

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

GREG ALVAREZ,

Defendant and Appellant.

D069938

(Super. Ct. No. RIF1103155)

APPEAL from a judgment of the Superior Court of Riverside County,
Thomas E. Kelly, Judge. (Retired judge of the Santa Cruz Super. Ct. assigned by the
Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Jamie L. Popper, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General,
Peter Quon, Jr. and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and
Respondent.

I.

INTRODUCTION

A jury found Greg Alvarez guilty of seven counts of aggravated sexual assault of a child (Pen. Code, § 269, subd. (a))¹ (counts 1-7) and eight counts of committing a lewd act on a child (§ 288, subd. (a)) (counts 8-15). The trial court sentenced Alvarez to a determinate term of 20 years in prison on the lewd act counts, and a consecutive indeterminate term of 105 years to life in prison on the aggravated sexual assault of a child counts.

On appeal, Alvarez claims that there is insufficient evidence to support the verdicts on the counts charging aggravated sexual assault of a child (counts 1-7), the trial court erred in failing to instruct the jury on two purported lesser included offenses with respect to these same counts, and the trial court abused its discretion in failing to exclude certain uncharged sexual offense evidence, pursuant to Evidence Code section 352. We affirm the judgment.

¹ Unless otherwise specified, all subsequent statutory references are to the Penal Code.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The People's evidence*

1. *The family*

The victim, Jane Doe 1, met Alvarez when she was two or three years old, when Alvarez began dating her mother. Alvarez married Jane Doe 1's mother when he was 28 years old and Jane Doe 1 was 4.

According to Jane Doe 1, Alvarez acted as a father to her, she loved him, and he referred to her as his daughter.

2. *The sexual abuse*

Alvarez, Jane Doe 1, her mother, her older brother and her stepbrother first lived together at a house on Banyon Street. Alvarez's parents owned the home and also lived with the family. Jane Doe 1 attended elementary school through the fifth grade while living at that home.

As discussed in greater detail in part III.A., *post*, according to Jane Doe 1, "[I]t all started" when she disclosed to Alvarez that his father (her stepgrandfather) had exposed his penis to her and made her orally copulate him. In response, Alvarez told Jane Doe 1 to demonstrate the oral copulation on him. Jane Doe 1 complied. Jane Doe 1 told an investigator that while she was living at the Banyon Street house, she orally copulated Alvarez on approximately five occasions and that Alvarez touched her vagina on one to five occasions. Jane Doe 1 told the investigator that she was between eight and nine years old and attending elementary school at the time these acts occurred.

Jane Doe 1's family moved from her stepgrandparents' house to a home on Gorham Street in Moreno Valley at approximately the time Jane Doe 1 started sixth grade. Jane Doe 1 told an investigator that while the family was living at the Gorham residence, Jane Doe 1 orally copulated Alvarez on one to five occasions, and that Alvarez touched her vagina on five to ten occasions, put his fingers inside her vagina on at least two occasions, and licked her vagina on five to ten occasions.

When Jane Doe 1 was about 12 years old and attending seventh grade, the family moved to a home on Zinfandel Street in Rancho Cucamonga. Sometime while the family was living at this residence, Alvarez and Jane Doe 1 attended a father/daughter dance. After the dance, Alvarez took Jane Doe 1 to the parking lot of a restaurant. Alvarez and Jane Doe 1 got in the back seat of the car where Alvarez touched and licked her vagina. Jane Doe 1 told an investigator that she orally copulated Alvarez on approximately two occasions while the family was living at the house on Zinfandel Street. Jane Doe 1 also said that Alvarez touched her vagina on approximately five occasions while the family was living at that home.

A final sexual assault incident occurred when Alvarez was orally copulating Jane Doe 1 in her bedroom. Jane Doe 1's mother came home from work early. Alvarez left the bedroom. Jane Doe 1's mother entered the bedroom and asked Jane Doe 1 what Alvarez had been doing there. Jane Doe 1 told her mother about the oral copulation. Jane Doe 1's mother confronted Alvarez. Shortly thereafter, Alvarez and Jane Doe 1's mother divorced.

3. Pretext telephone call

On June 16, 2011, law enforcement officers asked Jane Doe 1 to participate in a pretext telephone call to Alvarez and she agreed to do so. The People played the recorded call for the jury. During the call, Jane Doe 1 told Alvarez that she wanted to know, "why [there] were things that you did to me when I was little." Alvarez responded that Jane Doe 1 was "old enough to understand," and said, "I'm not gonna lie to you." Alvarez then explained that during the time period in question he was using drugs and alcohol and he was not seeing a lot of Jane Doe 1's mother, who was working. Alvarez continued, saying, "[T]here's no excuse." Shortly thereafter, Alvarez said, "So . . . having man cravings and not havin' a wife there, you know. Just - Just - there's no excuse, babe. I was wrong."

Throughout the call, Jane Doe 1 accused Alvarez of sexually abusing her. In response, Alvarez repeatedly said that there was "a lot a stuff" that he did not remember.

