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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ALFREDO CISNEROS,

Defendant and Appellant.

F068173

(Super. Ct. No. F12901591)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Hilary A. Chittick, Judge.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and John G. McLean, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Poochigian, J. and Peña, J.

## **INTRODUCTION**

Defendant Jose Alfredo Cisneros was charged with two counts of committing a lewd act upon a child (Pen. Code, § 288, subd. (a)),<sup>1</sup> one count of sexual penetration with a child 10 years of age or younger (§ 288.7, subd. (b)), and one count of continuous sexual abuse of a child under the age of 14 (§ 288.5). It was further alleged that the two counts of committing a lewd act upon a child involved multiple victims within the meaning of section 667.61, subdivision (e)(4). A jury found defendant guilty on all counts and found the allegations to be true. Defendant was sentenced to an aggregate term of 41 years to life in prison.

On appeal, defendant argues the trial court erred by instructing the jury with a modified version of CALCRIM No. 1191. Specifically, defendant contends (1) the instruction improperly permitted the jury to consider currently charged offenses as evidence of his propensity to commit other currently charged offenses; (2) the charged offenses were too dissimilar, remote, and unconnected to be probative of propensity; and (3) the instruction was defective because it did not state that the jury needed to find defendant committed the earliest crime before it could find him guilty of the later crimes on the basis of propensity evidence. We disagree, and affirm the judgment.

## **FACTS**

On March 2, 2012, defendant's nine-year-old daughter informed her teachers that she had been molested by defendant on February 9, 2012. The matter was reported to the police. On March 10, 2012, defendant's stepdaughter reported to police that she had been molested by defendant from the age of seven or eight to the age of 11 or 12. Defendant was subsequently charged with the molestation of both girls.

At defendant's trial, the trial court instructed the jury with the following modified version of CALCRIM No. 1191:

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

“The People presented evidence that the defendant committed the crime of child molestation and sexual penetration of M.C. as alleged in Counts 1 and 2, and child molestation and continuous sexual contact as to E.S. as charged in Counts 3 and 4. The crimes are defined for you in the instructions for each of the crimes. If you decide that the defendant committed any of these charged offenses as to one of the minors beyond a reasonable doubt, you may but are not required to conclude from that evidence that the defendant was disposed or inclined to commit the other charged crimes of child molestation and based on that decision also conclude that the defendant was likely to and did commit the other offenses of child molestation.

“In addition, if you decide that the defendant committed any of the charged offenses you may but are not required to consider that evidence for the limited purpose of deciding whether or not: the defendant acted with the intent of arousing, appealing to or gratifying the lust, passions or sexual desires of himself or the child or the defendant’s alleged actions were the result of mistake or accident. In evaluating this evidence consider the similarity or lack of similarity between the uncharged offenses and the charged offenses.

“If you conclude the defendant committed a charged offense as to one minor beyond a reasonable doubt, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove the defendant guilty of another charged offense as to the same or a different minor. The People must still prove each element of every charge and prove it beyond a reasonable doubt before you may consider one charge as proof of another charge.”

The jury convicted defendant on all counts. This appeal followed.

## **DISCUSSION**

### ***I. Defendant’s challenges to the jury instructions are forfeited.***

On appeal, defendant objects to the modified version of CALCRIM No. 1191 on three separate grounds. However, while defendant objected to the trial court’s first modified version of the instruction, he did not object to the final form of the instruction at the trial court level. Therefore, defendant’s arguments are forfeited. (*People v. Rivera* (1984) 162 Cal.App.3d 141, 146.) Even if defendant had preserved his claims, we find them to be without merit for the reasons explained below.

***II. The jury instruction explaining that defendant's charged sexual offenses may be considered as evidence of his propensity to commit other charged sexual offenses was not improper.***

First, defendant argues that the jury instructions violated his federal right to due process by permitting the jury to consider currently charged offenses as evidence of his propensity to commit other currently charged offenses. We disagree.

