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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY ANTHONY ROALSTON,

Defendant and Appellant.

D059704

(Super. Ct. No. RIF10000873)

APPEAL from a judgment of the Superior Court of Riverside, Gordon R.

Burkhart, Judge. Affirmed.

A jury convicted Jeffrey Anthony Roalston of battery (Pen. Code, § 242), forcible sexual penetration (Pen. Code, § 289, subd. (a)(1)), forcible sodomy (Pen. Code, § 286, subd. (c)(2)), rape of a person incapable of giving consent due to mental disability (Pen. Code, § 261, subd. (a)(1)), forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)), and felony child abuse (Pen. Code, § 273a, subd. (a)). The court sentenced Roalston to prison for a term of 26 years.

Roalston appeals, contending the court abused its discretion when it admitted evidence of prior uncharged sex offenses. He also challenges the constitutionality of Evidence Code<sup>1</sup> section 1108. We affirm.

## FACTS

### Prosecution

Jane Doe 1 was born in March 1995. She currently attends high school, where she is enrolled in special education classes in reading, social studies, and mathematics as well as regular high school classes in physical education and choir.

Doe 1 lived with Roalston and his wife (M. R.) her entire life. M.R. is Doe 1's maternal aunt. Doe 1's mother, M.T., who is also mentally disabled, lived with Roalston as well. While living in Fresno, Doe 1 finished 8th grade, then the family moved to Riverside where she began high school. In Riverside, Doe 1 lived with her mother, Roalston, Roalston's wife, her grandmother, and Roalston's three children: T.R., A.R., and J.R.

Prior to moving to Fresno, Doe 1 lived with Roalston in Kansas. In Kansas, Roalston showed Doe 1 a video of people having sex. Doe 1 told Roalston she did not want to watch, but Roalston told her she had to learn how to be a woman. While they were watching the movie, Roalston put his penis in Doe 1's vagina.

Roalston sodomized Doe 1 beginning while they were living in Fresno and continuing after they moved to Riverside. On one occasion in Riverside, Roalston came

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<sup>1</sup> Statutory references are to the Evidence Code unless otherwise specified.

into Doe 1's room while she was in bed. He was wearing a robe, but no underwear, so Doe 1 saw his penis. He told Doe 1 to bend over then he "put his private part in [her] butt." It hurt, and Doe 1 told him to take it out, but Roalston refused, saying that she "had to get used to it."

In addition, Roalston had forcible intercourse with Doe 1 in both Fresno and Riverside. Doe 1 was worried she might get pregnant. Roalston told her to ask her doctor for birth control pills.

Before moving into a house in Riverside, Doe 1 stayed in a motel in Riverside. A curtain was used to divide the room. Roalston molested Doe 1 several times while the family lived in the motel. During one incident, Roalston had Doe 1 come to the other side of the curtain where he was in bed with M.R., so she could "mess with his private part." M.R. and her children were asleep on the same side of the curtain. M.R. woke up and asked what they were doing.

On another occasion, Roalston was alone in the motel room with Doe 1. Roalston called Doe 1 over to his bed and asked her to lie on top of him. Doe 1 saw Roalston rubbing his penis. He took off his pants and had Doe 1 take off her pants. Roalston put his penis in Doe 1's vagina. Doe 1 was afraid that her aunt would find out, but Roalston told her that no one would know and that she was not to tell anyone.

While living in the motel, Doe 1 sometimes hid in the closet because she did not want to do anything with Roalston. Also, while staying at the motel, Doe 1 told her cousin, J.R., that his father had been touching her at night. J.R. was not sure what Doe 1

meant and did not take her seriously. Doe 1 also told her aunt and mother what was happening, but neither person did anything.

In addition, Roalston had Doe 1 orally copulate him. He told her that it was okay and she should not be afraid. If she said she did not want to, Roalston told her "to be a woman" "and do it."

While they were living in Riverside, Roalston would come into Doe 1's room at night and touch her breasts and genitals. Doe 1 told Roalston to stop, but Roalston responded that Doe 1 should relax because he was not going to hurt her. Once when M.R. came in the room, Roalston told M.R. that they were just playing. The touching happened more than once, but Doe 1 could not state how many times it occurred.