4. Alvarez's police interview

Approximately a week after the pretext call, the police interviewed Alvarez. The People played the recorded interview for the jury. During the interview, Alvarez told police that he did not know whether the sexual assaults had occurred, but if they had, he was prepared to apologize to Jane Doe 1. Alvarez said, "[I]f I did do it, I totally understand and not only am I sorry, I regret it, but I understand it because it happened to me when I was a kid." In discussing the pretext call, Alvarez said, "And that's why I'm saying, that's why I told my daughter, you know babe I don't remember any of it," and "I am sorry . . . I hope it didn't [happen], but if it did, it's not because I wanted to or I was

trying to." Alvarez also suggested that his inability to remember was due to the fact that during the relevant time period, he would become extremely intoxicated on occasion.

5. *Uncharged sexual offense evidence*

As discussed in part III.C., *post*, the People presented evidence that Alvarez sent numerous sexual text messages and photographs and engaged in sexual conversations with a 16-year-old girl referred to at trial as Jane Doe 2.

B. *The defense*

Two of Alvarez's relatives testified that Jane Doe 1 and Alvarez saw each other occasionally after the divorce and that they appeared to get along well.

III.

DISCUSSION

A. *Substantial evidence supports the jury's verdicts on the counts charging aggravated sexual assault of a child*

Alvarez contends that there is insufficient evidence in the record to support the jury's verdicts with respect to the counts charging him with aggravated sexual assault of a child (former § 269, subd. (a)) (counts 1-7).² Five of the counts were premised on Alvarez's commission of oral copulation by force, violence, duress, or menace (former § 269, subd. (a)(4), former § 288a) (counts 1-5) and two of the counts were based on

² Although not mentioned by the parties in their briefing, as discussed in part III.B., *post*, the jury was instructed with the language of former section 269, subdivision (a)(4) and (5), the statute in effect at the time of the charged offenses (Stats. 1993-1994, 1st Ex. Sess., ch. 48, § 1, eff. Nov. 30, 1994), while the amended information contained language pertaining to the current version of section 269, subdivision (a). The differences in the versions of the statute are not material in evaluating Alvarez's sufficiency claim.

Alvarez's commission of sexual penetration by force, violence, duress, menace, fear and threat (former § 269, subd. (a)(5), § 289, subd. (a)) (counts 6-7).

For each of the counts, the jury was required to find that Alvarez committed the unlawful sexual act by use of "force, violence, duress, menace or fear of immediate and unlawful bodily injury on the victim or another person." (Former § 269, subd. (a)(4); see former § 269, subd. (a)(5), former § 289, subd. (a).) Alvarez argues that all of his convictions must be reversed because there is insufficient evidence that he committed the acts by use of " 'force, violence, duress, menace or fear of immediate and unlawful bodily injury.' "

1. *The law governing sufficiency of evidence claims*

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. ' "The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" ' [Citations.] [¶] ' "Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our

evaluation of a witness's credibility for that of the fact finder." ' ' " (*People v. Smith* (2005) 37 Cal.4th 733, 738-739.)

2. *Applicable substantive law*

Duress, in the context of aggravated sexual assault against a child, is broadly defined as " 'a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.' " ³ (*People v. Cochran* (2002) 103 Cal.App.4th 8, 10, 13 (*Cochran*) [defining duress as applicable to violations of aggravated sexual assault on a child (§ 269, subd. (a)]; see also *People v. Senior* (1992) 3 Cal.App.4th 765, 774-775 (*Senior*) [defining duress with respect to forcible sexual penetration (§ 289, subd. (a)).]⁴

Duress, by its nature, "involves psychological coercion" of the victim. (*Senior, supra*, 3 Cal.App.4th at p. 775; *Cochran, supra*, 103 Cal.App.4th at p. 15.) Duress "can arise from various circumstances, including the relationship between the defendant and

³ The jury was specifically instructed on the meaning of duress with respect to each of the charged offenses.

⁴ The definition of duress applicable to sexual offenses committed against a child is broader than the definition that applies when duress is used as a defense to a criminal charge (see *People v. Pitmon* (1985) 170 Cal.App.3d 38, 51 (*Pitmon*) [discussing the distinction between duress as a defense to a criminal charge and duress as an element of commission of a lewd act on a child (§ 288, subd. (b))] or the definition applicable to other sexual offenses. (See *People v. Leal* (2004) 33 Cal.4th 999, 1008 (*Leal*) ["The Legislature may have wished to protect children against lewd acts committed by threats of hardship despite its determination that similar threats of hardship should not provide the basis for the crime of rape or spousal rape against an adult".]) The broad definition of duress applies with respect to both committing a lewd act on a child (§ 288, subd. (b)(1)) (see *Leal, supra*, at pp. 1004-1009) and aggravated sexual assault of a child (§ 269, subd. (a)) (see *Cochran, supra*, at p. 13 [applying *Pitmon* court's definition of duress]).

the victim and their relative ages and sizes." (*Senior, supra*, at p. 775.) " 'Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim' is relevant to the existence of duress." (*Ibid.*, quoting *People v. Superior Court (Kneip)* (1990) 219 Cal.App.3d 235, 239.) Further, the fact that a victim testifies that the defendant did *not* use force or threats does not establish a lack of duress. (*People v. Veale* (2008) 160 Cal.App.4th 40, 46 (*Veale*).

