the molestation described by M. and J. In each instance, the molestation consisted of Conde's touching the genitals and breasts of prepubescent girls to whom he had regular access, and Conde's act of forcing C. to touch

his penis is similar to the incidents that J. described when Conde forced her hand onto his penis. Moreover, the threatening behavior described by C. and P. was similar to the threats that J. described Conde making to her. Although Conde points out certain dissimilarities between the charged conduct and the uncharged conduct, such as the nighttime molestation described by A. and C. that was not experienced by M. or J., those differences can be explained by the different access that Conde had to the different victims and does not negate the many similarities in Conde's conduct as to each of the victims.

The testimony of C. and P. was also highly probative to bolster the credibility of the allegations made by M. and J. because the evidence was that C. and P. do not associate with the victims or the victims' families, and thus do not have the same motive to fabricate evidence that Conde ascribed to M. and J. (See *People v. Johnson* (2010) 185 Cal.App.4th 520, 533 ["weighing in favor of admissibility, the evidence of the prior assaults came from independent sources, which reduced the danger of fabrication"]; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404 ["The probative value of evidence of uncharged misconduct also is affected by the extent to which its source is independent of the evidence of the charged offense."].)

Conde contends that the lewd acts described by C. and P. lacked probative value because those acts took place many years before the period from 2004 to 2009 when he allegedly committed the lewd acts against M. and J. Specifically, based on their ages at trial, P. was molested from 1991 to 1995, and C. was molested from 1988 to 1991. "No specific time limits have been established for determining when an uncharged offense is

so remote as to be inadmissible." (*People v. Branch* (2001) 91 Cal.App.4th 274, 284.)

"In theory, a substantial gap between the prior offenses and the charged offenses means that it is less likely that the defendant had the propensity to commit the charged offenses. However, . . . significant similarities between the prior and the charged offenses may 'balance[] out the remoteness.'" (*Id.* at p. 285.) Under this approach, prior offenses have been deemed sufficiently probative despite the fact that they occurred over 20 years before trial. (See *People v. Soto* (1998) 64 Cal.App.4th 966, 977-978, 991; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395.) Here, as we have explained, the lewd acts described by A., C. and P. were very similar to those described by M. and J, and thus had significant probative value despite their temporal remoteness. In addition, the evidence from all of Conde's victims taken together shows an ongoing pattern of molesting prepubescent girls, spanning from 1988 to 2009, with only an eight-year gap between 1996 and 2003 with no evidence of a molestation. Because the evidence reveals an ongoing pattern spanning much of Conde's adult life, it is highly probative to show Conde's propensity to commit the offenses charged in this case.

According to Conde, "[t]he inflammatory nature of the evidence . . . weighed in favor of exclusion." We disagree. Because the lewd acts described by A., C. and P. were very similar to the lewd acts described by M. and J., the evidence of the uncharged acts was ""no stronger and no more inflammatory than the testimony concerning the charged offenses."" (*Miramontes, supra*, 189 Cal.App.4th at p. 1097.) Conde points out that the testimony from P. was especially moving because "[P.] suffered from muscular dystrophy and appeared at Conde's trial in a debilitated condition." However, P.'s condition at trial

did not make evidence of Conde's molestation of her as a child especially inflammatory, as the evidence established that P. developed her condition later in her life and was not disabled when Conde molested her. Moreover, Conde's attorney did not bring P.'s condition to the attention of the trial court as a basis for his request to exclude P.'s testimony, and thus the trial court cannot have abused its discretion in failing to consider P.'s condition when determining whether P.'s testimony would cause undue prejudice to Conde.

