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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY CHILDS,

Defendant and Appellant.

D059080

(Super. Ct. No. SCD 222039)

APPEAL from a judgment of the Superior Court of San Diego County, Michael T. Smyth, Judge. Affirmed.

A jury found Tony Childs guilty of numerous sexual offenses against 16-year-old Danielle, including rape, rape with a foreign object, and oral copulation, each by force and threat. (Pen. Code, §§ 261, subd. (a)(6), 289, subd. (a)(1), (2), 288a, subd. (c)(2), (3).) Childs admitted a prior strike conviction and a prior serious felony conviction. (Pen. Code, § 667, subs. (a)(1), (b)-(i).) The court imposed a 53-year prison term.

On appeal, Childs contends: (1) the court abused its discretion under Evidence Code section 352 and violated his due process rights by admitting evidence that he

previously pled guilty to sexual battery by restraint with personal use of a deadly weapon; and (2) the court erred in instructing the jury regarding the use of the prior conviction evidence. (See CALCRIM No. 1191.) These contentions are without merit and we affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

In May 2009, 16-year-old Danielle and her mother (Mother) went to Childs's house in the evening. Mother, who was a drug addict, left Danielle at the house and told her that Childs and his girlfriend would bring her home because Mother did not want to drive her home. Danielle did not think this was unusual because she had previously spent time at the house with Childs's daughter. Danielle sat on the couch and watched television in the living room. A few minutes later, Childs told Danielle to go upstairs to his bedroom and wait while his daughter finished her shower and dressed. Childs's teenage son was in the bedroom when Danielle arrived. After the son left the room, Danielle sat on the corner of the bed and watched television. Childs entered the room, folded and put clothes away, and told Danielle he was doing laundry.

Childs asked Danielle if she knew why she was there. Danielle said she was there so Childs and his girlfriend could take her home. Childs responded, "Yes, but do you know why you're here?" Danielle gave the same response and Childs asked the question two or three more times, telling Danielle that there was a reason why she was there, but he did not want to tell her. Childs eventually told Danielle that her mother owed money to some men and Childs had agreed to pay her debt in exchange for Danielle having sex with him. Danielle became scared and did not want to have sex with Childs. Childs

warned Danielle that if she did not have sex with him, the men would kill her, her mother, and Childs, and the men knew where Danielle and her mother lived. Danielle believed this threat and feared for her safety and her mother's safety.

Childs told Danielle that if she just took her clothes off, it would be okay.

Danielle undressed as Childs watched. Childs then told Danielle to lie on the bed, asked if she had ever "been eaten out," and asked Danielle if she wanted to do this. Although Danielle answered "no" to both questions, Childs orally copulated Danielle while rubbing her chest. He then switched between orally copulating her, sucking on her chest, and digitally penetrating her vagina with his finger. Childs also tried to put his penis into Danielle's vagina five to ten times. Although he had difficulty maintaining an erection, Childs penetrated Danielle's vagina with his penis. Danielle touched Childs's penis two or three times, at his direction. During the incident, Childs asked Danielle how it felt. She said it felt good because she did not want to make him angry. Childs stopped when Danielle was crying and said she was hurting.

Childs told Danielle to clean herself and gave her a rag. After Danielle cleaned up, she dressed in her pajama bottoms, sports bra and sweatshirt, and Childs took her home.

Once home, Danielle showered and called her 17-year-old boyfriend. She cried as she told her boyfriend that some "guy[ ]" had touched her and that she did not want to do it. Danielle spent that night at her boyfriend's house. The next day, she told her boyfriend's mother and her mother about what had happened. Danielle did not call the police that day or the next day.

One or two days later, Danielle went to the hospital because she was bleeding from her vagina. The physician who examined Danielle testified that she was unable to determine from the physical evidence whether the sexual acts were by force or consensual.

After the examination, Danielle was taken to the Polinsky Center, where she lived for a couple of months. Danielle was then placed in a foster home, and later lived with her boyfriend and his mother for about one year.

