Filed 12/18/12 P. v. Rowe CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,	
Plaintiff and Respondent,	E054284
v.	(Super.Ct.No. SWF1100107)
GENE ALEX ROWE,	**ORDER MODIFYING OPINION**
Defendant and Appellant.	[NO CHANGE IN JUDGMENT]

THE COURT

It is ordered that the opinion filed herein on November 30, 2012, be modified as follows:

1. On page 1, add new footnote 1 at the end of the last sentence on the page as follows:

> Defendant Gene Alex Rowe molested his 10-year-old niece by "dry-humping" her and by sticking his hand down her pants.[1]

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[1] Defendant objected to our use of the word "dry-humping" because it does not appear anywhere in the record. However, it accurately summarizes his conduct, as described by the child victim. We place it in quotes, not because it appears in the record, but because it is slang. If we knew a more dignified synonym, we would use it.

2. This change will necessitate renumbering the remaining footnotes accordingly.

Except for this modification, the opinion remains unchanged. This modification does not effect a change in the judgment.

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RICHLI
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.

Filed 11/30/12 P. v. Rowe CA4/2 (unmodified version)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GENE ALEX ROWE, Defendant and Appellant.	E054284 (Super.Ct.No. SWF1100107) **OPINION**

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik, Judge. Affirmed.

Jill M. Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Meagan Beale and Heather F. Crawford, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Gene Alex Rowe molested his 10-year-old niece by “dry-humping” her and by sticking his hand down her pants.

After a jury trial, defendant was found guilty on two counts of forcible lewd acts on a child under 14. (Pen. Code, § 288, subd. (b)(1).) He was sentenced to a total of 16 years in prison, plus the usual fines and fees.

Defendant now contends that the trial court erred by:

1. Admitting evidence that defendant had committed a previous sexual offense against a child.

2. Admitting evidence of defendant's sexual thoughts, sexual fantasies, and sexual conduct not amounting to a sexual offense.

3. Overruling defendant's psychotherapist-patient privilege objection to statements that defendant made in interviews that were required by his treatment program.

4. Excluding evidence of specific acts of violence by the victim's older brother, which, defendant argued, led to the victim having a motive to fabricate.

We find no error. Hence, we will affirm.

I

FACTUAL BACKGROUND

A. *The Case Against Defendant*.

1. *The charged molestation*.

Defendant and his wife lived in Vallejo. He worked as a truck driver.

Jane Doe[1] was defendant's niece. Doe and her family lived in Lake Elsinore.

[1] The trial court ordered that the record refer to the victim by this fictitious name. (Pen. Code, § 293.5.)

One time, in the fall of 2009, during a truck run, defendant stayed overnight with Doe's family. At the time, Doe was 10.

The next morning, Doe's father was outside chopping firewood; her mother had gone to the store. Doe was in her bedroom. Defendant came into the room. He had a "weird" smile, "like a smirk." He pushed Doe down on the bed, "[w]ith force." He then got on top of her and rubbed his "privates" against hers. When Doe's father called for defendant to come and help him, defendant stopped and left.

About 10 or 20 minutes later, however, defendant came back in. Once again, he pushed Doe down and got on top of her. He tried to kiss her, but she blocked him with a toy shield. He rubbed his privates against hers again.

After Doe was able to get up, defendant said he was going to give her a "front wedgie." To forestall this, she turned around and pulled up her own panties. Defendant, however, said, "[L]et me make sure," then put his hand down her pants, between her pants and her panties. Her father called to defendant again, and defendant left.

When Doe's mother got back, she found Doe sitting in her bedroom, with the lights out and the door closed. This was unusual. Doe's mother could tell something was wrong, although Doe denied it.

Defendant later told his wife that he had been alone with Doe in her bedroom, playing with her and tickling her. His wife found this "unusual."

Over the next year, Doe gradually became more and more depressed and withdrawn. At the time, her parents thought this might be related to her older brother, Nathaniel. Nathaniel had a severe anxiety disorder; he was violent and threatening

toward members of his family. Doe called him "scary." Doe and her parents did not feel safe around him.

In the fall of 2010, Doe told her mother about the molestation. At the time, Nathaniel was away at a wilderness therapy camp, and he was not due to return home for about six weeks.

Doe's mother called the police. As a result, a member of the Riverside Child Assessment Team (RCAT) conducted a forensic interview of Doe.

In the interview, Doe said that, when defendant entered her bedroom, " . . . I had my lights off and my door open cuz [*sic*] sometimes I just like the dark." At trial, however, Doe's mother testified that Doe would not normally be "in the room . . . with the lights off in the middle of the day."