Conde contends that the evidence of lewd acts described by A., P. and C. was unduly prejudicial because he was not prosecuted for those acts, increasing the danger that the jury punished him for the uncharged crimes rather than the charged crimes. Although such a risk is always present when the defendant has not been punished for the uncharged crimes admitted under Evidence Code section 1108, the jury was instructed with CALCRIM No. 1191 that it was to consider evidence of the uncharged crimes only for the purpose of showing that Conde "was disposed or inclined to commit sexual offenses" and that it was not to "consider this evidence for any other purpose." We must presume that the jury understood and followed the instructions. (*Hernandez, supra*, 200 Cal.App.4th at p. 969.) "These instructions, combined with the fact that the impact of the prior offenses was no more egregious than the charged offense[s] . . . , foreclosed the risk the jury would consider the evidence for a prohibited purpose." (*Ibid.*)

Further, although the testimony from A., P. and C. slightly lengthened the trial, the testimony was relatively brief and concise, and the introduction of the testimony did not open up time-consuming issues requiring additional witnesses or additional evidence.

Thus, we do not agree with Conde that "the resulting complexity and consumption of time supported exclusion of the evidence."

Based on all of the factors we have reviewed above, we conclude that the trial court was well within its discretion under Evidence Code section 352 to admit the testimony of A., P. and C. describing Conde's lewd acts against them.

C. *Conde's Challenge to the Constitutionality of Evidence Code Section 1108 Lacks Merit*

Conde argues that Evidence Code section 1108 violates the federal constitutional right to due process by allowing the admission of evidence to show that a defendant had a disposition or propensity to commit the charged crimes.

Conde acknowledges that our Supreme Court has rejected a due process challenge to Evidence Code section 1108. (*Falsetta, supra*, 21 Cal.4th at p. 922 ["We conclude, consistent with prior state and federal case law, that section 1108 survives defendant's due process challenge."]; see also *People v. Lewis* (2009) 46 Cal.4th 1255, 1288-1289 ["We decline defendant's invitation to reconsider our decision in *Falsetta, supra*, 21 Cal.4th 903, and to hold that the admission of evidence under Evidence Code section 1108 to establish a defendant's propensity to commit a sexual offense violates his or her due process rights."].) Conde also acknowledges that we are bound to follow our Supreme Court's ruling (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). Conde explains that he asserts the issue solely to preserve it for further review in federal court. We accordingly reject Conde's constitutional challenge to Evidence Code section 1108 based on our Supreme Court's holding in *Falsetta*.

D. *Conde's Challenge to the Preponderance of the Evidence Standard for Considering Uncharged Crimes as Set Forth in CALCRIM No. 1191 Is Without Merit*

The trial court instructed the jury with CALCRIM No. 1191 regarding how it was to approach the evidence of the uncharged crimes described in the testimony of A., C. and P.⁶ Among other things, the instruction informed the jury that it could consider the uncharged crimes "only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses" and that "[i]f the People have not met this burden, you must disregard this evidence entirely."

Conde contends that CALCRIM No. 1191 is wrong because the jury should be permitted to consider the evidence of the uncharged crimes as evidence that Conde committed the charged crimes only if the uncharged crimes are proven beyond a

⁶ The trial court instructed the jury in the language of CALCRIM No. 1191, as follows: "[T]he People presented evidence that the defendant committed the crimes of Lewd Acts Upon Children that 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, 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 four counts of Lewd Act Upon a Child and three counts of Forcible Lewd Act Upon a Child, 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 four counts of Lewd Act Upon a Child and three counts of Forcible Lewd Act Upon a Child. The People must still prove each charge and allegation beyond a reasonable doubt. [¶] Do not consider this evidence for any other purpose."

reasonable doubt, not by a preponderance of the evidence. He bases this contention on the general rule for the jury's use of circumstantial evidence to establish guilt, expressed to the jury in this case in CALCRIM No. 224, which provides: "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt." Conde argues that evidence of the uncharged crimes constitutes circumstantial evidence of his guilt, and thus consistent with jury instructions regarding circumstantial evidence, the uncharged crimes must be proven beyond a reasonable doubt, not by a preponderance of the evidence.