If Doe 1 told Roalston she did not want to be physical with him, he would sometimes hit her in the face and call her names. Once, Doe 1's cousin T.R., found Roalston in Doe 1's room after Roalston struck Doe 1, causing her to fall onto a shelf. Roalston had slapped Doe 1 because she would not touch his penis. Roalston told T.R. that Doe 1 was playing. Doe 1 told T.R. that Roalston hit her because she did not do what he said. Sometimes Roalston gave Doe 1 money to touch his penis.

On February 19, 2010, Doe 1 told police that Roalston had been sexually abusing her. During the most recent incident, Roalston took Doe 1 out of her room and walked her into the hallway. Roalston told Doe 1 it was better to go in the hallway because he did not want to be caught in her room. He told her to pull her pants down, and then touched her breasts and genitals with his hands. Roalston proceeded to lick Doe 1's "private part" and told her to touch his penis. Doe 1 did not want to but she rubbed his

penis with her hand. M.R. came into the hallway and talked to Roalston, but by that time, Doe 1 had pulled her pants back up, and she and Roalston were standing apart.

In an earlier incident, Roalston stopped Doe 1 in the hallway on her way to the bathroom. He touched her breasts and genitals with his hands.

Dr. Lorena Vivanco, a forensic pediatrician, examined Doe 1 on February 19, 2010. Doe 1 was 14 at the time of the examination. In Dr. Vivanco's opinion, Doe 1 was mentally or developmentally delayed. Her responses and ability to follow instructions or answer questions were more like those of a five or six-year-old child. Dr. Vivanco explained that injuries are found in only about 10 percent of physical examinations because vaginal or anal trauma heals very quickly, usually within 24 to 48 hours. Accordingly, a lack of physical finding does not necessarily indicate that no sexual assault occurred. However, Dr. Vivanco noted areas of abnormal hypopigmentation, or areas of decreased pigmentation, in Doe 1's perianal area. According to Dr. Vivanco, this finding would be consistent with repeated anal trauma that had not completely healed. The finding was not conclusive proof of sodomy because it can be explained by other medical conditions. Dr. Vivanco made the same finding at a follow-up examination of Doe 1 about two weeks later. She concluded the findings were consistent with anal penetration, although she could neither confirm nor rule out sexual abuse.

At trial, M.R. testified that she never saw Roalston be inappropriate with Doe 1. M.R. pleaded guilty to felony child endangerment on April 22, 2010. In pleading guilty, M.R. stated, "Furthermore, I agree and admit that I was aware of and witnessed Jeffery Roalston sexually abusing [Doe 1] while in Riverside in the year of 2010. I further admit

I shared custody and care of [Doe 1] while I was aware of and witnessed Jeffery Roalston sexually abusing [Doe 1]. I failed to report this sexual abuse to the authorities and/or law enforcement." At trial, M.R. denied being aware of, or witnessing, any abuse by Roalston, although she admitted signing the statement on her change of plea form.

#### Prior Uncharged Sexual Offenses

Jane Doe 2 is Roalston's stepdaughter. She was 32 years old at the time of trial and testified that Roalston came into her life when she was about three years old. He did not begin touching her sexually until she was about seven years old, while the family was living in Long Beach. The touching started when her mother was at work, leaving Doe 2 at home alone with Roalston. Roalston would start wrestling with Doe 2 and would touch her between her legs and on her genital area. The touching happened several times and started over her clothing, but eventually progressed to touching her under her clothing. When Doe 2 cried, Roalston told her that she was special and that this was how fathers expressed their love. Roalston put his fingers inside Doe 2's vagina. When she cried or squirmed, Roalston told her to stop crying and relax.

On one occasion, when Doe 2 was 11 or 12 years old, Roalston put a screwdriver (or like instrument) inside her vagina. He told her he was inserting the instrument into her vagina so it would not hurt when he put his penis inside her.

One night, Roalston came into the room Doe 2 shared with her sister, got on top of her, and put his penis inside her. Doe 2 started crying. Roalston put his hand over her mouth so that she would not wake up T.R., who was asleep in the other bed. Afterwards,

he told her that if she said anything it would be hard for her mother and the children and that they would be separated and unable to see each other anymore.

On another occasion, when the family was living in a hotel, while Doe 2 was sleeping on the floor next to Roalston's bed, Roalston reached down and put his hand between her legs. Doe 2 cried out, but apparently, her mother did not hear.

