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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.

JAMAR ORONDE MOORE,

Defendant and Appellant.

E062293

(Super.Ct.No. RIF1206606)

OPINION

APPEAL from 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 with directions.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant guilty of three counts of willfully committing a lewd or lascivious act with a child who is under the age of 14 years old. (Pen. Code, § 288, subd. (a).)¹ The jury found true the allegation that defendant committed the offenses against more than one victim. (§ 667.61, subd. (e)(4).) The trial court sentenced defendant to prison for a term of 30 years to life.

Defendant raises seven issues on appeal. First, defendant contends the trial court erred by admitting evidence of uncharged sexual misconduct. (Evid. Code, § 1108.) Second, defendant asserts, if his trial counsel waived the Evidence Code section 1108 issue, then he received ineffective assistance of counsel. Third, defendant contends the trial court erred by allowing Jane Doe 2 (JD2) to testify prior to her mother and aunt, who were JD2's support people. (Pen. Code, § 868.5.)

Fourth, defendant asserts the trial court erred by instructing the jury with CALCRIM No. 1191. Fifth, defendant contends the trial court erred by instructing the jury with CALCRIM No. 375. Sixth, defendant asserts the cumulative effect of erroneously instructing the jury with CALCRIM Nos. 375 and 1191 deprived him of a fair trial. Seventh, defendant contends the trial court erred by imposing a no contact order that lacked an expiration date. The People concede defendant's seventh contention is correct. We affirm the judgment with directions.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL AND PROCEDURAL HISTORY

A. PROSECUTION'S CASE

1. *JANE DOE 2*

JD2 was born in 1998 and was defendant's niece. At the time of trial, JD2 was 15 years old. When JD2 was approximately five years old, she went to defendant's house to play with defendant's daughter, Jane Doe 4 (JD4). JD2 and JD4 played with dolls while at defendant's house. While the girls played, defendant placed a blanket over JD2, which covered her from her waist to her feet. Defendant then touched JD2's feet. The feet touching occurred on approximately five separate occasions. Defendant told JD2 that he was massaging her feet.

One day, the rubbing on JD2's feet did not feel like defendant's hand because it felt "wet and cold." JD2 lifted up the blanket. JD2 saw defendant was rubbing his penis on her foot. JD2 told JD4 to look at what defendant was doing. JD4 looked underneath the blanket and said, "Ew." Defendant became upset and told JD4 not to look under the blanket. JD2 moved her feet away from defendant.

In first grade, JD2 attended a school assembly about sexual abuse. After the assembly, JD2 told her mother about defendant touching her feet. When JD2 was 13 or 14 years old, she told her cousin, Jane Doe 1 (JD1), about defendant touching her feet.

2. *JANE DOE 1*

JD1 was born in 2000 and was defendant's niece. At the time of trial, JD1 was 13 years old. When JD1 was approximately seven years old, she spent the night at defendant's house. While at defendant's house, JD1 shared a bed with JD4 and JD4's

brother. JD1 had not yet fallen asleep when she saw defendant in white boxer shorts. JD1 felt something round, about the size of a 50-cent piece, that wasn't exactly hard or soft rubbing her feet. The rubbing was an up and down motion and lasted for approximately 20 seconds. JD1's feet then felt wet with a thin liquid that was more "like water" than lotion.

JD4 and JD4's brother were asleep. JD1 asked JD4, "Did you see that?" JD4 said, "No," and fell back asleep. Defendant left the room. JD1 lay in the bed feeling "awkward."

3. *JANE DOE 4*

Defendant was not charged with misconduct related to JD4. (Evid. Code, § 1108.) JD4 was born in 2001 and was defendant's daughter. JD4 was 13 years old at the time of trial. When JD4 was 11 years old, she was sleeping at defendant's house in the same bed as her cousins JD1 and JD3, and a third female cousin. JD4 awoke when defendant opened the bedroom door. Defendant touched JD4's foot with his penis. Approximately one year after the touching, defendant told JD4 he had washed her and her cousins' feet.