Conde's argument lacks merit because it is well settled that a jury may consider evidence of other crimes if those crimes are proven by a preponderance of the evidence, rather than beyond a reasonable doubt. (*People v. Carpenter* (1997) 15 Cal.4th 312, 382.) Moreover, case law establishes that this principle applies, in a case such as this, where the jury is presented with evidence of the defendant's other sexual offenses that have been admitted as propensity evidence pursuant to Evidence Code section 1108. (*People v. Regalado* (2000) 78 Cal.App.4th 1056, 1061 ["to the extent the court's instructions permitted the jurors to consider [defendant's] disposition to molest young boys as evidence that he, in fact, committed the charged offense, the court did not err — so long as the existence of his disposition was proved by a preponderance of the evidence"]; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 146-147 (*Van Winkle*) ["prior sexual offenses proved by a preponderance of the evidence may be used to infer

that the defendant committed the current sexual offense" as "basic/evidentiary facts (such as prior offenses) may be proved by a preponderance of the evidence"].)

Despite the well-established rule that uncharged crimes may be established by a preponderance of the evidence, Conde contends that a different rule is required because of the jury instructions on circumstantial evidence. (See, e.g., CALCRIM No. 224.) Two decisions by our Supreme Court foreclose that specific argument. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1259 (*Virgil*); *People v. Medina* (1995) 11 Cal.4th 694, 762 (*Medina*).)⁷

In *Medina*, the trial court instructed the jury that it could consider evidence of the defendant's uncharged crimes if those crimes were proven by a preponderance of the evidence. (*Medina, supra*, 11 Cal.4th at p. 763.) The appellant argued that "this instruction was erroneous and conflicted with the court's general instruction to the effect that facts established through circumstantial evidence and admitted to establish defendant's guilt must be proved beyond a reasonable doubt." (*Ibid.*) Our Supreme Court rejected that contention, explaining that "we have long held that 'during the guilt trial evidence of other crimes may be proved by a preponderance of the evidence,'" and that "the facts tending to prove the defendant's other crimes for purposes of establishing his criminal knowledge or intent are deemed mere 'evidentiary facts' that need not be

⁷ We are disappointed that the Attorney General's briefing does not cite the authority that addresses Conde's argument, and instead relies on *People v. Reliford* (2003) 29 Cal.4th 1007, which addressed different issues concerning the constitutionality of the predecessor jury instruction to CALCRIM No. 1191.

proved beyond a reasonable doubt as long as the jury is convinced, beyond such doubt, of the truth of the 'ultimate fact' of the defendant's knowledge or intent." (*Ibid.*) Although the defendant argued that "when 'other crimes' evidence is offered to prove such matters as intent or identity, these facts should be proved by the 'beyond reasonable doubt' standard usually applicable to facts sought to be proved by circumstantial evidence," that argument failed because "the cases have developed special rules for the consideration of other crimes evidence." (*Id.* at p. 764.)

Our Supreme Court recently reaffirmed this approach in *Virgil, supra*, 51 Cal.4th 1210. After setting forth the long-standing rule that the preponderance of the evidence standard applied to the jury's consideration of uncharged crimes, *Virgil* explained that the "defendant urges us to reconsider the standard of proof set forth in the uncharged conduct instructions because, he asserts, this court 'has not adequately addressed the conflict between the circumstantial evidence instruction . . . ,' which requires proof beyond a reasonable doubt of each essential fact in the chain of circumstances necessary to establish guilt, and CALJIC No. 2.50,[⁸] which permits consideration of uncharged

⁸ More specifically, the reference should have been to CALJIC No. 2.50.1, which as *Virgil* explained was the basis for the trial court's instruction that "'such other crime or crimes purportedly committed by a defendant must be proved by a preponderance of the evidence'" and that "[t]he prosecution has the burden of proving these facts by a preponderance of the evidence." (*Virgil, supra*, 51 Cal.4th at pp. 1258, fn. 10, 1259.) The substance of CALJIC No. 2.50.1 has been retained in CALCRIM No. 1191, which was used in Conde's case. (See *People v. Schnabel* (2007) 150 Cal.App.4th 83, 87 [discussing substantial similarity of CALJIC No. 2.50.1 and CALCRIM No. 1191 with respect to their explanation of the law on permissive inferences from other crimes evidence and the burden of proof applicable to such evidence].) Thus, the analysis in *Virgil* of the instruction given under CALJIC No. 2.50.1 is also applicable to Conde's