Law enforcement officials extracted sperm from Danielle's pajama bottoms. The DNA profile of the sperm sample from Danielle's pajama bottoms matched Childs's DNA profile. DNA analysis also established that Childs was a minor contributor to a mixed DNA sample from Danielle's bra.

When the police asked him about the incident, Childs denied having sexual intercourse or any sexual contact with Danielle.

During a pretext call between Danielle and Mother, Mother said she was unhappy the incident had been reported to the police, she did not know if she would try to regain custody of Danielle, and that sexual assaults were part of life and no big deal.

As discussed in more detail below, over Childs's objection the prosecutor introduced a certified conviction packet at trial showing Childs pled guilty on October 15, 1990 to sexual battery by restraint and admitted the allegation that he personally used a deadly weapon (a butcher knife) during the commission of the offense.

Childs did not call any witnesses at trial. During closing argument, his counsel argued that Childs was not guilty of the charged sexual offenses because he actually and

reasonably believed that Danielle consented to have sex with him. The defense theory was that Danielle "behave[d] in a way" that led Childs to believe Danielle had "consented to having sex with him." Under this theory, defense counsel asserted that Danielle wanted to help and protect her mother so Danielle agreed to have sex with Childs and led Childs to believe that she voluntarily wanted to have sex with him.

## DISCUSSION

### I. *Prior Acts Evidence*

Childs contends the court erred in allowing the prosecutor to present the evidence of his sexual battery offense under Evidence Code section 1108.<sup>1</sup>

#### A. *Background Facts*

Before trial, the prosecutor moved to admit evidence that, on July 12, 1990 (about 19 years before the current crime), Childs lured a 14-year-old girl into his home under a false pretense, threatened to stab her with a knife, pulled off her jeans and inserted his fingers into her vagina. Childs was initially charged with rape by a foreign object, lewd act upon a child 14 or 15 years of age, and assault with a deadly weapon by means of force and likely to produce great bodily injury. Childs later pled guilty to sexual battery by restraint and admitted a knife-use allegation.

During the hearing on the motion, the prosecutor said the victim of the prior crime might not be available to testify at trial, and if the prosecution could not secure her

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<sup>1</sup> We reject the Attorney General's contention that Childs waived the issue by failing to sufficiently object to the evidence. All further statutory references are to the Evidence Code unless otherwise specified.

presence at trial, he intended to present the evidence through certified conviction documents. Defense counsel objected to the evidence as irrelevant, stating the two incidents were dissimilar because in the prior case Childs used a weapon, had no relationship with the prior victim, and used physical force. Defense counsel further noted that because Childs pled guilty to a lesser offense pursuant to *People v. West* (1970) 3 Cal.3d 595, there were proof problems regarding the underlying incident. The prosecutor countered that the circumstances of the two cases were sufficiently similar and the fact that Childs pled guilty to a lesser crime did not preclude introduction of the underlying facts.

The court said it could not provide a definitive ruling until it knew whether the prosecutor intended to call the victim or present documentary evidence, but noted that the evidence (in some form) appeared to be admissible under section 1108. The court recognized the prior crime occurred almost 20 years earlier, but said the evidence had "great probative value" and was unlikely to confuse the jury or be unduly time consuming. Pending information as to the form of the evidence, the court reserved ruling on several aspects of the motion, including whether the evidence would be unduly prejudicial under section 352. The court noted that "something is coming in, and we'll get more specific when I can."

During trial, the prosecutor indicated he would be introducing evidence of the uncharged sex crime through a "certified prior." Defense counsel acknowledged that the evidence was potentially admissible under section 1108, but objected that defense would

not have the opportunity to cross-examine the witness about "what happened" during the event. The court rejected defense counsel's objections.

The court subsequently granted the prosecutor's motion to admit an 11-page "certified conviction" packet, which was marked Exhibit 2. Exhibit 2 contained various documents reflecting Childs's prior conviction, including: (1) the amended information summary alleging three counts (rape by foreign object, assault with intent to commit a felony, and sexual battery by restraint with use of a deadly weapon ("butcher knife")), each of which allegedly occurred on July 12, 1990 against victim Tasha C.; (2) documents showing Childs pled guilty only to the sexual battery offense and admitted the weapon enhancement; and (3) an abstract of judgment showing the imposition of a two-year prison term.