In the interview, and also at trial, Doe said that she was wearing sweat pants. In the interview, however, she said that defendant "grab[bed] my belt loop and st[uck] his hand down my pants." "[H]is hand . . . locked on my belt loop so I couldn't pull away." At trial, she explained that she just meant that he had grabbed her pants (possibly referring to the waistband).

In the interview, Doe said that, after defendant left, she went outside and sat on a swing for a long time. However, as already mentioned, Doe's mother testified that, when she got home, she found Doe in her bedroom.

In a jailhouse phone call with his wife, defendant said, " . . . I'm the one . . . who has messed up. I'm the one who has brought this on the family and I'm the one . . .

who's responsible . . . ." He added that he had "not listen[ed] when if I had . . . there wouldn't have been room for accusations."

2. *Defendant's sexual history*.

a. *1991 interview by Detective Peregrin*.

In 1991, in Oregon, defendant had been arrested as a result of an incident involving a 10-year-old girl named M.M. Defendant was 18 at the time. Detective Peter Peregrin interviewed him. A tape of the interview was played for the jury.

Defendant claimed that M.'s older brother "br[ought] her over to do some sexual things." Her brother bribed her with a bike. Defendant watched while the brother orally copulated her. Defendant became aroused. He "pretended to bump her on the vagina, but did not penetrate her . . . ."

While M. was there, a girl named S., who was seven or eight years old, knocked on the door. Defendant asked S. if she had breasts and pubic hair. He told Detective Peregrin that he was "trying to gain [S.'s] trust so possibly later on if I couldn't find sexual . . . gratification I could . . . have her available." Ultimately, however, he masturbated instead.

In the interview, defendant admitted engaging in "sexual activity" with children. Sometimes, if the "victim" (defendant's word) was reluctant to comply, defendant would get angry and more sexually aggressive.

Defendant had engaged in "sexual activity" with persons ranging in age from four to 34. While in a relationship with a girl who was "[a]bout 17 1/2," he had had sex with her several times, including sexual intercourse, oral sex, and digital penetration.

Defendant also admitted having difficulty controlling his "sexual appetite."

Detective Peregrin testified that defendant "maintained an erection throughout the whole interview."

Later in 1991, defendant pleaded guilty to committing first degree sodomy[2] against M. and was sentenced to five years in prison.

b. *1998 and 1999 interviews by James Kirsch*.

James Kirsch testified that he was in the business of interviewing parolees and probationers. Defendant's treatment program had hired Kirsch to interview him.

i. *May 1998 interview*.

Defendant's treatment program required him to keep a "victim list." Accordingly, in a May 1998 interview, defendant provided a list of 21 victims. Most of these encounters had occurred when defendant was a minor himself. During the interview, defendant provided the names of seven additional victims; these encounters had all occurred when defendant was 17 or 18.

ii. *September 1999 interview*.

As part of his treatment program, defendant also kept a "fantasy log." In a September 1999 interview, defendant said that most of his fantasies involved adults, but

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[2] In Oregon, the crime of sodomy requires "deviate sexual intercourse." (O.R.S. §§ 163.385, subd. (1) [third degree], 163.395, subd. (1) [second degree], 163.405, subd. (1) [first degree].) Deviate sexual intercourse is defined as "sexual conduct between persons consisting of contact between the sex organs of one person and the mouth or anus of another." (O.R.S. § 163.305, subd. (1).) Thus, sodomy can be committed by oral copulation as well as by anal intercourse. (See *State v. Steele* (1978) 33 Or.App. 491, 498-499.)

some involved girls as young as 13. He also "expressed shame at erections he sometimes experienced while holding [his girlfriend's son]."

c. *1999 written statement.*

In 1999, defendant gave a written statement to his probation officer. In it, he admitted that in July 1998, he had had "sexual thoughts" about an 11- to 13-year-old girl whom he met at a friend's house. She was wearing a loose-fitting tank top; he noticed that she was not wearing a bra. He imagined "wrestling with her to get a feel." However, when he "realized where this was leading," he "[im]mediately left the house."

Defendant's statement concluded, "I think the majority of minor[s] are safe because I don't feel attraction sexual or otherwise to them. I do think a [c]ert[ai]n cat[e]gory of minor[s] are at risk. I think female[s] going through puberty are at the highest risk & I need to address that issue before I can say I'm safe to be around them."

B. *Defendant's Testimony*.

1. *The charged molestation.*

Defendant denied touching Doe "with any type of sexual intent[.]"