crimes if they are proven by only a preponderance of the evidence." (*Virgil*, at p. 1259.) Citing *Medina*, our Supreme Court rejected the defendant's position. "We have explained before . . . that these different standards of proof are reconciled by the different purposes for which the evidence is used. When evidence of uncharged misconduct is admitted for the purpose of establishing identity or intent, we have explained that the crimes are mere 'evidentiary facts.' ([*Medina*], *supra*, 11 Cal.4th at p. 763.) The jury cannot consider them at all unless they find them proven by a preponderance of the evidence. 'If the jury finds by a preponderance of the evidence that defendant committed the other crimes, the evidence is clearly relevant and may therefore be considered.'" (*Virgil*, at p. 1259.)

The reasoning of *Virgil* and *Medina* is fully applicable where, as here, evidence of uncharged sex offenses has been admitted to show the defendant's *propensity* to commit the charged sex offenses. As in *Virgil* and *Medina*, the evidence of the uncharged sex offenses admitted under Evidence Code section 1108 are "mere 'evidentiary facts'" (*Virgil, supra*, 51 Cal.4th at p. 1259) which in this case are relevant to the defendant's propensity to commit sex offenses. (See *Van Winkle, supra*, 75 Cal.App.4th at p. 146 [evidence of prior uncharged sexual offenses are "evidentiary facts"].) Therefore, consistent with *Virgil* and *Medina*, the jury instructions on circumstantial evidence do not give rise to a requirement that the uncharged crimes be proven beyond a reasonable doubt.

challenge to instruction on the preponderance of the evidence standard set forth in CALCRIM No. 1191.

E. *The Sealed Psychotherapy Records Did Not Contain Evidence Relevant to Conde's Defense*

Prior to trial, Conde subpoenaed from Rady Children's Hospital (the Hospital) the psychotherapy records of M., J., A. and another complaining victim who did not testify at trial. The Hospital moved to quash the subpoenas on the basis of Evidence Code section 1035.4, which allows a trial court to order disclosure of confidential communications between a sexual assault counselor and a victim only when the trial court determines that the relevancy of the information outweighs the negative effect on the victim and the treatment relationship. The trial court conducted an in camera review of the records and granted the Hospital's motion to quash on the ground that the records did not contain any evidence relevant to Conde's defense.

Conde requests that we conduct an independent review of the psychotherapy records to determine "if the trial court properly denied disclosure of the information contained in the records." The Attorney General does not oppose the request.

We have reviewed the records and have determined that they do not contain any evidence that is relevant to Conde's defense. Accordingly, we affirm the trial court's order granting the motion to quash the subpoenas.⁹

⁹ Conde also argues that reversal is required based on the cumulative prejudice from the trial court errors he identifies. As we have rejected each of the purported trial court errors asserted by Conde, we also reject his cumulative prejudice argument.

F. *Conde's Challenge to His Sentence Is Without Merit*

The trial court sentenced Conde to seven consecutive terms of 15 years to life pursuant to section 667.61. Specifically, Conde was sentenced pursuant to section 667.61, subdivision (b) — commonly known as the "One Strike law"¹⁰ — which provides for a sentence of 15 years to life when a defendant is convicted of an enumerated sexual offense (including, as relevant here, violation of § 288, subs. (a), (b)(1)) and the People plead and prove one or more specified aggravating circumstances (§ 667.61, subd. (b)). Here, the jury made a true finding on one such aggravating factor, namely that "[t]he defendant has been convicted in the present case or cases of committing [an enumerated sexual offense] against more than one victim." (§ 667.61, subd. (e)(4).)