### B. *Analysis*

Section 1101 generally prohibits the admission of evidence to show a defendant's propensity to commit a particular crime. Section 1108, subdivision (a) creates an exception to this rule, providing that: "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." (See *People v. Loy* (2011) 52 Cal.4th 46, 60; *People v. Falsetta* (1999) 21 Cal.4th 903, 911.) Under section 1108, a prior sexual offense may be admitted for any relevant purpose, including to show the defendant's propensity to commit the current sexual offense. (*People v. Falsetta, supra*, 21 Cal.4th at p. 915.) "With the enactment of section 1108, the Legislature 'declared that the

willingness to commit a sexual offense is not common to most individuals; thus, evidence of any prior sexual offenses is particularly probative and necessary for determining the credibility of the witness.'" (*People v. Soto* (1998) 64 Cal.App.4th 966, 983.)

Childs does not challenge that his prior sexual battery conviction was potentially admissible under section 1108 as propensity evidence, but contends the court abused its discretion in denying his motion to exclude the evidence under section 352.

Under section 1108, a trial court has the discretion to exclude the prior sexual offense evidence under section 352 if the probative value of the evidence is substantially outweighed by the probability that its admission will necessitate undue time consumption or create substantial danger of undue prejudice, confusing the issues, or misleading the jury. (*People v. Loy, supra*, 52 Cal.4th at pp. 61-64; *People v. Falsetta, supra*, 21 Cal.4th at p. 917.) We must uphold the trial court's refusal to exclude evidence under section 352 unless the court's ruling "'falls outside the bounds of reason.' [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 371; see *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

The court did not abuse its discretion here. Evidence of Childs's prior conviction for sexual battery by restraint was highly probative to counter Childs's defense theory that he reasonably believed the 16-year-old victim consented to engage in sex with him.<sup>2</sup> The

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<sup>2</sup> Under California law, under certain circumstances a minor is capable of giving legal consent to sexual intercourse, which would then support a conviction for unlawful sexual intercourse with a minor (Pen. Code, § 261.5), instead of rape (Pen. Code, § 261), which is subject to a higher punishment. (See *People v. Tobias* (2001) 25 Cal.4th 327, 333.)

evidence showing Childs previously committed a forcible sex crime against a young female victim bolstered the credibility of Danielle's statements that the sex acts were not consensual and negated the validity of Childs's defense that he reasonably believed this 16-year-old girl consented to the sexual acts. Additionally, contrary to Childs's contentions, the acts were sufficiently similar to support a finding that the prior evidence was relevant to the current charge. Although Childs did not use a physical weapon to commit the current sexual offense, he used a psychological weapon for the same purpose. Childs told Danielle that her mother had agreed to let Childs have sex with her in exchange for him paying the debt her mother owed to some men and that if Danielle did not have sex with him, the men would kill her and her mother. Under the circumstances, this threat was no different than using a knife to achieve his desired criminal purposes.

In arguing the court abused its discretion, Childs focuses on the fact that the prior incident occurred 19 years before the current offense. Although the remoteness of a prior offense is an appropriate factor in the section 352 balancing analysis (*People v. Harris* (1998) 60 Cal.App.4th 727, 739), the court had a reasonable basis to conclude the length of time between the offenses did not eliminate the probative value of the evidence. Given the similarity of the manner in which the offenses were committed, it is reasonable to infer that Childs's commission of a sexual battery in 1990 showed he had the propensity to commit this crime and thus made it more likely he would engage in a comparable act many years later and that he would have understood that Danielle was not consenting to the sexual acts. (See *People v. Branch* (2001) 91 Cal.App.4th 274, 284-285 [30-year gap between the offenses did not undermine probative value of prior sexual offense].)

