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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.

RICHARD PATRICK ROSALES,

Defendant and Appellant.

E055105

(Super.Ct.No. SWF10001865)

OPINION

APPEAL from the Superior Court of Riverside County. Eric G. Helgesen, Judge.  
(Retired judge of the former Tulare Mun. Ct. assigned by the Chief Justice pursuant to  
art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Patricia J. Ulibarri, 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, Assistant Attorney General, and William M. Wood and  
Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Richard Patrick Rosales was convicted of five counts of aggravated sexual assault by penetration by force of a child under 14 years of age and 10 or more years younger than defendant (Pen. Code, §§ 269, subd. (a)(5), 289, subd. (a)), five counts of aggravated sexual assault by oral copulation of a child under 14 years of age and 10 or more years younger than defendant (Pen. Code, §§ 269, subd. (a)(4), 288a), and five counts of forcible lewd acts on a child under the age of 14 (Pen. Code, § 288, subd. (b)(1)). Defendant moved for a new trial on the grounds of jury misconduct. The trial court denied the motion and sentenced him to a total term of 150 years to life, plus 40 years. Defendant appeals, contending: (1) the trial court erred in not conducting an evidentiary hearing on his motion for new trial; (2) CALCRIM No. 1191 is unconstitutional; (3) the trial court erred in admitting evidence under Evidence Code section 1108,<sup>1</sup> which is unconstitutional as applied to defendant; and (4) the fine imposed under Penal Code section 667.6, subdivision (f), should be stricken.

## I. PROCEDURAL BACKGROUND AND FACTS

The issues raised in this appeal require only an abbreviated recitation of the pertinent facts. Defendant repeatedly molested his niece (Jane Doe 1) from the time she was eight years old until she was 11, his stepdaughter (Jane Doe 2) from the time she was five or six years old until she was 10 or 11 years old, and his daughter (Jane Doe 3) when she was between the ages of four and six. Jane Doe 1 was born in 1995, Jane Doe 2 was

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<sup>1</sup> All further statutory references are to the Evidence Code unless otherwise indicated.

born in 1984, and Jane Doe 3 was born in 1990. Defendant never faced criminal charges for his conduct with Jane Does 2 or 3. After defendant was arrested, he wrote a letter to his mother from jail, in which he denied molesting Jane Does 2 and 3 but admitted molesting Jane Doe 1.

## II. DEFENDANT’S MOTION FOR NEW TRIAL AND THE NEED FOR AN EVIDENTIARY HEARING

Defendant contends the trial court abused its discretion when it failed to hold an evidentiary hearing prior to denying his motion for new trial. He further claims the failure to hold such hearing left the issue of whether Juror No. 11’s vote was coerced unresolved.

### **A. Further Background Information**

On May 19, 2011, the jury returned guilty verdicts on all 15 counts. After each and every count, the trial court inquired: “Ladies and gentlemen of the jury, is this your verdict?” Each and every time, the jury answered, “Yes.” The prosecutor observed that Juror No. 11 appeared upset, but nodded her head in the affirmative in response to the court’s inquiry. After taking the verdicts, the court asked both counsel if either side wished to poll the jury; neither chose to do so.

On July 29, 2011, defense counsel filed a motion for new trial. Counsel explained that a few weeks after the verdict, Juror No. 11 contacted him and said that she “felt forced to enter a verdict due to the conduct and pressure from the other jurors.” Private counsel was retained to handle defendant’s motion for new trial and a supplemental

motion was filed that included an affidavit from Juror No. 11. According to the affidavit, Juror No. 11 did not find Jane Doe 1 to be credible, did not believe her testimony, and did not participate in voting guilty on counts 1 through 15. Juror No. 11 also claimed that at the end of the trial, the court asked one time whether the jury found defendant to be guilty or not guilty, but did not go through each individual count. She did not answer the question because she was “emotionally drained and extremely upset.”

Upon the People’s request, the matter was continued to September 16, 2011, to allow the People time to respond. Juror No. 11 was ordered to return to the court on September 16 as a potential witness.

On September 16, 2011, the trial court indicated it was inclined to hear from Juror No. 11, but stated that the People had requested an opportunity to first gather affidavits from the other jurors. The court cautioned that “the real issue . . . is whether or not the jury actually voted on these charges.” After obtaining the approval of most of the jurors to unseal their contact information, the prosecutor gathered affidavits from nine of the other 11 jurors. Five of them stated that toward the end of deliberations, Juror No. 11 excused herself from the group and wanted a moment alone. Upon her return, she indicated she was ready to finalize her decision to vote guilty as to all of the charges.