Conde contends that he should only have been sentenced to two 15-years-to-life terms pursuant to section 667.61 because, according to Conde, when a conviction has been used to trigger the circumstance that "[t]he defendant has been convicted in the present case or cases of committing [an enumerated sexual offense] against more than one victim" (*id.*, subd. (e)(4)), that conviction cannot itself also be punished under section 667.61, subdivision (b). He argues that under this approach "One Strike punishment may be imposed for two of the lewd act convictions . . . ([M.'s] two convictions)" but "once the two convictions for molesting [M.] are used as 'triggering'

¹⁰ "Section 667.61 . . . is sometimes called the 'One Strike' law." (*People v. Anderson* (2009) 47 Cal.4th 92, 99.)

circumstances to increase punishment to One Strike punishment on two of [J.'s] convictions, there can be no One Strike punishment on the 'triggering' convictions." Conde asserts several separate legal arguments in support of this contention. We will consider each argument in turn, explaining why each lacks merit.

Conde's first argument focuses on the statutory language of section 667.61. He cites section 667.61, subdivision (f), which provides that if an aggravating circumstance has been pled and proved which would give rise to the punishment specified in section 667.61, "that circumstance . . . shall be used as the basis for imposing the term provided [in the relevant subdivisions of section 667.61,] whichever is greater, rather than being used to impose the punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or the punishment under another provision of law can be imposed in addition to the punishment provided by this section." (*Id.*, subd. (f).) Conde contends that this language limits the number of times that the trial court can use a single conviction as the basis for the multiple-victim aggravating circumstance set forth in section 667.61, subdivision (e). As have other courts, we reject this argument because it finds no support in the language of section 667.61, subdivision (f). "The meaning of . . . subdivision (f) is unambiguous and its application is clear. . . . Nothing in that provision even hints at an intent to limit imposition of the subdivision (b) [O]ne [S]trike life term, based on the multiple-victim circumstance. Rather, it evinces the intent to ensure the greatest possible punishment under that sentencing scheme." (*People v. Valdez* (2011) 193 Cal.App.4th 1515, 1522-1523.) As our Supreme Court has explained, "persons convicted of sex crimes against

multiple victims . . . 'are among the most dangerous' from a legislative standpoint," and "[t]he One Strike scheme therefore contemplates a separate life term for each victim attacked on *each* separate occasion." (*People v. Wutzke* (2002) 28 Cal.4th 923, 930-931, italics added.)

Conde's next argument is that applying the multiple-victim circumstance set forth in section 667.61, subdivision (e)(4) more than twice in this case violates the prohibition against multiple punishment set forth in section 654. Section 654, subdivision (a) provides in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Conde argues that the commission of sex offenses against more than one victim constitutes a single "act or omission" within the meaning of section 654. This argument was rejected in *People v. DeSimone* (1998) 62 Cal.App.4th 693, 700 (*DeSimone*), which concluded that the multiple-victim circumstance set forth in section 667.61 is "[a] penalty provision which relates solely to a defendant's status as a repeat offender . . ." and thus "does not punish an 'act or omission' and is not subject to section 654."¹¹ (*DeSimone*, at p. 700.) *DeSimone*'s conclusion is consistent with analogous case law from our Supreme Court establishing that statutes imposing increased punishment for recidivism — such as increased punishment for prior prison terms under

¹¹ Once again, we are disappointed that the Attorney General's brief does not cite *DeSimone* or the other authorities we have cited that address Conde's argument.

sections 666 and 667.5, and for habitual sex offenders under section 667.71 — punish the *fact* of defendant's recidivism, and thus do not punish an act or omission within the meaning of section 654. (*People v. Murphy* (2001) 25 Cal.4th 136, 155 [habitual sex offenders]; *People v. Coronado* (1995) 12 Cal.4th 145 [prior prison terms].) As *DeSimone* explained, "[l]ike other habitual offender provisions, section 667.61, [former¹²] subdivision (e)(5) "merely specifies the applicable sentence upon the present conviction for one with a certain criminal history. It is the *current* offense which calls for the penalty, the magnitude of which is attributable to [the defendant's] status as a repeat offender."'" (*DeSimone*, at p. 700, italics added.) We therefore reject Conde's contention that the trial court was barred under section 654 from imposing more than two 15-years-to-life terms pursuant to the multiple-victim circumstance in section 667.61, subdivision (e)(4).

