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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC FRANCIS FAGAN,

Defendant and Appellant.

G049938

(Super. Ct. No. FVI902353)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino, John P. Vander Feer, Judge. Affirmed.

David P. Lampkin, 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, Kristine A. Gutierrez and Warren Williams, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Eric Francis Fagan of first degree murder (Pen. Code, § 187, subd. (a); all statutory references are to the Penal Code unless noted otherwise), and premeditated attempted murder (§ 187; § 664, subd. (a)). It also found he personally used a firearm (§ 12022.5, subd. (a)) and inflicted great bodily injury (§12022.7, subd. (a)). Fagan contends the trial court abused its discretion by admitting evidence (see Evid. Code, §§ 1101, 352) he sexually abused the murder victim’s minor daughters, which the prosecution argued established a motive for the charged crimes. He also faults a jury instruction that provided the jury “may consider how the passage of time could affect the evidence.” For the reasons expressed below, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

In October 1989, Cathy Paternoster and her boyfriend Carl Fuerst lived in the Spring Valley Lake area of Victorville. Cathy had two daughters from a prior relationship, Lisa (born in 1979) and Nicole (born in February 1984). Cathy and Carl had a daughter together, Carla (born September 1985).¹

Fagan, a lawyer, maintained a long-term relationship with Cathy’s mother, Betty. The couple lived in Orange County, and according to Betty, “raised Nicole from the time she was . . . [two or three] months old.”

Fagan and Nicole initially enjoyed a “very good” relationship. He taught her to read and to use the computer. Betty and Fagan grew extremely close to Nicole and wanted to adopt her. But Fagan’s adult daughter Nancy described Fagan’s relationship with Nicole as “peculiar.” She testified he was “obsessed with Nicole” and treated “her

¹ We identify some of witnesses by their given names for convenience and to protect the identity of the minors.

like she is his little wife by the way he holds and touches her.” He “had to be by her all the time.”

Betty and Fagan relocated to Spring Valley Lake, about two miles from Cathy’s home, so “Nicole could be closer with her mother and sisters.” Cathy and Betty opened a women’s gym next to a gym operated by Carl. Fagan, who was no longer practicing law, often watched Nicole when Cathy and Betty both worked. But Nicole “got [to] where she did not want to stay with” Fagan, so Betty took Nicole with her to work. Nicole also did not want to go on a motor home trip with Fagan, and “cried the whole way” during a short practice run.

According to Carl, Cathy attempted to transition Nicole back into her home, but Betty and Fagan “weren’t letting go of her.” Cathy grew concerned something was “going on” between Fagan and her daughters. Carl saw Lisa and Nicole nude in the Jacuzzi, with Fagan “sitting there reading a book watching the girls.”

Sometime around February 1989, Nicole reported to Cathy that Fagan had sexually abused her. Lisa previously had disclosed to Nancy that Fagan sexually abused Lisa. When Nancy confronted Fagan about Lisa’s allegations, he “made up different excuses that he had come out of the shower and [Lisa] had seen him,” but Nancy “could tell that he was lying.” Fagan claimed Lisa caught him masturbating while he watched a pornographic video. He admitted he might have “accidentally got[ten] too low” while tickling Lisa, and suggested Lisa was jealous of Nicole and trying to gain attention. Betty later told Nancy she spoke with Fagan, who promised he “was not going to do anything anymore” Lisa apparently told a social worker she had not been abused, and no further action was taken.

After Nicole's report, Betty confronted Fagan. He left a day or two later, relocating to San Diego in his motor home. Betty persuaded Cathy not to call the police. According to Carl, he and Cathy "pulled [Nicole] out of" Betty's home and told her they "weren't going to do anything[,] just leave us alone"

Betty was distressed about losing contact with Nicole. She and Fagan traveled to Carl's and Cathy's home on three occasions to discuss Nicole. On the final visit, Fagan threatened to turn Carl and Cathy in for violating drug and tax laws, and to "turn all of this around" by accusing Carl of molestation.