He testified that, on the day in question, Doe's mother was home all day; Doe's father was chopping wood and doing other work outside. Defendant was "roughhousing" with all of the children, all over the house. He was in and out of Doe's bedroom at least five times. According to defendant, there was a "huge" window in Doe's bedroom; the shades were up, and Doe's father kept walking by.

Some of the children made a "dogpile" on Doe in her bedroom. Those children then left the room, but Doe stayed behind, on her bed. Defendant "tried going over and

kind of tickling, kind of coaxing her out." She kicked him away, but playfully, not angrily. He said, "Okay. Well, you can stay here. I'm going to go out and play with the others . . . ."

There were two or three other times when Doe stayed alone in her bedroom and defendant tried to coax her out. At one point, he noticed that her underwear was sticking out above the beltline of her shorts. He gave her a wedgie by pulling on it. However, he denied having any sexual intent, and he denied putting his hand down her pants.

Later that day, when defendant left, Doe hugged and kissed him and said she would miss him.

According to defendant, about two months before disclosing the molestation, Doe told him that she wanted to come and live with him to get away from Nathaniel. She said that Nathaniel was beating her, and she was afraid he would kill her. When defendant said he could not help her, Doe got angry and threatened to "make [him] pay . . . ."

Defendant explained that, in the jailhouse phone call with his wife, he was merely apologizing for creating the opportunity for accusations to be made.

2. *Defendant's sexual history*.

Defendant admitted having a sexual "fixation" on girls aged 11 to 13 who were starting to develop. He also admitted that he was the one who offered M. a bike, and that he, as well as her brother, orally copulated her. He thought that was what he had told Detective Peregrin, but he admitted that, at least according to the transcript of the interview, he had been "minimizing."

Defendant denied, however, committing any sexual offenses since the 1991 offense involving M. At the time of trial, he claimed, he no longer had any interest in sex with children.

As a result of his 1991 conviction, he had received counseling and treatment. At trial, he discussed "cycling," which he described as a four-phase process: (1) "pretend normal," in which he told himself he did not have a problem; (2) "buildup," which included fantasies and planning; (3) "acting out," which was "the actual carrying out of the victimization"; and (4) "justification," in which he minimized his conduct, telling himself, for example, "At least I'm not raping." Through therapy, he claimed, he had learned to control his cycling.

According to defendant, Doe had been too young to appeal to him; she was undeveloped, like "a board up and down." Moreover, she would have been "the worst kind of victim," because she was not withdrawn, isolated, or easy to manipulate.

Defendant admitted getting erections while holding his girlfriend's son, but he testified that he was not sexually aroused by the boy; he simply got "unexplain[ed] erections," even in the absence of any sexual thoughts.

II

EVIDENCE OF DEFENDANT'S SEXUAL THOUGHTS, FANTASIES, AND CONDUCT

Defendant contends that the trial court erred by admitting evidence of the sexual conduct that resulted in his 1991 conviction and by admitting evidence of his sexual thoughts, sexual fantasies, and other sexual conduct.

A. *Additional Factual and Procedural Background*.

In its trial brief, the prosecution indicated that it intended to introduce evidence of defendant's "history of molestation." (Some capitalization omitted.) Specifically, it intended to introduce evidence of:

1. Defendant's molestation of M. and his resulting 1991 conviction.

2. Defendant's statements about the molestation of M. (i.e., his statements to Detective Peregrin), including that:

a. Defendant had "ha[d] sexual relations with children as young as 4 years old."

b. Defendant "ha[d] a problem with his overactive sex drive."

c. Defendant was grooming a younger girl in the hope of obtaining sexual gratification from her.

3. Defendant's statements "about his sexual interests" (i.e., his statements to Kirsch and his 1999 written statement), including that:

a. Defendant had "ongoing fantasies about women as young as 13 years old."

b. Defendant got "sexually aroused when he picked up small children."[3]

The prosecution argued that this evidence was admissible under Evidence Code section 1101, subdivision (b), to prove propensity, and/or section 1108, to prove intent.

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[3] The prosecution also intended to introduce evidence that defendant had "admitted sexually fondling females as young as 6 to 8 years old" and "digitally penetrating an 8 year old female and performing oral sex on a 9 year old female." However, this evidence was never actually offered or admitted at trial.

Defense counsel objected: "The type of evidence that we're talking about in 1108, though, is commission of other sexual offenses, not thoughts [or] fantasies . . . . [¶] . . . 1108 is not . . . about thinking about sex. It's about actual other sexual offenses. . . . [T]he code section contemplates conduct."