In *People v. Villatoro* (2012) 54 Cal.4th 1152 (*Villatoro*), our Supreme Court rejected an identical argument concerning an instruction that was virtually identical to the instruction in this case.<sup>2</sup> In *Villatoro*, the court noted that Evidence Code section 1108 permits juries to use ““evidence of the defendant’s commission of another sexual offense or offenses”” as propensity evidence, and held that “[t]his definition of ‘another’ contains no limitation, temporal or otherwise, to suggest that [Evidence Code] section 1108 covers only offenses other than those for which the defendant is currently on trial.” (*Villatoro*, *supra*, at pp. 1160-1161.)

As we follow our Supreme Court’s decisions, defendant’s argument must be rejected. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

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<sup>2</sup> The instruction in the *Villatoro* case reads as follows:

““The People presented evidence that the defendant committed the crime of rape as alleged in counts 2, 4, 7, 9, 12 and 15 and the crime of sodomy as alleged in count 14. These crimes are defined for you in the instructions for these crimes. [¶] If you decide that the defendant committed one of these charged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit the other charged crimes of rape or sodomy, and based on that decision also conclude that the defendant was likely to and did commit the other offenses of rape and sodomy charged. If you conclude that the defendant committed a charged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove the defendant is guilty of another charged offense. The People must still prove each element of every charge beyond a reasonable doubt and prove it beyond a reasonable doubt before you may consider one charge as proof of another charge.”” (*Villatoro*, *supra*, 54 Cal.4th at p. 1167, fn. omitted.)

***III. The charged offenses were not dissimilar, remote, or unconnected.***

Defendant also argues that, even under *Villatoro*, the trial court erred by instructing the jury with the modified version of CALCRIM No. 1191, as the charged offenses were too dissimilar, remote, and unconnected to be probative for propensity purposes. We disagree.

In *Villatoro*, the court stated the following:

“Though recognizing that evidence of the charged offenses may not be excludable under [Evidence Code] section 352, the Court of Appeal below concluded that nothing precludes a trial court from considering [Evidence Code] section 352 factors when deciding whether to permit the jury to infer a defendant’s propensity based on this evidence. It explained: ‘Even where a defendant is charged with multiple sex offenses, they may be dissimilar enough, or so remote or unconnected to each other, that the trial court could apply the criteria of [Evidence Code] section 352 and determine that it is not proper for the jury to consider one or more of the charged offenses as evidence that the defendant likely committed any of the other charged offenses.’ We agree.” (*Villatoro, supra*, 54 Cal.4th at p. 1163.)

Here, however, we do not find that the charged offenses were dissimilar, remote, or unconnected. Defendant was charged with the molestation of his stepdaughter from the ages of seven or eight to 11 or 12, and the molestation of his nine-year-old daughter. While the molestations of his stepdaughter and daughter were separated by a period of several years, they both involved children who were under his care and approximately the same age at the time of the sexual abuse. Given the high degree of similarity in the charged offenses, we must reject defendant’s argument.

***IV. The trial court was not required to instruct the jury to establish the commission of the charged offenses in chronological order.***

Finally, defendant argues the modified instruction was defective because it did not inform the jury that it needed to find defendant had committed the earliest crime before it could find him guilty of the later crimes on the basis of propensity evidence. Again, we disagree.

Defendant's argument is premised on the notion that only prior offenses can serve as propensity evidence. There is no reason, however, why later offenses cannot or should not be used to establish that a defendant has a propensity to commit a particular offense. In fact, Evidence Code section 1108 explicitly states, "evidence of the defendant's commission of *another sexual offense or offenses* is not made inadmissible by [Evidence Code] Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352." (Italics added.) Nothing in that language limits Evidence Code section 1108's application to *prior* sexual offenses only. Accordingly, the jury was free to find defendant had committed the most recent offenses and then use that finding as propensity evidence for the earlier offenses.

#### **DISPOSITION**

The judgment is affirmed.