For example, in *Veale*, the victim testified that "defendant did not threaten her or use physical force when he committed the charged offenses." (*Veale, supra*, 160 Cal.App.4th at p. 46.) Nevertheless, the *Veale* court concluded that "[a] reasonable inference could be made that defendant made an implied threat sufficient to support a finding of duress, based on evidence that [the victim] feared defendant and was afraid that if she told anyone about the molestation, defendant would harm or kill [victim], her mother or someone else." (*Id.* at p. 47.) Similarly, in *Pitmon, supra*, 170 Cal.App.3d 38, notwithstanding that the victim testified that the defendant had *not* used any force or made any threats in committing various sex acts (*id.* at pp. 47-48), the court concluded that there was sufficient evidence of duress. The *Pitmon* court stated that it "seriously doubt[ed] [the victim] understood the questions [concerning force and duress]," noting

that "[t]hroughout his testimony at the trial, [the victim] had consistently stated defendant had 'made' him engage in the prohibited sex acts." (*Id.* at p. 48.)⁵

Courts consider the "totality of [the] evidence" (*Veale, supra*, 160 Cal.App.4th at p. 47), in determining whether there is sufficient evidence of duress to support a child sexual abuse conviction, with the victim's age at the time of the sexual conduct and the victim's relationship to the defendant having significant evidentiary weight. (See *Cochran, supra*, 103 Cal.App.4th at pp. 13-14.) In *Cochran*, this court noted that the defendant had been convicted of multiple counts of aggravated sexual assault and forcible lewd conduct against his nine-year-old daughter, even though the victim had testified that she was *not* afraid of the defendant, and that he had *not* beaten or punished her, *nor* had he grabbed her or forced her to participate in the charged acts. (*Id.* at pp. 11, 15.) The *Cochran* court noted that there was evidence that the victim "was mad or sad about what [the defendant] was doing to her, that [the defendant] gave her money or gifts when they were alone together, and that [the defendant] told her not to tell anyone because he would get in trouble and could go to jail." (*Id.* at p. 15.) In rejecting the defendant's claim that there was insufficient evidence of duress, this court reasoned:

"This record paints a picture of a small, vulnerable and isolated child who engaged in sex acts only in response to her father's parental and physical authority. Her compliance was derived from intimidation

⁵ In both *Veale* and *Pitmon*, the courts were discussing the meaning of duress for purposes of committing a lewd act on a child (§ 288, subd. (b)). (See *Veale, supra*, 160 Cal.App.4th at p. 45; *Pitmon, supra*, 170 Cal.App.3d at pp. 45-46.) As noted in the text, the meaning of duress for purposes of committing a lewd act on a child (§ 288, subd. (b)) and for aggravated sexual abuse on a child (§ 269, subd. (a)) is the same. (See *Cochran, supra*, 103 Cal.App.4th at p. 13.)

and the psychological control he exercised over her and was not the result of freely given consent. Under these circumstances, given the age and size of the victim, her relationship to the defendant, and the implicit threat that she would break up the family if she did not comply, the evidence amply supports a finding of duress." (*Id.* at pp. 15-16, fn. omitted.)

We further noted that, although the existence of a parent/child relationship between the victim and his/her molester does not establish duress as a matter of law, "*as a factual matter, when the victim is as young as this victim and is molested by her father in the family home, in all but the rarest cases duress will be present.*" (*Id.* at p. 16, fn. 6, italics added.)

3. *Application*

This case is not one of those "rarest" of cases referred to in *Cochran*. (*Cochran*, *supra*, 103 Cal.App.4th at p. 16, fn. 6.) To begin with, similar to *Pitmon*, *supra*, 170 Cal.App.3d 38 at page 48, Jane Doe 1 testified that Alvarez "*made me suck his penis*" (italics added) when she revealed to him that her stepgrandfather had made her orally copulate him. Jane Doe 1 also testified concerning this incident as follows:

"[The prosecutor]: Did [your stepgrandfather] ever make you do what [Alvarez] made you do?

"[Jane Doe 1]: Yes.

"[The prosecutor]: Did you say — were you telling [Alvarez] that?

"[Jane Doe 1]: Yes.

"[The prosecutor]: When [Alvarez] made you do that, why did you do it?

"[Jane Doe 1]: *He told me to.*

"[The prosecutor]: Why didn't you tell him no?

"[Jane Doe 1]: *I did tell him no.*

"[¶] . . . [¶]

"[The prosecutor]: You said you told him no?

"[Jane Doe 1]: Yes.

"[The prosecutor]: But . . . he still had you do it anyway?

"[Jane Doe 1]: Yes." (Italics added.)

Further, the sexual assaults occurred when Jane Doe 1 was a young girl, beginning when she was approximately 8 or 9 years old. (See *Pitmon, supra*, 170 Cal.App.3d at p. 51 [stating that evidence that victim was "eight years old, an age at which adults are commonly viewed as authority figures," supported finding of duress].) In addition, Alvarez was an adult at the time of the offenses, and "[t]he disparity in physical size between an eight-year-old and an adult also contributes to a youngster's sense of his relative physical vulnerability," and thus supports a finding of duress. (*Ibid.*)

In addition, Alvarez was Jane Doe 1's stepfather, and he had been a part of her life since she was two or three years old. Jane Doe 1 had lived with Alvarez in the same house for as long as she could remember prior to the sexual assaults, and she regarded Alvarez as the disciplinarian in the household. Alvarez's status as a father figure to a young child closely mirrors the facts at issue in *Veale*, in which the court found sufficient evidence of duress. (See *Veale, supra*, 160 Cal.App.4th at pp. 46-47 [noting that victim was seven years old at time of molestation by her stepfather, who "was an authority figure in the household"].)