Cathy hired a private investigator after receiving information Betty had instituted legal proceedings seeking custody of the children. Carl and Cathy were concerned the children would be kidnapped "if the legal stuff didn't work." Cathy feared Fagan and told Nancy that Fagan had offered Cathy \$100,000 for custody of Nicole. Nancy reported the child abuse to police in early August 1989.

Betty agreed tension developed between her and Cathy because Cathy would not let her visit the children after Fagan left. In the summer of 1989 Betty obtained monitored visitation with the children at Cathy's house. Betty admitted she maintained contact with Fagan after he moved to San Diego as he was her only source of income.

Fagan's son Douglas, a law student who worked in his father's San Diego law office during the summer of 1989, testified Fagan told him Betty was upset because Cathy prevented Betty from visiting her granddaughters. One day on the way to lunch, Fagan stopped at a costume shop and bought a beard that had long gray hair with black undertones. Fagan later warned, "If I have to, I'm going to take the kids so [Betty] can see them."

In late July 1989, Fagan purchased a five-shot stainless steel .38-caliber Ruger SP101 revolver from a Santa Ana gun store. About a month later he purchased a six-shot .357 Ruger GP100 revolver in the San Diego area.

Around 9:00 p.m. on the evening of Wednesday, October 11, 1989, Carl, Cathy, Nicole, and three-year-old Carla returned home in Carl's minivan after a trip to the video rental store. It was dark, and the porch or garage light had been smashed out. Shortly after Carl got out of the minivan, he heard gunshots and realized he had been struck in the back. He dropped to his knees, and a second shot hit him in the right shoulder or armpit area. The shooter, holding a pistol in his right hand, came around the front of the van with the gun pointed at Carl's head. Carl lunged at him and the gun went off, a bullet striking Carl in the chest. Carl tackled the shooter, but the shooter extricated himself and fled. Cathy was lying face down in front of the van. Carl directed the girls to wait while he sought help from a neighbor. When he returned, another neighbor was giving Cathy medical assistance. A helicopter transported Carl to the hospital, where he spent eight days. Cathy, shot in the head and chest, died soon after suffering her injuries.

Carl did not recognize the shooter, but was able to describe the assailant as wearing dark clothing, gloves, and a furry fake white or light-colored beard with no mustache. Carl thought the gunman used a revolver because he did not see shell casings on the ground.

Nicole testified she was five years old at the time of her mother's murder. As she got out of the van after returning from the video store an older person dressed in all black with a grayish beard approached and said, "Hi, Nicole" or "Hey, Nicole." She did not recognize his voice. She told a detective the man wore black clothing, a black

hat, black gloves, and his beard was black and white. He shot Carl and her mother with a black gun and ran away. Nicole told a detective in 1989 the man just said “Hi” or “Hey.”

Nicole also testified about the sexual abuse. She recalled Fagan melting chocolate and putting it on her vagina, and then licking it off. Nicole told a child abuse investigator five days after the murder that Fagan touched her and Carla inappropriately between the legs with his hand, and with white and black chocolate. She tasted the chocolate “[o]ff of him” and “off of his pee-pee” and it tasted “horrible.” He put chocolate between her legs many times and just left it there. He did something like this to Lisa and Carla too.

A sexual examination of Nicole in April 1990 revealed injuries to her vaginal area and scar tissue that could have been caused by chronic rough fondling. The examining physician concluded there was a high probability Nicole had been sexually abused.

Nancy Huerta was driving through Cathy’s and Carl’s neighborhood when she spotted a man 15 to 20 feet away running from the area of the shooting. She described him as a white male, 40 to 50 years old, gray hair, and slender. He wore dark clothing and had a full, grayish beard. She testified Fagan looked like the man she saw running based on his distinctive cheekbones and forehead. According to Betty, Fagan’s appearance had not changed substantially since 1989.

Cathy’s friend Cheryl Sanders observed a man in a black jogging suit walking on the road near Cathy’s home one or two nights before the murder. The man wore a phony-looking black and white or grayish beard, but Sanders “[k]new it was Eric Fagan” by his blue eyes and distinctive, bowlegged walk. She checked the inside of Cathy’s house, and as she came out she heard someone walking on the gravel outside.