Defense counsel also objected that defendant's statements to Kirsch were more prejudicial than probative. Finally, he argued that the 1991 conviction was remote.

The prosecutor responded that some of defendant's statements were "about specific acts of conduct," and the rest were relevant to intent.

The trial court ruled: "Well, I think 1108 does extend to these types of situations because . . . specific intent is something that has to be established . . . ." It further ruled that the evidence was admissible under Evidence Code section 1101, subdivision (b) to show "intent or motive."

The trial court also ruled that the evidence was not more prejudicial than probative. However, it excluded incidents that occurred when defendant was a minor. It also limited the number of sexual thoughts or fantasies that the prosecution could introduce: "If the testimony here is, 'Well, here's what he stated he thinks about doing,' I would maybe allow six of those in. Because I'm afraid if we go into 10, 12, 20 — all of a sudden it's cumulative."

B. *Analysis.*

1. *The 1991 conviction.*

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 Section 1101, if the evidence is not inadmissible pursuant to Section 352."

Defendant's 1991 conviction, and the conduct underlying that conviction, constituted "evidence of the defendant's commission of another sexual offense" for purposes of admissibility under Evidence Code section 1108. Defendant does not argue otherwise.

Defendant does argue, however, that this evidence was more prejudicial than probative.

"Like any ruling under section 352, the trial court's ruling admitting evidence under section 1108 is subject to review for abuse of discretion. [Citations.]" (*People v. Story* (2009) 45 Cal.4th 1282, 1295.) "'Under the abuse of discretion standard, "a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' [Citations.]" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286.)

Evidence that defendant had a propensity to commit sexual offenses against underage girls was substantially probative. "'In the determination of probabilities of guilt, evidence of character is relevant. [Citations.]' [Citation.] Indeed, the rationale for excluding such evidence is not that it lacks probative value, but that it is too relevant." (*People v. Fitch* (1997) 55 Cal.App.4th 172, 179.) It was particularly probative in this case, because it tended to prove that defendant acted with a sexual intent when he committed the charged crimes.

At the same time, the evidence in this case was not particularly prejudicial. ""The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'"" [Citation.] Evidence need not be excluded under this provision unless it 'poses an intolerable "'risk to the fairness of the proceedings or the reliability of the outcome.'"' [Citation.]" (*People v. Alexander* (2010) 49 Cal.4th 846, 905.)

The prior molestation was not particularly inflammatory. The victim participated willingly, in exchange for a bike. Her older brother was present and participated in the molestation, thus further inducing her cooperation, while lessening defendant's individual culpability. Finally, the sexual conduct consisted of oral copulation, not penetration.

Defendant argues not so much that the prior molestation was inflammatory, but that it was *more* inflammatory *than the current offense*. Reasonable minds could differ. The victim in this case was defendant's own niece, which some could view as significantly more heinous. Also, the victim in this case did not consent; thus, defendant used some force to push her down and hold her down. There was evidence that the event had a long-lasting traumatic effect on Doe; there was no such evidence as to M.

In any event, once again, the prior offense had significant probative value. Even if it was more inflammatory than the current offense, it was not so inflammatory that the jury was likely to act out of passion and prejudice rather than reason.

Defendant argues that the prior offense was not similar to the charged offense. However, "[a]dmissibility under Evidence Code section 1108 does not require that the sex offenses be similar; it is enough the charged offense and the prior crimes are sex offenses as defined by the statute. [Citation.]" (*People v. Jones* (2012) 54 Cal.4th 1, 50.)

The jury was made aware that defendant had been convicted of the 1991 offense and sentenced to prison. "[T]he prejudicial impact of the evidence is reduced if the uncharged offenses resulted in actual *convictions* and a prison term, ensuring that the jury would not be tempted to convict the defendant simply to punish him for the other offenses, and that the jury's attention would not be diverted by having to make a separate determination whether defendant committed the other offenses. [Citation.]" (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

The prior molestation also was not unduly remote. "[T]he passage of a substantial length of time does not automatically render . . . prior incidents prejudicial." (*People v. Soto* (1998) 64 Cal.App.4th 966, 991.) "No specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible." (*People v. Branch* (2001) 91 Cal.App.4th 274, 284.) Here, it is reasonable to suppose that a propensity to commit sexual offenses against underage girls could persist for at least 18 years.

Finally, the evidence of the prior molestation did not consume an undue amount of time. Detective Peregrin's testimony — some of which related to other matters (see part II.B.2, *post*) — took up about 35 pages. Defendant's own testimony on the subject took up approximately another 12 pages.