The abuse continued throughout the family's multiple moves. As she got older, Doe 2 was not allowed to have her own room, but instead slept in the living room. Once, while they were living in Arkansas, when Doe 2 was in ninth or tenth grade, Roalston kicked her in the head when she tried telling him no. Doe 2 called out for her mother, but Roalston told M.R. to go back to her room, and she did.

Roalston orally copulated Doe 2 and also had her orally copulate him.

Roalston impregnated Doe 2 twice. She terminated both pregnancies. The first time, Roalston drove her to the clinic for the abortion.

The last time Roalston tried to have sex with Doe 2 was when Doe 2 had just turned 17 years old. Doe 2 started screaming. When M.R. asked what was going on, Doe 2 said that Roalston was trying to have sex with her. Roalston and M.R. went upstairs. The next morning, in front of the entire family, Roalston admitted to having sex with Doe 2. Doe 2 told Roalston that she forgave him. Doe 2 thought things would change, but two days later, Roalston told her, "Don't think it's over." He threw her out of the house without any of her belongings.

A friend of Doe 2 allowed her to live with her so Doe 2 could finish school. Doe 2 eventually was convinced to report her abuse to the Long Beach Police. After Roalston

was arrested, the police interviewed Doe 2 again and she identified Roalston as the person who molested her. She heard nothing from the police after the second interview.

Doe 2 went to her family's apartment after leaving the police department. She saw a U-Haul truck at the apartment. When she returned to the apartment a second time, the family had moved.

#### Defense

Cari Caruso, a registered nurse, testified the physical findings of Doe 1's examination did not support Dr. Vivanco's conclusion that "sexual abuse was highly suspected." She explained the areas of light skin near Doe 1's anus were not a conclusive indication of anal trauma.

A.R. testified she shared a room with Doe 1 and was unaware of Roalston ever coming into the room for more than a few seconds. Doe 1 told A.R. that Roalston had been "messaging with her," but A.R. did not believe her. A.R. never saw Roalston hit Doe 1.

M.T., Doe 1's mother, testified that several years earlier when Doe 1 was one or two years old, Roalston made a nude videotape of her. She was embarrassed and angry when family members found and watched the tape. A defense investigator testified that M.T. told him that she told Doe 1 to make up allegations against Roalston.

Roalston's sister testified that she lived with the family for six or seven months in 1992. She never saw Roalston hit any of the children.

M.R. denied that she ever heard Roalston admit he molested Doe 2.

Roalston testified in his own defense. He denied having any sexual contact with Doe 1 or 2.

## DISCUSSION

### I

#### *THE EVIDENCE OF UNCHARGED SEX OFFENSES WAS ADMISSIBLE*

Roalston contends the trial court abused its discretion when it admitted propensity evidence concerning the uncharged sexual offenses committed against Doe 2 under section 1108. We disagree.

#### A. Background

In limine, Roalston moved to exclude the propensity evidence, arguing the evidence was more prejudicial than probative, and thus, was inadmissible under sections 352 and 1108. The prosecution opposed the motion and indicated it intended to call Doe 2 to testify about the prior sex offenses.

The court, after considering the evidence and hearing argument, ruled the propensity evidence was admissible under section 1108. In doing so, the court made clear that it had weighed the propensity evidence under section 352:

"Okay. Having heard your arguments now, and having read your respective briefs, it's my feeling that the 1108 evidence should come in. But before I make that a final ruling, I would also like to indicate that an integral part of an 1108 decision is 352. I am weighing—I mean, in looking at the evidence, I'm weighing it to determine whether or not its probative value is substantially outweighed by the probability that its admission would necessitate undue consumption of time or create substantial danger of undue prejudice or confusion of issues, and I think not. I think its probative value is significant and not substantially outweighed by these other factors."

## B. The Law

Subject to section 352, section 1108 permits a jury to consider prior incidents of sexual misconduct for the purpose of showing a defendant's propensity to commit offenses of the same type and essentially permits such evidence to be used in determining whether the defendant is guilty of a current sexual offense charge. (§ 1108, subd. (a).) Although before section 1108 was enacted, prior bad acts were inadmissible when their sole relevance was to prove a defendant's propensity to engage in criminal conduct (see § 1101; *People v. Falsetta* (1999) 21 Cal.4th 903, 911, 913 (*Falsetta*)), its enactment created a statutory exception to the rule against the use of propensity evidence, allowing admission of evidence of other sexual offenses in cases charging such conduct to prove the defendant's disposition to commit the charged offense. (*Id.* at p. 911.) The California Supreme Court has ruled section 1108 is constitutional and does not violate a defendant's due process rights. (*Id.* at pp. 910-922.)