On November 4, 2011, both sides presented oral argument. Defense counsel argued that Juror No. 11 should be allowed to testify because her affidavit was not an “all-encompassing declaration of every possible thing that occurred.” He explained his belief that if she was called to testify, “we would find out what she did or what she didn’t

do under penalty of perjury.” Counsel made an offer of proof as to what Juror No. 11 would say if called to testify: “Are you kidding me? She said that for writing out 15 counts and putting lessers on a piece of paper submitted to them to count and add up—she goes that did not occur to her, that she did not see that. And what she specifically stated is that there was no consideration for lesser counts. She didn’t do lesser counts, and she never voted in any way in any kind of a poll for guilty. [¶] There was a discussion that was made in a general way, and she said guilty as to a conversation but not as to counts specifically. And never was there a discussion about lesser included ones.” Defense counsel argued it would not cause harm or be unfair if Juror No. 11 was called to testify, especially considering the fact that he did not cover everything that he could have in the affidavit.

In response, the prosecutor argued that the “law is very clear in outlining exactly how these procedures are supposed to take place. And it is by way of affidavit.” She maintained it would not make sense to call the jurors to testify as to the very statements they already made in their affidavits. She noted the weight of the evidence overwhelmingly upholds the verdict that was based on written ballots that were counted. “All of the people that spoke with the prosecution and also some that spoke with the defense indicate that there was nothing untoward about what went on in the jury room and about how this group of 12 went about reaching their verdict.”

In deciding the motion, the trial court concurred “that the procedure that is set forth is to have this done by affidavits.” Although the court recognized there were

conflicting affidavits, it stated that it did “not believe that it is appropriate to call witnesses in this matter, and we should proceed on the affidavits.” Relying on the nine affidavits affirming the verdict, the fact that the jury affirmed the verdict in court without any objection, and the prosecutor’s affidavit that she had personally observed Juror No. 11 affirm the verdict, the court found there was an insufficient “showing to impeach the jury verdict and have a new trial in this matter. On that basis, I am going to deny the defense motion.”

### **B. Standard of Review**

“When a defendant has made a motion for a new trial based on juror misconduct, the trial court has the discretion to hold an evidentiary hearing to determine the validity of the charges if there are material, disputed issues of fact. Such a hearing is not to be used, however, as a ““fishing expedition”” to search for possible misconduct. [Citation.] We review the trial court’s decision to deny a hearing on juror misconduct for abuse of discretion. [Citation.]” (*People v. Polk* (2010) 190 Cal.App.4th 1183, 1202.)

### **C. Analysis**

“Our Supreme Court has made clear that a guilty verdict based on the vote of even *one* biased juror cannot be sustained, regardless of whether an unbiased jury would have reached the same result. [Citation.] ‘A defendant is “entitled to be tried by 12, not 11, impartial and unprejudiced jurors. ‘Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction

cannot stand if even a single juror has been improperly influenced.’ [Citations.]”  
[Citation.]” (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1123.)

““When a party seeks a new trial based upon jury misconduct, a court must undertake a three-step inquiry. The court must first determine whether the affidavits supporting the motion are admissible under Evidence Code section 1150, subdivision (a).’ [Citation.] ‘If the evidence is admissible, the court must then consider whether the facts establish misconduct. [Citation.] Finally, assuming misconduct, the court must determine whether the misconduct was prejudicial. [Citations.]’ [Citation.] [¶] . . . [¶] ‘In determining misconduct, “[w]e accept the trial court’s credibility determinations and findings on questions of historical fact if supported by substantial evidence.” [Citation.]’ [Citation.] We review independently whether those facts constitute misconduct. [Citation.]” (*People v. Engstrom* (2011) 201 Cal.App.4th 174, 182-183.)

Pursuant to section 1150, subdivision (a), “jurors may testify to ‘overt acts’—that is, such statements, conduct, conditions, or events as are ‘open to sight, hearing, and the other senses and thus subject to corroboration’—but may not testify to ‘the subjective reasoning processes of the individual juror . . . .’ [Citation.] [¶] Among the overt acts that are admissible and to which jurors are competent to testify are statements [of jurors]. Section 1150, subdivision (a), expressly allows proof of ‘statements made . . . either within or without the jury room . . . .’” (*In re Stankewitz* (1985) 40 Cal.3d 391, 398.)