The trial court exercised its discretion carefully and thoughtfully. It did not admit the prosecution's proffered evidence wholesale; it did exclude evidence of incidents that occurred when defendant was a minor, and it limited the prosecution to not more than six incidents. Arguably, the prosecution ultimately exceeded these limits. Even if so, however, defendant does not contend that that was reversible error.

We therefore conclude that the evidence regarding defendant's 1991 conviction was properly admitted.

2. *Defendant's other statements to Detective Peregrin and his statements to Kirsch.*

Defendant contends that, aside from his statements relating to the 1991 conviction, his statements to Detective Peregrin and to Kirsch were not "evidence of the . . . commission of another *sexual offense*" and hence not admissible under Evidence Code section 1108.

The People concede that "Evidence Code section 1108 was not the proper vehicle for admitting th[is] evidence . . . ." They argue, however, that the trial court properly admitted it as evidence of intent under Evidence Code section 1101, subdivision (b).

Defendant responds that "intent was not at issue." However, one element of the crime of a lewd act on a child is "the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of th[e defendant] or the child . . . ." (Pen. Code, § 288, subd. (a).) Defendant argues that he did not deny having a sexual intent when he performed the alleged acts; rather, he denied performing them at all. However, "'a fact — like defendant's intent — generally becomes "disputed" when it is raised by a plea of

not guilty or a denial of an allegation. [Citation.] Such a fact remains "disputed" until it is resolved.' [Citation.] [¶] A defendant may seek to limit the admissibility of . . . evidence by stipulating to certain issues. However, defendant did not do so here." (*People v. Scott* (2011) 52 Cal.4th 452, 471.)

Defendant cites *Bowen v. Ryan* (2008) 163 Cal.App.4th 916. There, a child patient sued a dentist for assault, battery, and professional negligence, alleging that the dentist had restrained him, choked him, and slammed him against a wall. (*Id*. at p. 919.) The appellate court held that the trial court erred by admitting evidence of nine incidents in which the dentist had forcibly touched or hit other child patients. (*Id*. at 924-925; see also *id*. at pp. 921-922.) It specifically held that the evidence was not admissible to prove intent: "[P]laintiff contended that defendant put his arm against his neck and choked him, and then shoved him against a wall. Had defendant conceded doing these acts but sought to defend them as occurring by accident or otherwise, evidence of uncharged acts might have been admissible to establish his intent. [Citation.] But that is not the case. Instead, defendant denied choking or shoving plaintiff. Because the act was not conceded or assumed, defendant's intent was not at issue." (*Id*. at p. 926.)

Bowen, however, was a civil case. Thus, the plaintiff did not have the burden of proving intent beyond a reasonable doubt. In this criminal case, cases like *People v. Scott*, *supra*, 52 Cal.4th 452 are controlling.

In any event, defendant *did* dispute intent. He flatly denied ever touching Doe with any sexual intent. He then gave a lengthy account of roughhousing with Doe, as well as her siblings, all over the house, including in Doe's bedroom. He admitted that he

was in Doe's bedroom at least five times, and that he was alone with her in her bedroom at least twice. He also admitted tickling her and giving her a wedgie. This testimony was clearly intended to suggest that his hand or his crotch may have come into contact with her crotch at some point, but if so, the contact was unintentional and certainly not sexual. Thus, evidence that defendant had a long-standing sexual attraction to children was significantly probative of his sexual intent.

Defendant also argues that the evidence of his sexual thoughts and fantasies was more prejudicial than probative. As already discussed, however, it was significantly probative of defendant's intent. At the same time, it was not particularly prejudicial. Defendant did not go into detail about the nature of his sexual activity with children. The evidence showed that much of it took place when defendant was a minor himself, thus lessening his culpability, although there was still enough of a difference between his age and the victims' ages to show that defendant had an abnormal sexual interest in children.[4]

Defendant argues that three particular items of evidence were not sufficiently similar to the charged offense to be relevant to intent: that (1) he got erections while holding his girlfriend's son; (2) he masturbated a lot; and (3) he had difficulty controlling

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[4] It is arguable that the evidence of defendant's sexual activity with a 17 1/2-year-old girl, when he himself was 18, was irrelevant and/or more prejudicial than probative. Once again, however, defense counsel did not specifically object to this evidence; he did not ask to have the interview with Detective Peregrin redacted in any way. Moreover, defendant does not appear to challenge the admission of this evidence specifically (as distinct from the other evidence of his sexual history) on appeal.