In addition, as in *Veale*, there was evidence that fear had prevented Jane Doe 1 from revealing the molestations. (See *Veale, supra*, 160 Cal.App.4th at p. 47 [concluding that evidence of victim's fear supported "reasonable inference" that "defendant made an implied threat sufficient to support a finding of duress"].) According to an investigator, Jane Doe 1 said that "she was too scared to tell [her mom]," about the molestations. When Jane Doe 1 was asked at trial why she had not told her mom "what was going on," Jane Doe 1 responded: " I don't remember. I don't know. Maybe I was scared or terrified what he would do to me, or I don't know. I obviously kept my mouth shut for some reason." Alvarez also told Jane Doe 1 not to reveal the molestations to her mother, and paid her not to do so.

Moreover, as in *Cochran*, the record fully supports the conclusion that Jane Doe 1 was a "vulnerable and isolated child." (*Cochran, supra*, 103 Cal.App.4th at p. 15.) Not only was Alvarez Jane Doe 1's stepfather and father figure, Alvarez *began* to sexually abuse her when she disclosed to him that her stepgrandfather had sexually abused her. A jury could reasonably infer that the manner by which Alvarez began his sexual assaults reflected an "attempt to isolate the victim and increase or maintain her vulnerability to his assaults." (*Ibid.*) As the prosecutor argued in the trial court, such evidence is precisely the type of "psychological coercion," (*ibid.*) that may support a finding of duress:

"We have a victim, who from the age of two sees the defendant as her father. He takes care of her, when her mother is not home. She goes to him for help. I mean, if we just look at the way this all started, it's classic. The little girl is eight years old, and she goes to the defendant and asks for help. She's going to him to say, hey your father is molesting me. Please help me, because she didn't have

anybody else to go to. And he used that against her to molest her on that same day. There's no greater psychological coercion than that."

Alvarez's arguments to the contrary are not persuasive. Alvarez relies heavily on this court's decision in *People v. Hecker* (1990) 219 Cal.App.3d 1238 (*Hecker*), and its progeny, *People v. Espinoza* (2002) 95 Cal.App.4th 1287 (*Espinoza*). Citing *Hecker*, Alvarez argues "psychological pressure or fear not based on violence or threats of violence was insufficient." We disagree. As this court explained in *Cochran* in disagreeing with *Hecker*, "The very nature of duress is psychological coercion." (*Cochran, supra*, 103 Cal.App.4th at p.15 [stating that language in *Hecker* stating that "'[p]sychological coercion" ' without more does not establish duress," was "overly broad," *Cochran, supra*, at pp. 14-15, quoting *Hecker, supra*, at p. 1250].)⁶ We agree with the *Cochran* court on this point. Evidence of a defendant's exertion of "psychological pressure" that causes the victim to engage in acts in which the victim would not otherwise engage constitutes evidence supporting a finding of duress. We disagree with any language in *Hecker* or *Espinoza* that is to the contrary.

Alvarez also argues that evidence of continuous sexual abuse of a child in the context of a parent/child relationship is not, *by itself*, sufficient to support convictions for aggravated sexual abuse of a child. Even assuming that this is so, the evidence that supports Alvarez's convictions consists of more than this. Further, Alvarez is incorrect in

⁶ The *Espinoza* court also quoted this portion of *Hecker* in concluding that there was insufficient evidence of duress in that case. (See *Espinoza, supra*, at p. 1321 ["' "Psychological coercion" ' without more does not establish duress," quoting *Hecker, supra*, at p. 1250].)

asserting that the fact that the People also charged Alvarez with nonforcible sex offenses (counts 8-15) based on conduct similar to that charged in counts 1 through 7, and that the People did not elect to charge Alvarez with continuous sexual abuse of a child under 14 (§ 288.5), demonstrates that the evidence on the counts for aggravated sexual abuse of a child was insufficient. The fact that the People might have charged Alvarez with other crimes based on his conduct does not establish that the evidence supporting the jury's verdicts on the crimes that the People did charge was insufficient. Finally, we reject Alvarez's argument that there is insufficient evidence to support the jury's verdicts on counts 1 through 7 because the People did not establish the existence of Alvarez's use of duress with respect to each individual count. The jury could reasonably infer that Alvarez used duress in the commission of all of the counts based on the evidence of his pattern of abuse discussed above. (See *Cochran, supra*, 103 Cal.App.4th at p. 13 [concluding evidence sufficient to support numerous aggravated sexual abuse convictions based on a pattern of abuse].)

Accordingly, we conclude that there is sufficient evidence to support the jury's verdicts on the counts charging aggravated sexual assault on a child (counts 1-7).