4. *JANE DOE 3*

Jane Doe 3 (JD3) was born in 2003 and was defendant's cousin. The Riverside County District Attorney's Office charged defendant with willfully committing a lewd or lascivious act upon JD3. (§ 288, subd. (a).) The jury found defendant not guilty of that charge. Defendant, on the night of August 11, 2012, during a meteor shower gathering, had allegedly caused JD3's feet to touch his penis over his swim trunks while

in a hot tub. The following day, JD3 told her mother, Andrea, about the incident in the hot tub.²

5. *INTERVIEW*

On August 14, 2012, defendant spoke with Riverside County Sheriff's Investigator Cole. Defendant admitted that, during the meteor shower gathering, he touched Andrea's foot, which made Andrea uncomfortable. Andrea is in her 30s. Defendant explained that, while Andrea was asleep in a bedroom, he "fondled her foot." Andrea jumped and was startled by the touching. Defendant said, "But growing up, I, I know and I realize that as a little, little boy I've always been—had some foot fetish with them, or fascination with—for women's foot [*sic*]."

In regard to JD1, defendant admitted being in the bedroom, removing JD1's socks, and putting lotion on her feet. As to JD2, defendant said he also put lotion on her feet. Defendant explained, "I just have this thing with cleaning peoples' feet and rubbing lotion on them."

B. DEFENDANT'S CASE

Andrea testified as a defense witness. Andrea recalled awaking, during the night of the meteor shower gathering, to defendant touching her feet. Andrea was with JD3 while she was in the hot tub with defendant.

² We have excluded the victims' and alleged victims' mothers' surnames in an effort to protect the victims' and alleged victims' identities. No disrespect is intended.

JD2's mother, Isabel, testified as a defense witness. When JD2 was in the first grade, she told Isabel about defendant touching her feet with his penis. Isabel asked JD2 if defendant had his pants on during the touching, at which point JD2 became hysterical and cried. JD2 refused to talk further about the touching. Isabel did not contact law enforcement because she was unclear as to whether defendant was wearing clothes when he touched JD2.

JD1's mother, April, testified as a defense witness. When April heard about defendant touching Andrea's feet, she asked her daughters if defendant had been touching them inappropriately. JD1 denied that defendant had touched her in an inappropriate manner. April then asked if defendant ever touched their feet, at which point JD1 became upset. JD1 told April defendant rubbed her feet, but JD1 did not know with what body part or object defendant rubbed her feet.

Defendant testified at trial. Defendant denied intentionally rubbing his penis on the feet of JD1, JD2, JD3 and JD4. However, defendant admitted touching the feet of JD1, JD2, JD4, and Andrea. Defendant explained that JD2's feet accidentally touched his penis at one point.

DISCUSSION

A. EVIDENCE CODE SECTION 1108

1. *PROCEDURAL HISTORY*

Defendant was not charged with molesting his daughter, JD4. The prosecutor filed written motions in limine. In the motion, the prosecutor explained that, after defendant's preliminary hearing, JD4 informed an investigator that defendant rubbed his

penis on her foot. The prosecutor sought to admit evidence of the uncharged conduct involving JD4 because it demonstrated defendant's propensity to commit sexual crimes. (Evid. Code, § 1108.)

The prosecutor asserted the charged and uncharged acts were similar, and therefore the uncharged acts were not more inflammatory than the charged conduct. The prosecutor asserted a jury instruction could cure any issues caused by defendant not having been charged or convicted of the acts involving JD4. Additionally, the prosecutor argued two witnesses, one of whom was already scheduled to testify, would provide the evidence of the uncharged acts and thus would not consume an undue amount of time. Defendant's trial counsel did not object to the prosecutor's Evidence Code section 1108 motion.

2. ANALYSIS

(a) Contentions

Defendant raises two issues related to the uncharged sexual offense evidence. (Evid. Code, § 1108.) First, defendant asserts admitting propensity evidence under Evidence Code section 1108 violates due process. Second, defendant contends the evidence involving acts against JD4 should have been excluded under Evidence Code section 352.