In any event, precisely because this evidence showed a not-abnormal sexual interest in a girl of approximately defendant's own age, we cannot see how it could have been prejudicial.

his sexual appetite. Defense counsel forfeited this contention by failing to object specifically to these particular statements by defendant.

In any event, the fact that defendant got erections while holding a male child was relevant. "Some [pedophiles] prefer males, others females, and some are aroused by both males and females." (American Psychiatric Association, Diagnostic & Statistical Manual of Mental Disorders (4th ed. 2000) Pedophilia, § 302.2, p. 571.)

The evidence that defendant masturbated a lot and had trouble controlling his sexual appetite was likewise relevant. In the interview with Detective Peregrin, defendant indicated that he had difficulty controlling his sexual appetite, *including his sexual appetite for children*, and that he masturbated a lot, *including when he was aroused by children*. Hence, these statements, when taken in combination with defendant's other statements indicating an abnormal sexual interest in children, were sufficiently probative of intent to be admissible.

Defendant's thoughts and fantasies were not particularly inflammatory. Again, they were not set forth in detail. Defendant argues that they were remote. Admittedly, the interview with Detective Peregrin, in 1991, was somewhat remote; however, it was corroborated by the interviews with Kirsch, in 1998 and 1999, indicating that defendant's thoughts and fantasies were both consistent and persistent over time. Finally, this evidence did not take up much time at trial.

We therefore conclude that the evidence regarding defendant's sexual thoughts and fantasies was properly admitted.

3. *Jury instruction.*

The jury was given a modified version of CALJIC No. 2.50.01, which, as relevant here, stated:

"Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in this case.

"Sexual offense means a crime . . . that involves any of the following: contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person.

"One's sexual fantasies may be considered to determine one's intent; however, a person cannot be convicted on the mere basis of one's sexual fantasies alone.

"If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crimes of which he is accused.

"However, if you find . . . that the defendant committed prior sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. . . . Unless you are otherwise instructed, you must not consider this evidence for any other purpose."

In the course of arguing that the claimed evidentiary errors were prejudicial, defendant asserts that "the jury was not properly instructed [on] how to use" this evidence. However, defendant does not argue that, even if there was *no evidentiary* error, there was a reversible *instructional* error. Certainly he does not raise any such argument

under a separate heading or subheading, as would be required. (Cal. Rules of Court, rule 8.204(a)(1)(B).) We deem any such contention forfeited.

Separately and alternatively, we also reject this contention on the merits. First, defendant argues that, because the instruction referred to prior sexual offenses, it did not give the jury any guidance concerning sexual thoughts or fantasies not amounting to a sexual offense. The instruction, however, included a separate paragraph regarding sexual fantasies. Precisely because such fantasies did not amount to a sexual offense, the jury was not likely to be confused.

Second, defendant argues that the separate paragraph regarding sexual fantasies "impermissibly invited the jury to consider [such] evidence . . . for the purpose of establishing [his] propensity to commit the charged offense." Not so. The instruction carefully distinguished "sexual offenses," which could be used as evidence of a "disposition to commit sexual offenses," from "sexual fantasies," which could be used as evidence of "intent." Moreover, it concluded, "Unless you are otherwise instructed, you must not consider this evidence for any other purpose."

We therefore conclude that defendant has not shown that this instruction was erroneous.

III

THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

Defendant contends that the admission of his communications with Kirsch violated the psychotherapist-patient privilege. (Evid. Code, §§ 1010-1027.)

A. *Additional Factual and Procedural Background*.

As noted, in its trial brief, the prosecution sought to introduce statements that defendant had made in his interviews with Kirsch.

At a hearing on the motions in limine, the prosecutor explained: "After the [prior] conviction, the defendant had a series of interviews. This . . . includes polygraph interviews, but it also includes other interviews where the defendant makes many statements. These statements include statements of continued sexual interest in children and fantasies about children and things of that nature up through 1999."

Defense counsel argued: "If the Court does allow them in for any purpose, we'd ask that it be limited to impeachment. They are statements that were made in the context of counseling. . . . [I]t's my understanding he was on parole and was doing this as a mandated part of parole.

"The probative value as to the current charge is minimal. We're talking about statements made in the course of therapy not in prison as part of a rehabilitation process, and [the] potential for prejudice is great. And the reason I say that is because if you're in counseling, you're supposed to be as open as you possibly can. And then to turn around and say . . . you should . . . be prosecuted for the statements that you made while you were in counseling seems to be wrong and prejudicial in a way that doesn't allow for a fair trial."

The prosecutor stated:

"[PROSECUTOR]: . . . Let me be clear. . . . I am not going to be asking for counseling. It is the statements made to individuals other than his counselor.