B. *The trial court did not have a sua sponte duty to instruct on section 288a, subdivision (c)(1) and section 289, subdivision (j) as lesser included offenses with respect to the counts charging aggravated sexual assault of a child*

Alvarez claims that the trial court erred in failing to instruct the jury on section 288a, subdivision (c)(1) and section 289, subdivision (j) as purported lesser included offenses with respect to the counts charging aggravated sexual assault of a child (counts 1-7).

"We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense." (*People v. Cole* (2004) 33 Cal.4th 1158, 1218 (*Cole*).

1. *General principles of law governing a trial court's sua sponte duty to instruct on lesser included offenses*

"A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, ' "that is, evidence that a reasonable jury could find persuasive" ' [citation], which, if accepted, ' "would absolve [the] defendant from guilt of the greater offense" [citation] *but not the lesser.*' " (*Cole, supra*, 33 Cal.4th at p. 1218.)

" 'For purposes of determining a trial court's instructional duties, we have said that "a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." ' [Citation.] When applying the accusatory pleading test, '[t]he trial court need only examine the accusatory pleading.' " (*People v. Banks* (2014) 59 Cal.4th 1113, 1160 (*Banks*), italics omitted.)

2. *Relevant statutory text*

At the time of the alleged offenses (between September 7, 2001 through September 6, 2006) former section 269, subdivision (a) provided in relevant part:

"Any person who commits any of the following acts upon a child who is under 14 years of age and 10 or more years younger than the person is guilty of aggravated sexual assault of a child:

"(1) A violation of paragraph (2) of subdivision (a) of Section 261.

"(2) A violation of Section 264.1.

"(3) Sodomy, in violation of Section 286, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

"(4) Oral copulation, in violation of Section 288a, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

"(5) A violation of subdivision (a) of Section 289."

Section 288a, subdivision (c)(1) provides: "Any person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he or she shall be punished by imprisonment in the state prison for three, six, or eight years."

Section 289, subdivision (j) provides: "Any person who participates in an act of sexual penetration with another person who is under 14 years of age and who is more than 10 years younger than he or she shall be punished by imprisonment in the state prison for three, six, or eight years."⁷

3. *Section 288a, subdivision (c)(1) and section 289, subdivision (j) are not lesser included offenses to the charged offense of section 269, subdivision (a) in counts 1 through 7*

As is clear from the text of former section 269, subdivision (a), there are numerous alternative predicate acts that can serve as the basis for aggravated sexual assault of a child. Thus, it is clearly possible to commit aggravated sexual assault of a child without committing a violation of either section 288a, subdivision (c)(1) or section 289,

⁷ Section 288a, subdivision (c)(1) and section 289, subdivision (j) contained the same text at the time of the commission of the charged offenses.

subdivision (j), e.g., by committing either "(1) [a] violation of paragraph (2) of subdivision (a) of [s]ection 261," (i.e., forcible rape), or "(2) [a] violation of [s]ection 264.1," (i.e., committing various forcible sexual offenses in concert) or engaging in "(3) [s]odomy, in violation of [s]ection 286, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." (Former § 269, subd. (a).)⁸ It follows, under the elements test, that neither section 288a, subdivision (c)(1) nor section 289, subdivision (j) is a lesser included offense of former section 269, subdivision (a). Therefore, under the elements test, the trial court did not have a sua sponte duty to instruct the jury on either section 288a, subdivision (c)(1) or section 289, subdivision (j).

The trial court also did not have a sua sponte duty to instruct the jury on either section 288a, subdivision (c)(1) or section 289, subdivision (j) under the accusatory pleading test. Count 1 of the accusatory pleading alleged in relevant part:

"The District Attorney of the County of Riverside hereby accuses GREG ALVAREZ of a violation of Penal Code section 269, subdivision (a), subsection (4), a felony, in that on or about September 7, 2001, through and including September 6, 2006, in the County of San Bernardino, State of California, he did willfully, unlawfully, and lewdly commit a violation of subsection (2) or (3) of subdivision (c), or subdivision (d), of Penal Code section 288a, ORAL COPULATION, by force, violence, duress, menace and fear of immediate and unlawful bodily injury, upon JANE DOE [1], a child who was under 14 years of age and *seven or more years younger* than the defendant." (Italics added.)

⁸ The same is true under *current* section 269, subdivision (a), which also provides numerous alternative ways in which an aggravated sexual assault of a child may be committed. (See fn. 9.)

Counts 2 through 5 were identical in all material respects to count 1.

Count 6 alleged in relevant part:

"For a further and separate cause of action, being a different offense from but connected in its commission with the charges set forth in counts 1 through 5 hereof, the District Attorney of the County of Riverside hereby accuses GREG ALVAREZ of a violation of Penal Code section 269, subdivision (a), subsection (5), a felony, in that on or about September 7, 2001, through and including September 6, 2006, in the County of Riverside, State of California, he did commit a violation of Penal Code section 289, subdivision (a), SEXUAL PENETRATION, by force, violence, duress, menace, fear and threat, upon JANE DOE [1], a child who was under 14 years of age and *seven or more years younger* than the defendant." (Italics added.)

Count 7 was identical in all material respects to Count 6.