“Evidence Code section 1150 plays an important role in protecting the finality of jury verdicts. A verdict cannot be impeached simply because it was mistaken or

erroneous. [Citation.] ‘To grant a new trial in these circumstances would permit enterprising but dissatisfied litigants to cull the jurors’ deliberations’ and undermine the ‘stability of verdicts.’ [Citation.] Accordingly, Evidence Code section 1150 “prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors’ mental processes or reasons for assent or dissent. The only improper influences that may be proved under [Evidence Code] section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration.” [Citation.]’ [Citation.]” (*People v. Engstrom, supra*, 201 Cal.App.4th at p. 184; *People v. Cissna, supra*, 182 Cal.App.4th at p. 1116.)

When the defendant moves for a new trial based on jury misconduct, the trial court has the discretion to conduct an evidentiary hearing to determine the truth of the allegations, and to allow the parties to call jurors to testify. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 415.) “This does not mean, however, that a trial court must hold an evidentiary hearing in every instance of alleged jury misconduct. The hearing should not be used as a ‘fishing expedition’ to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating *a strong possibility* that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties’ evidence presents a material conflict that can only be resolved at such a hearing.” (*Id.* at p. 419, italics added.)

In *Hedgecock*, the defense brought a motion for new trial based on misconduct by jurors and by one of the bailiffs who was in charge of the sequestered jury. The defense produced affidavits from two jurors supporting the allegations, and the prosecution produced affidavits of the remaining 10 jurors and of the two bailiffs disputing the allegations. Believing it lacked authority to do so, the trial court refused to hold an evidentiary hearing in order to resolve the evidentiary issues raised by the competing affidavits. (*People v. Hedgecock, supra*, 51 Cal.3d at pp. 411-414.) The California Supreme Court held that the trial court did have the authority to hold an evidentiary hearing, and that under the circumstances, remand was necessary so the trial court could exercise its discretion in determining whether such a hearing was needed. (*Id.* at p. 420.) Thus, the trial court has the discretion to make credibility determinations based on the affidavits and resolve the issue without holding an evidentiary hearing. (*Id.* at pp. 414-415.)

Here, the alleged misconduct occurred during jury deliberations and was not disclosed until after the jury had reached its verdict. The trial court and the parties did not see the actions occur. Hence, there was no inquiry during deliberations or the reading of the verdict. The parties and the trial court were first made aware of possible misconduct when defendant submitted Juror No. 11's affidavit as part of his motion for new trial. According to the affidavit, Juror No. 11 claims to have not participated in the guilty verdicts. She further claims she did not speak up when the verdicts were read because she was "emotionally drained and extremely upset." In response, the trial court

sought, and obtained, permission from the other jurors to allow both parties to contact them. Nine more jurors provided affidavits that consistently contradicted Juror No. 11's claims. Five specifically detailed how Juror No. 11 left the room toward the end of the deliberations, and upon returning, stated aloud that she was ready to finalize her decision to vote guilty as to all counts. Additionally, the prosecutor swore, under penalty of perjury, that Juror No. 11 nodded her head in the affirmative when the court inquired as to whether the guilty verdict read was the verdict of the jury. Further, Juror No. 11's claim that the court inquired only one time as to whether the verdict, as read, was the jury's verdict, is contradicted by the record before this court.

Notwithstanding the above, defendant points out that during deliberations, Juror No. 11 handed the bailiff a note at the same time the foreperson presented a note regarding CALCRIM No. 301. Juror No. 11's note read: "Granted, 'Muffin' example was meant as just that, an example, but wasn't the point of that example to be that current acts were not to be judged solely upon past acts? [¶] Is coincidence in nature of details of prior acts to be given sole weight of guilt simply due to coincidental nature of some similarity of acts? [¶] Is Jane Doe #'s [sic] 2 or 3 supposed to be taken as be all, end all proof of guilt against Def against Jane Doe #1 or to be considered as possible past propensities. Therefore should 2 or 3's testimony supposed to prove credibility of unconvincing testimony of #1?" According to defendant, Juror No. 11 "had serious questions regarding the credibility of the witnesses." Given the fact that the juror wrote a note, unknown to the foreperson, defendant contends such conduct "raises a reasonable

inference that Juror No. 11 was not comfortable with the deliberat[ive] process or asking questions through the jury and the juror foreperson.” Defendant emphasizes Juror No. 11’s claim that “*she* had been *coerced* by jurors in entering her verdict and therefore her verdict had not been a legitimate one.” We view the juror’s note differently. As the People point out, if Juror No. 11 was comfortable sending a note directly to the court through the bailiff, then Juror No. 11 “was aware that she could seek the court’s assistance and was comfortable doing so.” Such action contradicts her claim that she was excluded from deliberations and had not voted at all, but was too “emotionally drained and extremely upset” to say anything. Moreover, it contradicts any claim of coercion. Clearly, Juror No. 11 was comfortable going “rogue” in order to get her question answered regarding a jury instruction.