"THE COURT: Okay. So this would include [*sic*] any statements made in the course of counseling.

"[PROSECUTOR]: That's correct.

"THE COURT: And I think defense might have a point there."

Thereafter, as discussed in part II.A, *ante*, the trial court ruled that the evidence was admissible under Evidence Code sections 1101, subdivision (b) and 1108.

When Kirsch finished testifying, defense counsel moved for a mistrial on the ground that the prosecution had violated the trial court's ruling by eliciting evidence of sexual conduct that had occurred when defendant was a minor. The trial court denied the motion.

B. *Analysis*.

1. *Forfeiture*.

The People respond that defendant forfeited this contention by failing to raise it below. We agree.

"""[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.""" (*People v. Williams* (2008) 43 Cal.4th 584, 620; see also Evid. Code, § 353, subd. (a).)

"A properly directed motion *in limine* may satisfy the requirements of Evidence Code section 353 and preserve objections for appeal. [Citation.]" (*People v. Ramos* (1997) 15 Cal.4th 1133, 1171.) Here, however, the prosecution's motions in limine did not indicate that the psychotherapist-patient privilege was at issue.

Moreover, defense counsel never objected based on the psychotherapist-patient privilege. He conceded that the evidence could be admitted for purposes of impeachment, which would be inconsistent with a claim of privilege. Moreover, while he did allude to some of the policies underlying the privilege, he did so to support an objection that the evidence was more prejudicial than probative. (See Evid. Code, § 352.)

While Kirsch was on the stand, defense counsel did not object at all. And finally, while he did make a motion for mistrial after Kirsch testified, it, too, was not based on the psychotherapist-patient privilege. We therefore conclude that defendant's present contention has been forfeited.

2. *Merits*.

Separately and alternatively, we also reject this contention on the merits.

The psychotherapist-patient privilege applies to "a confidential communication between patient and psychotherapist . . . ." (Evid. Code, § 1014.) "'[C]onfidential communication between patient and psychotherapist' means information . . . transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted . . . ." (Evid. Code, § 1012.)

Defendant argues that, while Kirsch was not a therapist himself, he was either "present to further the interest of the patient in the consultation" or "reasonably necessary

for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted." In principle, we agree. However, we question whether defendant carried his burden of proving that the treatment program that hired Kirsch did, in fact, involve a "psychotherapist," as this term is narrowly defined by California statute. (See Evid. Code, § 1010; see also Cal. Law Rev. Com. com., 29B West's Ann. Evid. Code pt. 3B (2009 ed.) foll. § 1010, p. 5.)[5]

More to the point, however, as a matter of law, the communication between defendant and the therapist was not confidential. Under Oregon law, a sex offender's parole conditions must include "completion of or successful discharge from a sex offender treatment program," which "may include polygraph . . . testing." (O.R.S. § 144.102, subd. (4)(b)(F).) Communications between a certified sex offender therapist and a client are generally confidential; however, there are several statutory exceptions. (O.R.S. § 675.390.) One of these exceptions *allows* the therapist to disclose such communications "[t]o . . . parole and probation officers supervising the client under a mandated sex offender treatment condition imposed by a court or releasing authority." (*Id*., subd. (5).)

Thus, defendant's communications with his treatment program — whether they went through Kirsch or not — were not confidential. It follows that they were not privileged.

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[5] Defendant does not contend that we must apply Oregon law regarding the psychotherapist-patient privilege. Accordingly, he has forfeited any such contention. (*Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 581.)

IV

EVIDENCE OF THE VICTIM'S BROTHER'S ACTS OF VIOLENCE

Defendant contends that the trial court erred by excluding specific acts of violence committed by Doe's brother Nathaniel, because they were relevant to Doe's credibility.

A. *Additional Factual and Procedural Background*.

The prosecution made an oral motion in limine to exclude evidence of Doe's brother's "behavioral problems."

Defense counsel argued that the evidence was relevant to Doe's credibility. As an offer of proof, he stated that Nathaniel "was assaulting [Doe's] father and the other siblings on a daily basis with deadly weapons. . . . [T]he mother and father[] believed that he was in danger of physically harming or killing either the parents or the siblings." He added that defendant would testify that Doe had asked to come and live with him because she was afraid of Nathaniel; when he refused, Doe became "enraged. So enraged . . . that she concocted these false allegations against Mr. Rowe."