As is clear from the italicized phrases in the counts quoted above, the People alleged that the victim was *seven or more years younger* than the defendant,⁹ and, as

⁹ It appears that the People's allegation was based on the *current* version of section 269, which provides in relevant part:

"(a) Any person who commits any of the following acts upon a child who is under 14 years of age and *seven or more years younger* than the person is guilty of aggravated sexual assault of a child:

"(1) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261.

"(2) Rape or sexual penetration, in concert, in violation of Section 264.1.

"(3) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 286.

"(4) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 288a.

discussed above, to violate either section 288a, subdivision (c)(1) or section 289, subdivision (j), the victim must be "*more than 10 years younger*," than the defendant. (Italics added.) Thus, since it was possible for the victim of the offenses charged in counts 1 through 7 of the amended information to have been "seven or more years younger than" the defendant (§ 269, subd. (a)), but not "more than 10 years younger" (§§ 288a, subd. (c)(1), 289, subd. (j)) than the defendant, the latter two offenses are not lesser included offenses under the operative accusatory pleading.¹⁰ (See *Banks, supra*, 59 Cal.4th at p. 1160 [an offense is a lesser included offense under the accusatory pleading test where " ' "*the facts actually alleged in the accusatory pleading*, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser" ' "].)

Accordingly, we conclude that the trial court did not err in failing to instruct the jury sua sponte on section 288a, subdivision (c)(1) or section 289, subdivision (j) with respect to counts 1 through 7.

C. *The trial court did not abuse its discretion in failing to exclude uncharged sexual offense evidence that was admissible pursuant to Evidence Code section 1108, under Evidence Code section 352*

Alvarez claims that the trial court abused its discretion in failing to exclude evidence of Alvarez's sexual texting with a minor that was otherwise admissible pursuant

"(5) Sexual penetration, in violation of subdivision (a) of Section 289." (Italics added.)

¹⁰ No portion of the accusatory pleading alleged the actual age of either Jane Doe 1 or Alvarez. "When applying the accusatory pleading test, '[t]he trial court need only examine the accusatory pleading.'" (*Banks, supra*, 59 Cal.4th at p. 1160.)

to Evidence Code section 1108, pursuant to Evidence Code section 352. We review the trial court's ruling for an abuse of discretion. (See, e.g., *People v. Robertson* (2012) 208 Cal.App.4th 965, 991 (*Robertson*) ["A challenge to admission of prior sexual misconduct under Evidence Code sections 1108 and 352 is reviewed under the deferential abuse of discretion standard"].)

1. *Governing law*

a. *The statutory scheme*

Evidence Code section 1108, subdivision (a) provides:

"In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code] [s]ection 1101,¹¹ if the evidence is not inadmissible pursuant to [Evidence Code] [s]ection 352."

Evidence Code section 352 provides:

"The court in its discretion 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."

b. *Relevant case law*

In *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), the California Supreme Court described the factors that a trial court should consider in determining whether to

¹¹ Evidence Code section 1101 provides in relevant part: "(a) Except as provided in this section and in [Evidence Code] [s]ection[] . . . 1108 . . . , evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

exclude evidence that is otherwise admissible pursuant to Evidence Code section 1108, pursuant to Evidence Code section 352:

"[T]rial 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*, at p. 917.)

The *Falsetta* court explained that "the 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." (*Falsetta, supra*, 21 Cal.4th at p. 917.)

A trial court need not expressly refer to all of the *Falsetta* factors in considering whether to exclude evidence pursuant to Evidence Code section 352. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1168 [" '[W]e are willing to infer an implicit weighing by the trial court on the basis of record indications *well short* of an express statement' " (italics added)].)

2. *Factual and procedural background*

a. *Pretrial proceedings*

Prior to the trial, the People filed a motion in limine requesting permission to offer evidence at trial that Alvarez had sent sexually explicit text messages and photographs to

a 16-year-old girl (Jane Doe 2).¹² The People maintained that in the text messages, Alvarez described various sexual acts that he wanted to perform with Jane Doe 2 and sent her photographs of his penis. The People argued that Alvarez's conduct constituted a violation of section 288.2 (sending obscene material to a minor) and that the evidence was admissible pursuant to Evidence Code sections 1108, and 1101, subdivision (b).

The trial court held a hearing on the motion prior to trial. At the hearing, defense counsel requested that the court exclude the evidence pursuant to Evidence Code section 352. Counsel argued that the uncharged offense evidence was "too different" from the charged offenses because the charged offenses involved alleged sexual activity, while the uncharged offenses were merely "exchanges of text messages." In response, the People argued that the evidence "falls squarely within [Evidence Code section] 1108," noting that, "Not only was he sending sexually explicit text messages where he specifically told [Jane Doe 2] how he wanted to have sex with her and what sex acts he wanted to perform on her, sex acts that are similar to what's charged in this case, he also sent her pictures of his penis." The prosecutor also argued that the introduction of the uncharged offense evidence would not be overly prejudicial because Alvarez had not engaged in actual sex acts with Jane Doe 2.