However, because section 1108 conditions the introduction of uncharged sexual offense evidence on whether it is admissible under section 352, any objection to such evidence, as well as any derivative due process assertion, necessarily depends on whether the trial court sufficiently and properly evaluated the proffered evidence under that section. "A careful weighing of prejudice against probative value under [section 352] is essential to protect a defendant's due process right to a fundamentally fair trial." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314 (*Jennings*)). As our high court stated in *Falsetta*, in balancing such propensity evidence under 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 . . . offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta, supra*, 21 Cal.4th at p. 917.)

We review the admission of other acts or crimes evidence under section 1108 for an abuse of the trial court's discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 371 (*Kipp*)). The determination as to whether the probative value of such evidence is substantially outweighed by the possibility of undue consumption of time, unfair prejudice or misleading the jury is "entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence." (*People v. Fitch* (1997) 55 Cal.App.4th 172, 183 (*Fitch*)).

The weighing process under 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." (*Jennings, supra*, 81 Cal.App.4th at p. 1314.) "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." ' ' (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) We will not conclude that a court abuses its discretion in admitting such other sexual acts evidence unless its ruling

" 'falls outside the bounds of reason.' " (*Kipp, supra*, 18 Cal.4th at p. 371.) We affirm a trial court's ruling under section 352 " 'except on a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Nothing requires a trial court to consider or apply a list of particular factors; we need not go beyond the settled appellate standards for assessing a trial court's decision to admit evidence under section 352. (*Jennings, supra*, 81 Cal.App.4th at pp. 1314-1315.)

### C. Analysis

Relying on *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*), Roalston contends the trial court prejudicially erred in admitting propensity evidence from Doe 2 under section 1108 over his section 352 objection. He argues the propensity evidence was: (1) more inflammatory than what Doe 1 suffered; (2) confusing to the jury; (3) overly time consuming; and (4) remote. We are not persuaded.

As a threshold matter, Roalston's reliance on *Harris, supra*, 60 Cal.App.4th 727 is misplaced. In *Harris*, the trial court prejudicially abused its discretion in admitting an incomplete and distorted version of the defendant's prior act involving brutal sexual mutilation in a case in which the defendant had kissed, fondled and sexually preyed upon emotionally and physically vulnerable women, crimes held to be of a "significantly different nature and quality." (*Id.* at p. 738.) Here, the prior sexual offenses and the charged crimes were sufficiently similar. They both involved Roalston abusing a position of trust to molest underage girls, neither related to him by blood, but both living with him. In addition, the charged crimes and prior sex offenses involved the same

conduct: the touching of breasts and genitals, forcible penetration of the vagina, oral copulation (both giving and receiving), isolation of the victims, and threats or violence against the victims if they did not follow Roalston's instructions. *Harris* is not instructive.

Further, even if we ignore the facts of *Harris, supra*, 60 Cal.App.4th 727 and merely apply the factors set forth in *Harris* at pages 737 through 739 to the facts here, Roalston still does not prevail. For example, we are not convinced Doe 2's testimony was "far more inflammatory than the testimony of Doe 1" as Roalston urges. Evidence of prior sex offenses necessarily involves unpleasant facts of sexual misconduct. We recognize the propensity evidence showed Roalston penetrated Doe 2's vagina with a screwdriver and kicked her in the head when she resisted his advances. It also showed Roalston threatened Doe 2 that she would no longer see her siblings if she told anyone what he was doing. The propensity evidence showed Roalston impregnated Doe 2 twice, and Doe 2 terminated both pregnancies. While some of this evidence could be considered more egregious than what Doe 1 endured, on whole, we do not conclude it was so unduly inflammatory or extreme as to warrant exclusion, especially in light of some of the acts Doe 1 testified she suffered (e.g., sodomy, physical violence, and Roalston's instruction to ask the doctor for birth control pills).