Defense counsel also argued specifically that defendant had a constitutional right to present this evidence: "[I]t's the basis of our defense, and we have a right to present a defense to the jury. [¶] We have a right to confront and cross-examine witnesses, and if we're limited in our ability to do so, he's being denied his rights to a fair trial, to due process under the Fifth and Fourteenth Amendment, [and] his right to effective assistance of counsel . . . ."

The prosecution responded that the evidence was more prejudicial than probative.

The trial court ruled that defense counsel could "go into that," but only "in a limited fashion . . . ." It allowed defense counsel to ask Doe if Nathaniel was violent and threatening; if, as a result, she felt unsafe; if she asked to come and live with defendant; and if defendant refused. On the other hand, the trial court excluded evidence of specific instances in which Nathaniel had been violent. It explained that "the probative value . . . is quite minimal," "that would be a whole new trial," and "that would tend to mislead the jury." "The brother is not the one on trial."

Defense counsel noted that Doe's parents had been on the *Dr. Phil* show, where they had made statements about Nathaniel's acts of violence. He asked whether, if Doe or her parents denied that Nathaniel was violent, he could use the parents' statements to impeach them.

The trial court responded: "[I]f the alleged victim states that there have been acts of violence and threats by the brother, that ends it once and for all. If she denies threats or violence . . . by the brother, [the] parents . . . could be asked if in fact there [we]re incidents of violence or threats by the brother without going into them. [¶] If they deny it, then at that point I would like to go further to see exactly what the defense intends on introducing, without at this point stating one way or the other."

Ultimately, both Doe and her parents admitted that Nathaniel had been violent and threatenening.

B. *Analysis.*

The trial court excluded the evidence as more prejudicial than probative under Evidence Code section 352. Defendant does not appear to challenge this ruling. He

argues that the evidence was relevant. However, he never disputes the trial court's conclusion that it was likely to mislead the jury and to consume undue time. Rather, defendant argues only that the exclusion of the evidence violated his constitutional rights to due process and to present evidence.

"'[A]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.' [Citation.]" (*People v. Dement* (2011) 53 Cal.4th 1, 52.) Thus, when evidence is properly excluded under Evidence Code section 352, the defendant's constitutional rights are not violated. (*People v. Mills* (2010) 48 Cal.4th 158, 196 ["having found no error under Evidence Code section 352, we also reject defendant's various constitutional claims"].)

Separately and alternatively, even assuming the trial court misapplied Evidence Code section 352, the error did not violate defendant's constitutional rights. "[T]he trial court's ruling 'did not constitute a refusal to allow defendant to present a defense, but merely rejected certain evidence concerning the defense.' [Citations.]" (*People v. Cowan* (2010) 50 Cal.4th 401, 473.) "A trial court's determinations under Evidence Code section 352 do not ordinarily implicate the federal Constitution, and are reviewed under the 'reasonable probability' standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243]." (*People v. Gonzales* (2011) 51 Cal.4th 894, 924.)

Under the *Watson* standard, any error was clearly harmless. Both Doe and her parents admitted that Nathaniel was threatening, violent, and "scary." As a result, Doe

"didn't feel safe in the house."[6] Defendant testified that Doe asked to come and live with him and, when he refused, she got angry and threatened him.

Defense counsel took full advantage of this evidence in closing argument. His opening words were: "My name is [Jane Doe]. I live in fear. I'm afraid to live in my own house. I've told my parents why I'm afraid. They know. They're afraid too. They've told me that. We're afraid to live in our own house because we don't know what my brother will do. My brother has attacked me in the past, and I live in physical fear of assault every day." He went on to explain how this was relevant to show that Doe lied.

Defendant complains that he was "denied . . . the opportunity to establish the gravity of Nathaniel's conduct . . . ." Defendant's only offer of proof on this point, however, was the transcript of the *Dr. Phil* episode. In it, Doe's parents listed a number of specific instances of violence: Nathaniel punched and kicked people, broke things, hit his father with a poker and with rocks, attacked his mother with a metal candle holder, and stabbed his mother with a pencil. He also broke things, including chairs, a window, and a screen door.[7] There was one reference to him "wailing" [*sic*] on Doe. All of this was fairly encompassed within the family's admission that Nathaniel was violent and threatening and that they were afraid for their safety. We see no reasonable probability that, if these specific instances had been admitted, the outcome would have been any different.

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[6] Defense counsel never actually asked Doe if she had asked to go and live with defendant, even though the trial court had given him permission to do so.

[7] Dr. Phil alluded to three arguably more extreme acts — Nathaniel choking his parents, throwing a shovel, and stabbing the kitchen counter with a knife — but this would have been excludable as hearsay.

V

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.