(b) Constitutionality

We address defendant's constitutional contention. Our Supreme Court has concluded the use of propensity evidence under Evidence Code section 1108 does not violate due process. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.) Defendant cites to

Falsetta in his appellant’s opening brief and concedes this court is bound by Supreme Court precedent. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455 (*Auto Equity*)). However, defendant seeks to preserve his constitutional argument for possible federal court review. Defendant is correct that we must follow our Supreme Court’s precedent. Accordingly, we conclude the use of propensity evidence, in the abstract, does not violate due process. (*Falsetta*, at p. 917.)

(c) Evidentiary Ruling

We now turn to defendant’s contention that the trial court erred by admitting the propensity evidence involving JD4. The People assert defendant waived this issue for appeal by failing to object in the trial court. We agree defendant waived the issue, but choose to address it on the merits because it is easily resolved. (*People v. Earp* (1999) 20 Cal.4th 826, 884 [failure to object waives the issue for appeal].)

“This court reviews the admissibility of evidence of prior sex offenses under an abuse of discretion standard. [Citation.] A trial court abuses its discretion when its ruling ‘falls outside the bounds of reason.’” (*People v. Wesson* (2006) 138 Cal.App.4th 959, 969.)

“Evidence Code section 352 gives a [trial] court the 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.’” (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1116.) 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 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.” (*Id.* at p. 1117.)

First, in regard to probative value, we examine whether the uncharged conduct is similar enough to the charged behavior to tend to show defendant did in fact commit the charged offense. JD1 was defendant’s niece. When JD1 was approximately seven years old, while JD1 lay awake in a bed with her cousins, including JD4, defendant rubbed his penis on her feet. JD4 was defendant’s daughter—when JD4 was approximately 11 years old, she was sharing a bed with her cousins when she awoke and felt defendant touching his penis to her foot.

The crimes involving JD1 and JD4 are nearly identical because they both involve child relatives sharing a bed and defendant entering the room and touching the girls’ feet with his penis. Due to the nearly identical nature of the acts, we conclude the act involving JD4 has probative value because the JD4 evidence helped to support JD1’s testimony.

Second, we address whether the propensity evidence is stronger and more inflammatory than evidence of the defendant's charged acts. The evidence involving JD4 was not stronger because it was similar in nature to the evidence involving the charged acts—a victim testifying about an event that occurred years prior. Arguably the evidence involving JD4 could be considered more inflammatory because JD4 is defendant's daughter, which presents a closer relationship than with the victims of the charged acts (niece/uncle). However, the possible inflammatory nature of that relationship is balanced by JD4 being older than the victims of the charged offenses. JD4 was 11 years old when defendant allegedly touched her, whereas JD1 was five years old and JD2 was seven years. Thus, the uncharged act is equally inflammatory when compared to the charged acts because, while JD4 has a closer relationship with defendant, the victims of the charged acts were younger and arguably more vulnerable in that sense. Additionally, JD4 was present during the molestation of JD1 and JD2, so the evidence involving JD4 was not more inflammatory because, to the extent one would be more incensed by defendant behaving inappropriately around his own daughter, such evidence was already part of the charged conduct.

Third, we look at whether the uncharged conduct is remote or stale. The uncharged act was more recent than the charged acts. JD2 was 15 years old at the time of trial. Defendant touched her when she was approximately five years old, which would mean the JD2 offenses happened 10 years prior to trial. JD1 was 13 years old at the time of trial. Defendant touched JD1 when she was approximately seven years old, which would mean the JD1 molestation occurred six years prior to trial. JD4 was also

13 years old at the time of trial. JD4 was allegedly molested two years prior to trial, when she was 11 years old. Thus, the uncharged conduct was not remote or stale because it was the most recent conduct.

Fourth, we examine 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. As explained *ante*, the conduct involving JD4 was very similar to the conduct involving JD1; however, because different victims were involved and both testified at trial, it is unlikely the jury would have been confused by the JD4 evidence due to the jury being able to see separate victims were involved. Also, it is unlikely the jury would have wanted to punish defendant for the uncharged, unpunished conduct because the allegations involving JD4 were so similar to the allegations involving JD1 that, if the jury believed the conduct occurred, then it knew defendant would be punished for the behavior via the JD1 allegations. Notably, the jury found defendant not guilty of molesting JD3, which supports the conclusion that the JD4 evidence did not cause the jury to want to punish defendant to a greater degree.