We also are not convinced the admission of the propensity evidence led to the confusion of issues, causing the jury to misapply the propensity evidence to an improper purpose. The jury was instructed under CALCRIM No. 1191, which concerns evidence

of uncharged sex offenses.<sup>2</sup> California courts have found CALCRIM No. 1191 (and its predecessor 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; *Fitch, supra*, 55 Cal.App.4th 172, 184-185.) In addition, we presume the jury followed the jury instructions. (*People v. Gray* (2005) 37 Cal.4th 168, 217.) Roalston does not challenge the jury instruction, but instead, under the guise of jury confusion, argues the "extremely inflammatory nature of the prior uncharged conduct" distracted the jury and caused the jury to believe he "got away" without being punished for his assaults on Doe 2. As we discuss above, we do not conclude the propensity evidence was "extremely

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<sup>2</sup> The court provided the jury with the following CALCRIM No. 1191 instruction: "The People have presented evidence that the defendant committed the crimes of sexual penetration and oral copulation that were not charged in this case. These crimes are defined -- were defined in the instructions I've already given you. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence -- preponderance is different than beyond a reasonable doubt, as I said earlier, there being an exception. This is the exception. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant did the act as described in the uncharged offense. [¶] Proof by a preponderance of the evidence is different -- it's a different burden than proof beyond a reasonable doubt. The fact -- a fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that it 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 offense, you may, but you're not required, to conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses and, based upon that decision, also conclude that the defendant was likely to have committed and did commit aggravated sexual assault, sexual penetration, sodomy, oral copulation, and rape of a disabled person as charged in this case. If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor in considering -- to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of these charged crimes. The People must still prove that the defendant is guilty of the charged crimes beyond a reasonable doubt. [¶] Do not consider this evidence for any other purpose than what I've just described."

inflammatory" and we reject Roalston's contention accordingly. Further, any potential confusion was addressed by appropriate jury instructions.

We further reject Roalston's assertion that the past sex offenses were too remote. There are no specific time limits establishing when a prior offense is so remote as to be inadmissible. (*People v. Pierce* (2002) 104 Cal.App.4th 893, 900.) Here, the prior sex offense involving Doe 2 occurred 17 to 25 years before trial, which is not per se remote. (See *People v. Branch* (2001) 91 Cal.App.4th 274, 284 [evidence of 30-year-old sex offense properly admitted].) Moreover, we conclude that the similarities between Roalston's attacks on both Doe 1 and Doe 2 described above balance out any remoteness. (Accord, *Pierce, supra*, at p. 900; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395.)

Finally, we are not troubled by the length of Doe 2's testimony. Her direct testimony consisted of 55 pages in the transcript and her cross-examination consisted of 71 pages. She was one of two witnesses to testify on Friday, October 22, 2010. The length of her testimony did not warrant exclusion.

In summary, we cannot conclude the trial court's decision to admit testimony from Doe 2 regarding Roalston's prior sex acts on her was arbitrary, capricious, manifestly absurd, or exceeded the bounds of reason. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 658.) There was no error.

## II

### *SECTION 1108 IS CONSTITUTIONAL*

Roalston contends the trial court should not have relied on section 1108 to admit evidence of his prior sex offenses because that statute violates his rights to due process

and equal protection under both the United States and California Constitutions. Roalston, however, forfeited these contentions because he did not raise them in the trial court. (*People v. Monterroso* (2004) 34 Cal.4th 743, 759 [failure to object forfeited due process, fair trial and unbiased jury claims].)

Even if the claims were not forfeited, we would reject them. Roalston's due process argument was rejected by the California Supreme Court in *Falsetta, supra*, 21 Cal.4th at pages 913 through 922. We are bound to follow this precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The equal protection claim also is without merit. "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.'" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199, italics omitted, quoting *In re Eric J.* (1979) 25 Cal.3d 522, 530.) Roalston cannot meet this prerequisite because sex offenders are not similarly situated to other types of felons. (*Hofsheier, supra*, at p. 1199; *People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1330; *People v. Mitchell* (1994) 30 Cal.App.4th 783, 795.) "By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations." (*Falsetta, supra*, 21 Cal.4th at p. 915; see also *Fitch, supra*, 55 Cal.App.4th 172, 184.) Because there is a rational basis for the distinction created by section 1108, the statute does not violate the equal protection

guarantee contained in either the United States or the California Constitutions.

(*Hofsheier, supra*, at pp. 1200-1201.)

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

McINTYRE, J.

AARON, J.