All of the information regarding the alleged misconduct was before the trial court, which was tasked with determining whom to believe. Given the overwhelming evidence that contradicted Juror No. 11’s claims, the trial court did not abuse its discretion in refusing to conduct an evidentiary hearing on juror misconduct. While defense counsel claims to have “*“minimized* his interview with Juror No. 11 so as not to evade the sacrosanct nature of the deliberative process with a view toward an evidentiary hearing[,]” the reality of the situation remains that the trial court was never required to conduct such hearing. (*People v. Polk, supra*, 190 Cal.App.4th at p. 1202.) More importantly, it is the objective evidence that the trial court must consider. Any further

inquiry would have been addressed to inadmissible matters of the jurors' deliberative process prohibited by section 1150.

### III. CALCRIM NO. 1191

The jury was instructed pursuant to CALCRIM No. 1191 as follows: “The People presented evidence that the defendant committed the crimes of oral copulation, sexual penetration and lewd and lascivious acts on a minor that were not charged in this case. These crimes have been defined for you in these instructions. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit the crimes charged in this case. If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the crimes charged in this case. The People must still prove each charge beyond a reasonable doubt. [¶] Do

not consider this evidence for any other purpose except for the limited purpose of determining the defendant's credibility.”

Defendant contends CALCRIM No. 1191, the standard jury instruction on prior uncharged acts, interferes with the presumption of innocence and his right to have the jury make a determination of guilt upon proof beyond a reasonable doubt. He acknowledges that his substantive challenge to this instruction has been rejected by our Supreme Court in *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016 (*Reliford*), and that we must follow the directions of our Supreme Court on this issue (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). Nonetheless, he raises the issue “for purposes of the state exhaustion rule.”

In *Reliford*, the California Supreme Court rejected a similar challenge to CALJIC No. 2.50.01. It explained: “Defendant complains that, having found the uncharged sex offense true by a preponderance of the evidence, jurors would rely on ‘this alone’ to convict him of the charged offenses. The problem with defendant’s argument is that the instruction nowhere tells the jury it may rest a conviction solely on evidence of prior offenses. Indeed, the instruction’s *next sentence* says quite the opposite: ‘if you find by a preponderance of the evidence that the defendant committed a prior sexual offense . . . , that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime.’” (*Reliford, supra*, 29 Cal.4th at p. 1013.) It also noted that the jury was otherwise correctly instructed regarding the requirement that every element of the charged offense be proved beyond a reasonable doubt. (*Id.* at pp. 1013-1016.) It

concluded: “[N]o juror could reasonably interpret the instructions to authorize conviction of a charged offense based solely on proof of an uncharged sexual offense.” (*Id.* at p. 1015.)

The version of CALJIC No. 2.50.01 that was at issue in *Reliford* is not materially different from CALCRIM No. 1191. Accordingly, other courts, citing *Reliford*, have rejected identical challenges to CALCRIM No. 1191. (*People v. Loy* (2011) 52 Cal.4th 46, 71-74; *People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1103 [Fourth Dist., Div. One]; *People v. Wilson* (2008) 166 Cal.App.4th 1034, 1049 [Sixth Dist.]; *People v. Crompt* (2007) 153 Cal.App.4th 476, 480 [Third Dist.].) Likewise, we reject it here.

#### IV. SECTION 1108

Over defendant’s objection, the trial court admitted evidence of defendant’s prior, uncharged acts of sexual misconduct involving Jane Does 2 and 3 pursuant to section 1108.

