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

THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
MARTIN JUAREZ,  
  
Defendant and Appellant.

F069188  
  
(Super. Ct. No. DF011203A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman, II, Judge.

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

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Jeffrey Grant, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Gomes, Acting P.J., Kane, J. and Franson, J.

In March 2014, a jury found defendant, Martin Juarez, guilty of one count of continuous sexual abuse (Pen. Code, § 288.5, subd. (a))<sup>1</sup> and two counts of committing a lewd act upon a child (§ 288, subd. (a)). Each count involved separate victims. The jury also found allegations that each offense had been committed against multiple victims to be true. The trial court sentenced defendant to an aggregate term of 45 years to life in prison.

On appeal, defendant argues the trial court erred by instructing the jury with CALJIC No. 2.50.01. 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, or unconnected to be probative of propensity; and (3) the instruction improperly lowered the People's burden of proof, specifically that the charged offenses, if proven by a preponderance of the evidence, could be used as propensity evidence that defendant committed the other charged offenses.

We find that the trial court's instruction impermissibly lowered the People's burden of proof on the use of charged offenses as propensity evidence. However, we find this error harmless and therefore affirm the judgment.

## **FACTS**

On June 24, 2013, defendant was charged with sexually abusing his wife's two granddaughters and grandniece between 2006 and 2011. Each girl was under the age of 13 at the time of the abuse. At trial, all three victims testified defendant approached them and engaged in inappropriate conduct with them while they were staying at his house, outside Delano, California.

The first victim testified defendant touched her breasts and vagina on numerous occasions between 2007 and 2009, and would force her to touch his penis by forcefully

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<sup>1</sup> Unless otherwise specified, all statutory references are to the Penal Code.

manipulating her arm, while at the same time he touched her genitals. The second victim testified that on one occasion, in either 2010 or 2011, defendant touched her vagina and attempted to make her touch his penis, but she was able to run away. The third victim testified that in 2009 defendant approached her from behind and put his hands under her shirt and rubbed her breasts. In an instance of uncharged misconduct, the People presented the testimony of another teenage girl who testified that in 2009 defendant had approached her in his home and rubbed her inner thigh. There were no witnesses to these events.<sup>2</sup>

At the conclusion of defendant's trial, the court instructed the jury with CALJIC No. 2.50.01 as follows:

“In determining whether defendant has been proved guilty of any sexual crime of which he is charged, you should consider all relevant evidence[,] including whether the defendant committed *any other sexual crimes*[,] *whether charged or uncharged*[,] about which evidence has been received. The crimes charged in Counts 1, 2, and/or 3, may be considered by you in that regard[.] [A]ny conduct made criminal by Penal Code [s]ection 647.6 [(a)](1). The elements of this crime are set forth elsewhere in these instructions.

“If you find by a *preponderance of the evidence* that the defendant committed *any such other sexual offense*, you may[,] but are not required to[,] infer that the defendant had a disposition to commit sexual offenses. If you find the defendant had this disposition, you may[,] but are not required to[,] infer that he was likely to commit and did commit the crime or crimes of which he is accused. However, even though you find by *preponderance of the evidence* that the defendant committed *other sexual offenses*, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes you are determining.

“If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider[,] along with all other evidence[,] in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crimes that you are

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<sup>2</sup> References to dates in this paragraph were calculated based on the testimony of the victims as to their age and/or birthdate.

determining. You must not consider this evidence for any other purpose.”  
(Italics added.)

The jury convicted defendant on all counts, and this appeal followed.

## DISCUSSION

### *I. Defendant’s Charged Sexual Offenses May Be Considered as Evidence of His Propensity to Commit Other Charged Sexual Offenses.*

Defendant contends that CALJIC No. 2.50.01 violates his right to due process since, in addition to permitting the jury to consider previously uncharged offenses as evidence of his propensity to commit currently charged offenses, it also allowed the jury to consider currently charged offenses as propensity to commit other currently charged offenses as well. The California Supreme Court rejected an identical argument in *People v. Villatoro* (2012) 54 Cal.4th 1152 (*Villatoro*), holding that other charged crimes could be used as propensity evidence. (*Id.* at pp. 1168-1169.)

Because this issue has been decided by our Supreme Court, we must reject defendant’s argument. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

### *II. The Charged Offenses Were Not Dissimilar, Remote, or Unconnected.*

Next, defendant argues that, even under *Villatoro*, the instruction was inappropriate, 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 section 352, the Court of Appeal below concluded that nothing precludes a trial court from considering 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 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 the charged offenses were dissimilar, remote, or unconnected. Defendant was charged with the sexual abuse of three young girls between 2007 and 2011. Each child was under the age of 13 at the time of the abuse, staying at defendant’s house with other family members during school breaks, and each child’s story included substantially similar descriptions of the sexual misconduct engaged in by defendant. Given the similarity, location and time-frame of the charged offenses, defendant’s argument fails.