The trial court ruled that the evidence was admissible pursuant to Evidence Code section 1108 and that the court would not exclude the evidence pursuant to Evidence Code section 352. The court stated that introduction of the evidence would not take a lot

¹² Although, in their briefing, the People used the girl's first name, at trial, she testified as Jane Doe 2.

of time and would not mislead the jury. The court also noted that although the charged and uncharged conduct was not the same, Alvarez's "mental state [was] the same in both situations." The court also stated that introduction of the evidence would not be unduly prejudicial in that the conduct involved in the uncharged acts was "not worse than what's charged." Ultimately, the court ruled that, after having performed the "balancing" required by Evidence Code section 352, the court concluded that the evidence would be admitted.

The trial court stated that it was also inclined to admit the evidence pursuant to Evidence Code section 1101, subdivision (b) on the issues of intent, common plan or scheme, and lack of mistake. After the court invited defense counsel to offer any argument against admission of the evidence pursuant to Evidence Code section 1101, subdivision (b), defense counsel stated that he would submit on the matter in light of the court's Evidence Code section 1108 ruling. In response, the court stated, "So using the same [Evidence Code section] 352 analysis, I feel it should come in under [Evidence Code section] 1101[, subdivision] (b) as well."

b. *Defense counsel's renewed objection to the introduction of the uncharged offense evidence*

During trial, outside the presence of the jury, defense counsel renewed his objection to the introduction of the uncharged offense evidence. Counsel argued that it was "pretty clear" what Alvarez's state of mind was with respect to the charged offenses and stated, "[W]e're gonna be conceding some of these points." In response, the trial court said that it would reconsider the admissibility of the uncharged offense evidence if

defense counsel would enter into a stipulation with respect to Alvarez's state of mind in committing the charged offenses. After defense counsel stated that it was unlikely that he would enter into such a stipulation, the prosecutor asserted that Alvarez's state of mind was "clearly an issue" at trial. The prosecutor noted that Alvarez had attempted to minimize his conduct during his police interview and had told police that he was unsure whether he had committed the charged offenses because he had frequently been intoxicated during the relevant time period.

The prosecutor added that there was evidence that Alvarez had told Jane Doe 2 that he had committed sexual acts in front of his then stepdaughter, a girl named S.G.¹³ Defense counsel objected to the introduction of this evidence on the ground that there was no evidence that Alvarez had engaged in any sexual behavior with S.G. The prosecutor responded that the evidence was relevant irrespective of whether sexual acts involving S.G. had *actually* occurred because Alvarez *told* Jane Doe 2 that he had committed such acts and the evidence thus demonstrated Alvarez's state of mind. After the court confirmed that the statements concerning S.G. had been provided in discovery, the court ruled that this evidence would also be admissible.

c. Jane Doe 2's testimony

Jane Doe 2 met Alvarez, who is her cousins' uncle, when she was approximately 15 years old. Jane Doe 2 saw Alvarez at family events at least once a month on a consistent basis for approximately a year. When Jane Doe 2 was 16, Alvarez sent her

¹³ At trial, Jane Doe 2 testified that S.G. was Alvarez's girlfriend's daughter, not his stepdaughter.

numerous sexually explicit text messages. Jane Doe 2 explained that Alvarez texted her that he wanted to kiss, touch, and "finger" her. Alvarez also texted Jane Doe 2 that he wanted to have sex with her. The People showed the jury photographs of several of the text messages, and read the contents of the texts to the jury. Alvarez also sent Jane Doe 2 photographs of his erect penis on approximately three or four occasions.

Jane Doe 2 also stated that Alvarez texted her a photograph of his girlfriend's daughter, S.G., sitting on the couch with her legs slightly open.¹⁴ Jane Doe 2 stated that Alvarez told her that his girlfriend had performed oral sex on him in front of S.G. In addition, Jane Doe 2 said that Alvarez told her that he had masturbated in S.G.'s presence and asked her if she wanted to "join." When Jane Doe 2 asked Alvarez whether he had really done that, Alvarez responded "no," and told her that he had been joking. The parties stipulated that if called to testify, Alvarez's former girlfriend and S.G. would state that "nothing inappropriate occurred between them and . . . Alvarez."

3. Application

The trial court reasonably determined that, although the charged and uncharged conduct was not identical, Alvarez's "mental state [was] the same in both situations." Alvarez sent text messages to Jane Doe 2 in which he described his desire to perform various sexual acts with Jane Doe 2 that were similar to the acts on which the charged offenses were based. Further, Alvarez told Jane Doe 2 about his purported commission of other sexual acts in front of a minor. This evidence bore substantial probative value in

¹⁴ Jane Doe 2 stated that S.G. was approximately 14 or 15 years old at the relevant time.

proving his commission of the charged offenses, all of which involved sexual conduct with a minor. (See *Falsetta*, *supra*, 21 Cal.4th at p. 917 [noting that "the probative value of 'other crimes' evidence is increased by the relative similarity between the charged and uncharged offenses"].)