Fifth, we address whether admission of the propensity evidence required an undue consumption of time. JD4's testimony was the primary evidence of the uncharged act. JD4's testimony consumes approximately 30 pages of the reporter's transcript, which, in total, exceeds 500 pages. JD4's testimony was arguably brief given that it was only 30 pages in length, and thus did not consume an undue amount of time.

In sum, the JD4 evidence was probative because it was nearly identical to the JD1 incident and therefore helped to support JD1’s testimony; the JD4 evidence was not more inflammatory than the evidence of the charged acts; the JD4 act was not chronologically remote or stale; the JD4 evidence was unlikely to confuse or distract the jury; and the JD4 evidence did not consume an undue portion of the trial. Accordingly, we conclude the trial court did not err by admitting the evidence of the uncharged conduct. (Evid. Code, § 1108.)

B. INEFFECTIVE ASSISTANCE

Defendant contends that if his trial counsel waived the Evidence Code section 1108 issue for appeal, then he received ineffective assistance of counsel. We elected, *ante*, to address the merits of the uncharged conduct issue (Evid. Code, § 1108), and we concluded the trial court did not err. If we examined the issue without the “abuse of discretion lens,” and instead looked at the issue to determine if reasonable counsel would have objected and if defendant were prejudiced by the failure to object, we would still conclude that the JD4 evidence was so similar to the JD1 evidence that the prejudice prong was not met. (See *In re Welch* (2015) 61 Cal.4th 489, 514 [two prongs of ineffective assistance are deficient performance of counsel and prejudice due to the deficiency].) JD4 was present during the JD1 molestation, the JD4 incident was nearly identical to the JD1 molestation, and the jury found defendant not guilty of molesting JD3. Given these factors, we could not find that defendant was prejudiced by his counsel’s failure to object to the JD4 evidence because there is nothing indicating that, but for the JD4 evidence, a different result would have occurred. (*Id.* at p. 517)

[prejudice requires a showing that counsel’s performance altered the outcome of the case].)

C. SECTION 868.5

1. *STATUTE*

Section 868.5, subdivision (a), provides that a victim in a molestation case may have “up to two persons of his or her own choosing, one of whom may be a witness,” present for support during the victim’s testimony. In regard to procedure, section 868.5, subdivision (c), provides, “The testimony of the person or persons so chosen who are also witnesses shall be presented before the testimony of the prosecuting witness.” In other words, the support people, if they are witnesses, must testify before the victim.

2. *PROCEDURAL HISTORY*

The prosecutor moved in limine to permit JD2 to have two support people present during her testimony—her mother and her aunt. The trial court asked if there were objections, and the prosecutor responded that the mother and aunt were possibly going to be called as witnesses, and would hear JD2’s testimony. The trial court asked if the adults could testify before JD2. The prosecutor said the adults could not testify before JD2 because he had not yet decided whether to call them as witnesses.

Defense counsel said he had subpoenaed both the mother and aunt, and they would testify as defense witnesses. Defense counsel asserted JD2’s support people should not be witnesses; she should have a victim’s advocate, for example. The trial court explained that having potential witnesses present during JD2’s testimony “opens up an avenue of cross-examination for [the] defense.”

When JD2 began testifying, her mother and aunt were present in the courtroom. JD2 said that, after a school assembly on sexual abuse, she told her mother about defendant touching her feet with his penis. JD2 could not recall exactly what she told her mother, but remembered “crying a lot.” During the cross-examination of JD2, the court took its noon recess.

Outside the presence of the jury, defense counsel said he used the recess to research section 868.5, which concerns support people. Defense counsel asserted the prosecution failed to give the required written notice about JD2’s support people. Additionally, defense counsel argued that defendant’s right to a fair trial was violated by having witnesses as support people because they were able to listen to JD2’s testimony. Defense counsel contended the aunt’s and mother’s testimonies were tainted. Due to the lack of notice and the two witnesses being present during JD2’s testimony, defense counsel requested a mistrial.