*III. The Jury Instructions Impermissibly Lowered the People’s Burden of Proof.*

Defendant next contends that CALJIC No. 2.50.01, as given, impermissibly lowered the People’s burden of proof on the use of charged offenses as propensity evidence. Specifically, it allowed the jury to establish the charged offenses for propensity purposes by a preponderance of the evidence, then use that propensity evidence to establish defendant’s guilt. We agree.

It is well settled that prior uncharged instances of sexual offenses need only be established by a preponderance of the evidence to be used as propensity evidence. But the same cannot be said of currently charged offenses. *Villatoro* held that use of charged offenses as propensity evidence requires those charges be proved beyond a reasonable doubt. In *Villatoro*, the jury was instructed with the following, modified version of CALCRIM No. 1191:

““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, italics added.)

This instruction does not mention the preponderance of evidence standard.

On appeal, the defendant in *Villatoro* argued that instruction “failed to designate clearly what standard of proof applied to the charged offenses before the jury could draw a propensity inference from them.” (Villatoro, *supra*, 54 Cal.4th at p. 1167.) The Court rejected the argument, holding the following:

“Unlike the standard pattern instruction CALCRIM No. 1191, which refers to the use of uncharged offenses, *the modified instruction did not provide that the charged offenses used to prove propensity must be proven by a preponderance of the evidence. Instead, the instruction clearly told the jury that all offenses must be proven beyond a reasonable doubt, even those used to draw an inference of propensity. Thus, there was no risk the jury would apply an impermissibly low standard of proof. [Citation.] Moreover, the court instructed the jury with CALCRIM No. 220, which defines the reasonable doubt standard and reiterates that the defendant is presumed innocent; it also explains that only proof beyond a reasonable doubt will overcome that presumption.*” (Villatoro, *supra*, 54 Cal.4th at pp. 1167-1168, italics added.)

Unlike *Villatoro*, the jury instruction in this case did not require the charged offenses be proved beyond a reasonable doubt in order to be used to prove propensity. Instead, the instruction, after defining “any such other sexual offense” to include both charged and uncharged crimes, instructed the jury that “[i]f you find by a *preponderance of the evidence* that the defendant committed *any such other sexual offense*, you may[,] but are not required to[,] infer that the defendant had a disposition to commit sexual offenses.”

This instruction explicitly told the jury that they need only find a charged offense had been committed by a preponderance of the evidence in order for them to use that charged offense to show a propensity to commit other charged offenses. This

impermissibly lessened the People's burden of proof on their consideration and use of material evidence. Although the jury was ultimately instructed that defendant's guilt needed to be proved beyond a reasonable doubt, this separate admonition is insufficient to overcome the direct instruction to the jury that they need only find a charged offense had been committed by a preponderance of the evidence in order for them to use that charged offense to show a propensity to commit other charged offenses.

We conclude CALJIC No. 2.50.01 violates the holding of *Villatoro* and the trial court erred by instructing the jury it could find defendant committed the charged offenses by a preponderance of the evidence for propensity purposes.

*IV. The Instructional Error Was Harmless Beyond a Reasonable Doubt.*

Having concluded the trial court erred by instructing the jury it could find defendant committed the charged offenses by a preponderance of the evidence for propensity purposes, we must determine whether the error was prejudicial. Both defendant and the People agree that, because the erroneous instruction lessened the prosecution's burden of proof below the constitutionally required reasonable doubt standard, and therefore violated his federal due process right to proof beyond a reasonable doubt of each element of the charged offenses, a *Chapman*<sup>3</sup> standard of review is required. (*People v. James* (2000) 81 Cal.App.4th 1343, 1360.) We agree. This requires a careful review of the trial record to determine whether the People have shown "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman, supra*, 386 U.S. at p. 24).

Based on our review of the record, we conclude the *Chapman* standard has been met in this case. Here, four different young women testified they had been sexually abused by defendant and, if credible, their claims were sufficient to establish the elements of the charged offenses beyond a reasonable doubt. By their verdict, we can infer the

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<sup>3</sup> *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).

jury found each of the young girls' testimony credible. (See *People v. Young* (2005) 34 Cal.4th 1149, 1181[“unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction”].) As a reviewing court, we cannot substitute this Court's evaluation of witnesses' credibility for that of the fact finder. (*People v. Barnes* (1986) 42 Cal.3d 284, 304.) As the jury's verdict represents a clear acceptance of the young women's testimony, we conclude the People have shown beyond a reasonable doubt that the instructional error did not contribute to the verdict obtained.

### **DISPOSITION**

The judgment is affirmed.