Finally, Conde makes two constitutional arguments. First, he contends that applying a One Strike sentence based on the multiple-victim circumstance of section 667.61, subdivision (e)(4) constitutes double jeopardy in violation of the Fifth and Fourteenth Amendments to the United States Constitution. *DeSimone* considered and rejected that argument, explaining that "in the 'multi-punishment' context, double jeopardy precludes a court from imposing cumulative sentences for the same conduct only when the Legislature fails to specifically authorize such punishment," and because

¹² At the time that *DeSimone* was decided, the multiple-victim circumstance currently set forth in section 667.61, subdivision (e)(4) was set forth in section 667.61, subdivision (e)(5). (See Stats. ch. 210, § 16.)

"[t]he Legislature has authorized the punishment imposed" by the multiple-victim circumstance of section 667.61, subdivision (e)(4), "double jeopardy concerns are not implicated." (*DeSimone, supra*, 62 Cal.App.4th at p. 700.) We reject Conde's double jeopardy challenge based on this reasoning.

Second, Conde contends that his sentence amounted to cruel and unusual punishment. Conde's argument is not well developed and simply repeats his contention that the sentence imposed by the trial court is "the equivalent of imposing multiple punishment for both an element of an offense and the offense itself." As we have explained, that contention has no merit, as the multiple-victim circumstance increases punishment based on the defendant's status, not based on an element of the triggering offense. "A punishment violates the Eighth Amendment if it involves the 'unnecessary and wanton infliction of pain' or if it is 'grossly out of proportion to the severity of the crime.'" (*Gregg v. Georgia* (1976) 428 U.S. 153, 173.) A punishment may violate article I, section 17 of the California Constitution if 'it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (*In re Lynch* (1972) 8 Cal.3d 410, 424 . . .)" (*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1230-1231.) To the extent that Conde intends to argue that his punishment was grossly disproportionate to his offenses, we reject any such contention based on the facts of Conde's crimes. (See *id.* at p. 1231 ["Defendant was convicted of numerous sex crimes against four young girls, including the rape of a 10-year-old. He attempted to silence two of his victims by threats against the life of the person they loved the most. His many offenses were made possible by exploiting the trust of his victims'"]

parents. [¶] Defendant's sentence is not disproportionate to the offender or the offenses. His claim of cruel and unusual punishment is without merit."].)

G. *Conde's Challenge to the Imposition of a Sex Registration Fine Lacks Merit*

At sentencing, the trial court ordered Conde to pay a sex registration fine pursuant to section 290.3 in the amount of \$400. In connection with that order, the trial court made a finding that "based upon the defendant's work history . . . he has the ability to pay." Defense counsel did not object to the imposition of the fine.

The law provides that the trial court shall impose the fine specified in section 290.3 "unless the court determines that the defendant does not have the ability to pay the fine." (*Id.*, subd. (a).) The defendant has the burden in the trial court to challenge his ability to pay the fine. (*People v. McMahan* (1992) 3 Cal.App.4th 740, 749-750 (*McMahan*) [it is "incumbent upon the defendant to affirmatively argue against application of the fine and demonstrate why it should not be imposed"].) Conde argues (1) that the trial court failed to make an ability to pay determination; and (2) any such determination would not have been supported by substantial evidence.

Conde's contention that the trial court failed to determine his ability to pay is without merit because, as we have explained, the trial court expressly found that Conde had the ability to pay.

Conde has forfeited his challenge to the sufficiency of the evidence that he has the ability to pay the fine because he failed to raise the issue in the trial court, and we reject the argument on that basis. (*McMahan, supra*, 3 Cal.App.4th at p. 750 [appellate challenge to ability to pay the sex registration fee under § 290.3 would not be considered

because defendant did not raise the issue in the trial court]; cf. *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468 ["because the appropriateness of a restitution fine is fact-specific, as a matter of fairness to the People, a defendant should not be permitted to contest for the first time on appeal the sufficiency of the record to support his ability to pay the fine"].)

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.