##### **A. Constitutionality of Section 1108**

On appeal, defendant claims his right to due process under the Fifth and Fourteenth Amendments was violated by the admission of the testimonies of Jane Does 2 and 3, because section 1108, which allows the admission of propensity evidence, is unconstitutional. Defendant acknowledges that our Supreme Court has rejected a due process challenge to section 1108. “[W]e think the trial court’s discretion to exclude propensity evidence under section 352 saves section 1108 from defendant’s due process challenge.” (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.) Defendant argues that the

reasoning in *Falsetta* is flawed but recognizes that if we conclude *Falsetta* controls the issue, he is presenting the issue only to preserve it for further review. We are bound by the Supreme Court's ruling. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal. 2d at p. 455.) No further discussion of this claim is required. Defendant also asserts that section 1108 violates equal protection because it treats those charged with sexual offenses differently from those who are charged with other offenses. However, we agree with the reasoning of the appellate court in *People v. Fitch* (1997) 55 Cal.App.4th 172, 184 and 185, cited with approval in *People v. Falsetta, supra*, at page 918, rejecting this argument, and adopt it as our own.

#### **B. Probative Value of Defendant's Prior Acts of Sexual Misconduct**

Section 1108, subdivision (a), provides that: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [s]ection 1101, if the evidence is not inadmissible pursuant to [s]ection 352." Section 352 permits the court, in its discretion, to 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. We apply the abuse of discretion standard in reviewing the trial court's resolution of the issue. (*People v. Kipp* (1998) 18 Cal.4th 349, 371.)

Factors that a trial court should consider when deciding whether to allow the presentation of prior sexual offense evidence are: "(1) whether the propensity evidence

has probative value, e.g., whether the uncharged conduct is similar enough to the charged behavior to tend to show the defendant did in fact commit the charged offense;

(2) whether the propensity evidence is stronger and more inflammatory than evidence of the defendant's charged acts; (3) whether the uncharged conduct is remote or stale;

(4) whether the propensity evidence is likely to confuse or distract the jurors from their main inquiry, e.g., whether the jury might be tempted to punish the defendant for his uncharged, unpunished conduct; and (5) whether admission of the propensity evidence will require an undue consumption of time. [Citation.]” (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1117.)

We confine our review to the information provided prior to and during motions in limine, since that was the information available to the trial court at the time it made its ruling. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 998.) We note that defendant's primary objection to the evidence was that it was remote in time and that Jane Doe 3's testimony was particularly prejudicial because she is defendant's daughter. Defendant noted that “these happened quite a long time ago—a significant amount of time. Jane Doe No. 2—I think it talks about how she is 26 years old now, and it happened when she was less than 4 years old. And in terms of Jane Doe No. 3, she is close to—about 20 now, and this happened when she was 4 years old.” The trial court found that the time factor did not keep the evidence out. We agree. (See *People v. Waples* (2000) 79 Cal.App.4th 1389, 1392-1393, 1395 [Fourth Dist., Div. Two] [approximately 20 years between charged and uncharged offenses].) Regarding

prejudice, it appears that the evidence involving Jane Does 2 and 3 was not stronger than the evidence involving Jane Doe 1, if the evidence of physical abuse was excluded. The trial court recognized this and ruled that the physical abuse was not “relevant and could be prejudicial and take up an undue consumption of time as well.” Since the uncharged offense evidence is similar in nature to the charged offense evidence, it does not appear that there was stronger evidence related to Jane Does 2 and 3.

Based upon the foregoing, we conclude the trial court’s decision to allow the prosecution to present evidence of the uncharged acts was reasonable, and therefore, we do not find an abuse of discretion.

#### V. PENAL CODE SECTION 667.6, SUBDIVISION (F) FINE

During sentencing, the trial court imposed a \$20,000 fine pursuant to Penal Code section 667.6, subdivision (f). That subdivision authorizes a fine, not to exceed \$20,000, for persons convicted of certain enumerated sex offenses who had previously been convicted of one such offense. On appeal, defendant contends that because the People did not allege that he had been previously convicted of such an offense, the \$20,000 fine amounts to an unauthorized sentence. The People concede this point. The fine specified in Penal Code section 667.6, subdivision (f), applies to defendants sentenced under subdivision (a) or (b) of the same statute. Subdivisions (a) and (b) require enhanced sentences for defendants with current convictions for enumerated sex offenses and with either one (subd. (a)), or two (subd. (b)), previous convictions for the same enumerated sex offenses. (See Pen. Code, § 667.6, subd. (e) [list of enumerated sex offenses].)

Defendant does not have any qualifying prior convictions and thus cannot be ordered to pay the fine in subdivision (f), as he was not sentenced pursuant to subdivision (a) or (b). Accordingly, this fine should be stricken.

VI. DISPOSITION

We order the abstract of judgment be modified to strike the fine imposed pursuant to Penal Code section 667. 6, subdivision (f). The amended abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

RICHLI

J.