In regard to notice, the prosecutor asserted he included the notice regarding support people in his written motions in limine, although names were not included in the written motion. As to the support people being witnesses, the prosecutor asserted he did not know until that day that JD2 wanted her mother and aunt to be her support people. The prosecutor asserted the mother and aunt were not percipient witnesses so any tainting of the witnesses was minimal. The prosecutor argued that if the mother’s and aunt’s testimonies differed from what they told the police, then defense counsel could impeach them, and defense counsel could cross-examine them about being present during JD2’s testimony.

In regard to notice, defense counsel asserted a formal notice was necessary—a motion in limine was insufficient. Defense counsel also argued the “real problem” was that the mother and aunt heard JD2’s testimony and could “tailor their testimony” to JD2’s version of the events.

The trial court concluded it had erred by allowing the prosecutor to present JD2’s testimony prior to the testimonies of JD2’s mother and aunt. However, the trial court was not convinced that the error was sufficiently prejudicial that a mistrial was warranted. The court took the matter under submission. The court explained that it needed to know if the witnesses would be called, and if they were called, to what they would testify, before it could rule on the mistrial issue. The court said, “Fortunately, both those witnesses have given statements already. If they’re consistent with the earlier statements, it would be most likely harmless error. If they have a whole different story here, then we have some problems.”

The prosecutor explained that his mistake was unintentional, and he originally had not planned on calling the mother and aunt as witnesses. The prosecutor further asserted the mother and aunt were defense witnesses, which was complicated because if the witnesses had to testify prior to JD2 (a prosecution witness) then the procedure could interfere with defendant’s right not to present any evidence.

When JD2’s testimony resumed, her mother and aunt were not present in the courtroom. The prosecutor did not call either JD2’s mother (Isabel) or aunt (April) as a witness; however, defense counsel called both women, Isabel and April, as witnesses. When Isabel testified, she said she was present during part of JD2’s testimony. Isabel

testified that, when JD2 told her about defendant molesting her, JD2 was crying. Defense counsel asked if JD2 was hysterical. Isabel responded, “Yes, she was.” Defense counsel asked if Isabel told Investigator Cole about JD2 being hysterical. Isabel did not recall speaking to Investigator Cole. When pressed to give a yes or no answer, Isabel said she did not tell Investigator Cole that JD2 was hysterical.

After the close of evidence, the trial court again addressed defendant’s motion for a mistrial. Defense counsel asserted that, at a minimum, the court should declare a mistrial as to the two counts concerning JD2 because Isabel’s testimony was tainted as shown by Isabel adding details about JD2 crying, which matched JD2’s testimony, but were not in Isabel’s original statement to Investigator Cole.

The prosecutor asserted Isabel’s presence during part of JD2’s testimony was relevant to the weight and credibility to be given Isabel’s testimony, but it was not relevant to prejudice. The prosecutor asserted the error was harmless because defense counsel was able to cross-examine Isabel and April about their presence in the courtroom.

The trial court said, “I carefully went through the notes that I took of both Isabel and April’s testimony, and I don’t see that there was any tailoring of testimony to conform with [JD2]. [¶] Isabel admitted the earlier statements that she made to Investigator Cole, statements that were inconsistent with [JD2’s] testimony, namely, crying—Isabel did admit that there was no initial crying by the child. She didn’t backtrack or try to qualify the statements she made to the investigator. [¶] Also, April really didn’t testify about the [JD2] incident at all when her turn came. I don’t see how

her testimony in any way would have been influenced by having heard [JD2]. [¶] So there was technical error. It's unfortunate that it occurred, but I don't see any prejudice here. It's harmless error."

The trial court proposed giving the jury an instruction regarding the presence of Isabel and April during JD2's testimony. The trial court instructed the jury as follows: "Normally witnesses are excluded from the courtroom when other witnesses testify so that their own testimony is not influenced by what they hear. Isabel . . . was allowed to remain present as a support person during her daughter [JD2]'s) testimony. You may consider . . . that fact as another factor in evaluating the credibility and weight to be given to [JD2] and Isabel[']s . . . testimony."