Further, the guilty plea to the sexual battery offense was not more inflammatory than the charged crimes. Although the prior incident involved a knife, the current sex offenses were just as despicable as they involved threats of death and the actual rape and oral copulation of a teenage girl. Moreover, the jury was informed that Childs had received a prison sentence for the prior offense, decreasing the likelihood that it would find Childs guilty merely to punish him for the prior crime. (See *People v. Yovanov* (1999) 69 Cal.App.4th 392, 406.) Additionally, given the nature of the proof—a conviction packet—the evidence did not consume a great deal of time and there was little likelihood the jury would become confused or distracted by the evidence.

Childs's reliance on *People v. Harris, supra*, 60 Cal.App.4th 727 is misplaced. In *Harris*, the reviewing court held the trial court abused its discretion in admitting the defendant's uncharged act—which involved a home invasion and rape followed by a sexual mutilation—because the charged acts, occurring 23 years later, involved the defendant sexually preying upon emotionally and physically vulnerable women, which the court described as crimes of a "significantly different nature and quality" from the prior violent and brutal acts of sexual mutilation. (*Id.* at p. 738.) Here, the fundamental character of the two crimes were similar, and, unlike *Harris*, the prior conviction (sexual battery) was no more inflammatory than the charged sexual offenses of rape, rape by foreign object, and oral copulation, each by force and threat.

Childs alternatively contends the admission of the prior acts evidence violated his due process rights.

The argument is without merit. As the California Supreme Court has held, if the prior sexual offense evidence is probative and properly admitted under section 352, the admission of the evidence is consistent with the due process clause of the federal Constitution. (See *People v. Falsetta*, *supra*, 21 Cal.4th at pp. 910-922.) "[T]he trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge. . . . '[S]ection 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. . . . By subjecting evidence of uncharged sexual misconduct to the weighing process of section 352, the Legislature 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 . . . . This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. . . . With this check upon the admission of evidence of uncharged sex offenses in prosecutions for sex crimes, we find that . . . section 1108 does not violate the due process clause.'" (*Id.* at pp. 917-918, italics omitted.)

These principles apply here. The record supports the court's conclusion that the probative value of the evidence was not outweighed by the possibility that it would unduly prejudice Childs's case. Moreover, as described below, the court properly instructed the jury that it was not required to infer from the prior acts evidence that Childs had the disposition to commit the charged offenses and that the evidence was only one

factor of many to consider in deciding whether the prosecution met its burden to prove the current offenses beyond a reasonable doubt. There was no due process violation here.

## II. CALCRIM No. 1191

Childs next contends the court erred in instructing the jury about the evidence of his prior sexual battery conviction. The argument is without merit.

The court instructed the jury pursuant to a slightly modified version of CALCRIM No. 1191, which informed the jury that, if the jurors found by a preponderance of the evidence that Childs committed the offense of prior sexual battery by restraint, "you may, but are not required to, conclude from that evidence that [Childs] was disposed or inclined to commit sexual offenses, and . . . also conclude that [Childs] was likely to commit one or more of the crimes charged here." This instruction also included several admonitions about the limited use of the evidence, including that: "If you conclude that the defendant committed the uncharged offense, 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 the crimes charged here. The People must still prove each charge beyond a reasonable doubt. Do not consider this evidence for any other purpose."

Childs contends the instruction violated his due process rights because it allowed the jury to infer guilt of the charged offenses based on his propensity to commit the crimes and misleads the jury about the proof burden. Almost 10 years ago, the California Supreme Court rejected these same contentions in approving a substantially similar instruction, former CALJIC No. 2.50.01. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1015.) As the courts have recognized, *Reliford's* holding applies equally to

CALCRIM No. 1191. (See *People v. Schnabel* (2007) 150 Cal.App.4th 83, 87; *People v. Cromp* (2007) 153 Cal.App.4th 476, 480.)

Childs acknowledges the *Reliford* decision is controlling but states that he is raising the issue to preserve it for possible federal review.

DISPOSITION

Judgment affirmed.

HALLER, Acting P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.