The trial court also reasonably concluded that introduction of the uncharged offense evidence would not be unduly prejudicial in that the conduct was "not worse than what's charged." Evidence that Alvarez had sent Jane Doe 2 sexually explicit text messages was far less inflammatory than his commission of the charged offenses. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1287 [stating the fact that evidence of uncharged offense was "less inflammatory" than charged offenses supported conclusion that trial court did not abuse its discretion under Evidence Code section 352 in refusing to exclude evidence offered pursuant to Evidence Code section 1108].) In addition, the court did not abuse its discretion in determining that the introduction of the evidence would not be overly time consuming. Further, the trial court properly determined that the introduction of evidence of the uncharged offenses was unlikely to mislead the jury, since the evidence pertaining to Jane Doe 2 was entirely distinct from that involving Jane Doe 1.¹⁵

¹⁵ We are not persuaded by Alvarez's contention that the evidence pertaining to sexual conduct involving S.G. was "particularly confusing" because it suggested additional sexual misconduct, and the trial court failed to instruct the jury that the evidence was not offered to prove that Alvarez had actually engaged in sexual conduct with S.G. To the extent that Alvarez desired such a limiting instruction, it was his burden to request one. (See, e.g., *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1316 ["[i]n the absence of a request, a trial court generally has no sua sponte duty to give a limiting instruction"].) In addition, the possibility of the jury finding that Alvarez had engaged in sexual conduct with S.G. was lessened by the stipulation read to the jury stating that, if

Additionally, although not specifically mentioned by the trial court, the uncharged acts were not particularly remote in time from the charged crimes.¹⁶ "Numerous cases have upheld admission pursuant to Evidence Code section 1108 of prior sexual crimes that occurred decades before the current offenses." (*Robertson, supra*, 208 Cal.App.4th at p. 992.) Further, in light of the introduction of the actual text messages in evidence, there was a high degree of certainty that Alvarez had in fact committed the uncharged offenses. The probative value of the uncharged offense evidence was also increased by the fact that the charged and uncharged offenses involved different victims. (See *Falsetta, supra*, 21 Cal.4th at p. 917.) Moreover, since it was essentially undisputed that Alvarez had committed the uncharged offenses, Alvarez did not face a significant burden in defending against them. In fact, his attorney conceded during his closing argument that "[h]e sent her those text messages."

Alvarez's arguments to the contrary are unpersuasive. Alvarez's primary argument is that, due to differences in the ages of the victims and the nature of the conduct at issue in the charged and uncharged offenses, evidence of the uncharged evidence was "simply not probative," in determining whether he committed the charged offenses. We disagree. (See *People v. Escudero* (2010) 183 Cal.App.4th 302, 311 ["the prior offense evidence had substantial probative value despite the differences in the ages of the females"]);

called to testify, S.G. and Alvarez's former girlfriend would each state that no such sexual conduct occurred.

¹⁶ The People's motion in limine suggested that Alvarez sent the texts to Jane Doe 2 in 2011, which was approximately five years after the end of the date range specified in the first amended information for Alvarez's commission of the charged offenses.

People v. Soto (1998) 64 Cal.App.4th 966, 984 [" "[m]any sex offenders are not 'specialists', and commit a variety of offenses which differ in specific character" ' "].)

Alvarez cites *People v. Earle* (2009) 172 Cal.App.4th 372 (*Earle*), in which the Court of Appeal concluded that evidence of the defendant's commission of an *indecent exposure* offense would not be admissible pursuant to Evidence Code section 1108 to prove his propensity to commit an *assault with intent to rape* because "the uncharged offense has no tendency in reason to show that the defendant actually *has* the propensity whose proof the statute authorizes." (*Earle, supra*, at p. 397.) Even assuming that we were to agree with *Earle*, in this case, the uncharged and charged offenses were far more similar than the offenses in *Earle*, in that through his commission of the *uncharged* offenses, Alvarez described his desire to commit acts that were similar to the *charged* offenses. Thus, as stated above, the introduction of the uncharged offense evidence had "some tendency in reason to show that the defendant is predisposed to engage in conduct *of the type charged.*" (*Ibid.*)

Alvarez also argues that the trial court erred in admitting the uncharged offense evidence because his "propensity for a sex offense and intent were not truly at issue," in light of the evidence presented at trial. The trial court clearly did not abuse its discretion in determining that in view of defense counsel's unwillingness to enter into a stipulation concerning Alvarez's intent, and the equivocal nature of Alvarez's admissions in the pretext call and in his police interview, the uncharged offense evidence had significant probative value in proving Alvarez's intent in committing the charged offenses. Finally, while Alvarez is correct that the fact that he had not been convicted of the uncharged

offenses increased the possibility of prejudice (see *Falsetta, supra*, 21 Cal.4th at p. 917), this factor clearly did not mandate the exclusion of the evidence.

Accordingly, we conclude that the trial court did not abuse its discretion in failing to exclude uncharged sexual offense evidence that was admissible pursuant to Evidence Code section 1108, under Evidence Code section 352.¹⁷

IV.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.

¹⁷ Alvarez also argues that the evidence of other sexual offenses was not admissible under Evidence Code section 1101. However, given our determination that the trial court did not abuse its discretion in permitting the evidence to be introduced pursuant to Evidence Code section 1108, which permits a more expansive use of prior offense evidence than that permitted under Evidence Code section 1101, subdivision (b), we need not address the admissibility of the evidence under Evidence Code section 1101, subdivision (b). (See *People v. Britt* (2002) 104 Cal.App.4th 500, 506 [stating that because the trial court properly admitted the testimony concerning the uncharged offenses under Evid. Code, § 1108, appellate court had no need to reach the question of the admissibility of that evidence under Evid. Code, § 1101].)