3. ANALYSIS

Defendant contends the trial court erred by failing to follow the procedure set forth in section 868.5. The trial court stated that it erred. We will assume the trial court was correct in finding error and discuss whether the error was harmless.

Defendant contends the harmless beyond a reasonable doubt standard should apply because the court's error impacted defendant's constitutional right to confront witnesses. (*Chapman v. California* (1967) 386 U.S. 18, 24.) For the sake of judicial efficiency, we will apply the standard defendant has selected. Under the *Chapman* standard we consider whether, beyond a reasonable doubt, the error did not contribute to the verdict. (*Ibid.*)

When JD2 testified, she could not recall exactly what she told her mother about the molestation, but remembered “crying a lot.” Isabel testified that she asked JD2 if defendant had his pants on when defendant touched JD2, at which point JD2 became hysterical and cried. JD2 refused to talk further about the touching. Isabel did not contact law enforcement because she was unclear as to whether defendant was wearing clothes when he touched JD2. Isabel did not recall speaking to Investigator Cole, but when pressed to give a yes or no answer, said she did not tell Investigator Cole about JD2 crying.

The foregoing testimony does not reflect Isabel tailored her testimony to JD2’s version of the events. There is nothing indicating Isabel changed her story after hearing JD2’s testimony. Rather, the record reflects Isabel perhaps left out the detail of JD2 crying when speaking to Investigator Cole, and included that detail at trial. In other words, it does not appear Isabel had said JD2 was stoic when reporting the molestation and then changed her testimony to state JD2 was hysterical. Further, because the only point at issue is whether JD2 was crying, the error was harmless, especially in light of defendant admitting he accidentally touched JD2’s foot with his penis. It is clear to us, beyond a reasonable doubt, that the error of having Isabel testify after being present for part of JD2’s testimony did not contribute to the verdict.

D. CALCRIM NO. 1191

Defendant contends the trial court erred by instructing the jury with CALCRIM No. 1191, which concerns evidence of uncharged sexual offenses (Evid. Code, § 1108). Defendant asserts the instruction violated defendant's right of due process because it permitted the jury to infer defendant was guilty of the charged offenses based upon a finding defendant committed the uncharged act, which only needed to be proved by a preponderance of the evidence. (CALCRIM No. 1191.) Defendant asserts the instruction confused and misled the jury on the burden of proof. Defendant concedes our Supreme Court has rejected a similar argument, but seeks to preserve the issue for possible federal review.

CALJIC No. 2.50.01 was the predecessor of CALCRIM No. 1191. “[T]here is no material difference” between CALJIC No. 2.50.01 and CALCRIM No. 1191. (*People v. Cromp* (2007) 153 Cal.App.4th 476, 480; see also *People v. Villatoro* (2012) 54 Cal.4th 1152, 1160 [citing *Cromp* for the “no material difference” conclusion].)

In discussing CALJIC No. 2.50.01, our Supreme Court rejected the argument defendant presents in the instant case. Our Supreme Court wrote, “We do not find it reasonably likely a jury could interpret the instructions to authorize a conviction of the charged offenses based on a lowered standard of proof. Nothing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed a prior sexual offense.” (*People v. Reliford* (2003) 29 Cal.4th 1007, 1016 (*Reliford*).)

Because there is no material difference between CALCRIM No. 1191 and its predecessor CALJIC No. 2.50.01, we are bound by our Supreme Court’s precedent. (*Auto Equity, supra*, 57 Cal.2d at p. 455 [Supreme Court decisions are binding on lower courts]; see also *People v. Cromp, supra*, 153 Cal.App.4th at p. 480 [relying on *Reliford* when discussing CALCRIM No. 1191].) Accordingly, we must conclude the use of CALCRIM No. 1191 did not violate defendant’s right of due process.

E. CALCRIM NO. 375

Defendant contends the trial court erred by instructing the jury with CALCRIM No. 375, which concerns using evidence of uncharged acts to prove identity, intent, common plan, motive, and/or lack of mistake or accident (Evid. Code, § 1101, subd. (b)). Defendant asserts the instruction permitted the jury to convict defendant under a standard of proof that is lower than beyond a reasonable doubt. Defendant concedes this court is bound by Supreme Court authority that has rejected similar arguments, but seeks to preserve the issue for possible review by other courts. (*Auto Equity, supra*, 57 Cal.2d at p. 455 [Supreme Court decisions are binding on lower courts]; *Reliford, supra*, 29 Cal.4th at pp. 1013-1016 [uncharged sexual offense instruction does not violate due process, with comparisons to Evidence Code section 1101, subd. (b) evidence].) Because we are bound by Supreme Court precedent, we conclude the trial court did not err.³

³ In defendant’s opening brief, he asserts it is unclear why the court instructed the jury with CALCRIM No. 375 because “[t]he People sought admission of the uncharged offense . . . only pursuant to Evidence Code section 1108.” Contrary to
[footnote continued on next page]

F. COMBINATION OF CALCRIM NOS. 375 AND 1191

Defendant contends the combined effect of CALCRIM Nos. 375 and 1191 lowered the prosecution's burden of proof.

In *Reliford*, in discussing the uncharged sexual offense instruction, our Supreme Court wrote, "We do not find it reasonably likely a jury could interpret the instructions to authorize conviction of the charged offenses based on a lowered standard of proof. Nothing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed a prior sexual offense The instructions instead explained that, in all other respects, the People had the burden of proving defendant guilty 'beyond a reasonable doubt.' [Citations.] Any other reading would have rendered the reference to reasonable doubt a nullity." (*Reliford, supra*, 29 Cal.4th at p. 1016.) In sum, our Supreme Court has concluded that the uncharged sexual offense instruction is a correct statement of the law, and does not confuse the jury.

Further, in discussing the uncharged sexual offense instruction, the high court compared it to the Evidence Code section 1101, subdivision (b) instruction. In particular, the court wrote, "We likewise reject the Court of Appeal's assertion that the instruction, even if correct, is too 'complicated' for jurors to apply. This is not the first time jurors have been asked to apply a different standard of proof to a predicate fact or

[footnote continued from previous page]

defendant's position, the prosecutor sought to have the uncharged offense evidence admitted pursuant to Evidence Code sections 1108 and 1101, subdivision (b).

finding in a criminal trial. (E.g., CALJIC Nos. 2.50 [evidence of other crimes under Evid. Code, § 1101]) As we do in each of those circumstances, we will presume here that jurors can grasp their duty—as stated in the instructions—to apply the preponderance-of-the-evidence standard to the preliminary fact identified in the instruction and to apply the reasonable-doubt standard for all other determinations.” (*Reliford, supra*, 29 Cal.4th at p. 1016.)

We are bound by our Supreme Court’s conclusion that the jury instructions are not confusing and do not lead to the application of a lower standard of proof. (*Auto Equity, supra*, 57 Cal.2d at p. 455 [Supreme Court decisions are binding on lower courts].) Accordingly, we conclude the combination of the instructions does not require reversal.

G. PROTECTIVE ORDER

Defendant contends the trial court erred by imposing a no contact order without an expiration date. The People concede defendant is correct.

The trial court had authority to impose a protective order that lasted 10 years. (§ 136.2, subd. (i)(1).) At the sentencing hearing, the trial court said, “And, obviously, you’re to have no contact with either of the victims in our case, either in custody or out of custody.” Neither the reporter’s transcript nor the clerk’s transcript reflects an expiration date for the no contact order. Accordingly, we conclude the trial court erred. We will direct the trial court to amend the protective order to include the duration of the order. The duration should “be based upon the seriousness of the facts before the court,

the probability of future violations, and the safety of the victim and his or her immediate family.” (§ 136.2, subd. (i)(1).)

DISPOSITION

The trial court is directed to amend the protective order to include the duration of the order. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

KING
Acting P. J.

CODRINGTON
J.