Detectives found a fresh-looking latex glove in a vacant lot about two blocks from the crime scene adjacent to a street that provided “the quickest way out of the Spring Valley Lake area.” A criminalist identified male DNA found on the glove as Fagan’s, and a third party lab confirmed the presence of Fagan’s DNA on the finger and palm areas of the glove. Another criminalist found two unique gunshot residue particles inside the manila envelope used to store the glove. Detectives found latex gloves in the trunk of Fagan’s car and at the Santa Ana home of Fagan’s girlfriend, Marie Talley Fortney. They also found gray-colored fibers in the passenger compartment of Fagan’s car.

Fortney said Fagan came to her home on the night of the murder, but left for a while to go to the store or jogging. She did not know how long he was gone because she fell asleep. An employee at Fagan’s law office told a detective Fagan did not come into the office on the day of the murder.

The emergency room physician identified the three bullets that struck Carl as .38-caliber. The two bullets recovered from Cathy’s body likely came from the same .38 special caliber or .357 magnum firearm and could have been fired from a Ruger SP101. The absence of cartridge casings at the scene suggested the rounds came from a revolver. Investigators recovered Fagan’s .357-caliber revolver from Fagan’s attorney, but Fagan claimed his .38-caliber SP101 revolver had been stolen some months earlier, although he had not reported the theft.

Betty’s friend Judith Means called Fagan at Betty’s request at his San Diego office the afternoon following the murder. Means advised Fagan of the shootings. He paused, and then said without emotion, “I’m sorry for Cathy, but I wish they had gotten the stud [Carl].”

After the murder, Betty volunteered to take custody of the children.

According to Nicole, Betty came to her school near Turlock on two occasions. Betty brought toys and tried to coax Nicole to go with her, but the teacher would not permit her to leave. Betty admitted going to court to try and get custody of Nicole after Cathy's murder because she was Nicole's "bonding parent." In 2008, Betty told a detective Fagan was "very emotional and attached to Nicole" and that Fagan "probably thought Betty would get custody after the murders." Betty testified Fagan approached her with a plan to kidnap Nicole, although she could not recall if it was before or after Cathy's murder.

While the trial was pending Fagan's daughter, Nancy, went through Fagan's personal belongings and found a "very meticulous" plan to kidnap Nicole. It contained information about Nicole living near Turlock and references to learning "when she leaves to school," how the bus picked her up, and the time she arrived home. It also included information and articles about disappearing with children, and obtaining new identification and social security numbers. The latest articles were dated in 1989. Betty testified Fagan had hired a private investigator "to check on Nicole where she was living and everything." Fagan testified "if Betty were going to take Nicole, it would have to be done . . . logically, before or after school." Fagan admitted on the stand he probably would have been there to help effectuate the plan because "[o]ne person would have to talk to Nicole and calm her down, while the other person is driving her away." He also admitted he loved Nicole "to pieces," but denied he was obsessed with her.

Fagan testified he did not kill Cathy or attempt to kill Carl, and denied being in Victorville after May 1989. He made a "social call" at Fortney's home the night of the murder and only went out for snacks or beer and was gone less than an hour. He

could not recall if he had been at work that day, or where else he might have been. In his testimony, Fagan representing himself, attempted to refute the prosecution's evidence against him and the prosecutor on cross-examination tested Fagan's explanations.

In his pretrial statements to the police in 2008, and his testimony at trial, Fagan admitted he was very close with Nicole and wanted to adopt her. He admitted showering with Lisa and Nicole while naked, but denied sexually abusing the girls. When Lisa caught him masturbating, he "gave her a little run down on the birds and bees"

Turning to the physical evidence, Fagan claimed he bought a box of latex gloves because he got a "good deal." Fagan explained he used them to put in a rock garden at the Victorville house, and he might have used them to change or put oil in his car, although in his 2008 pretrial statement he did not recall using them. Fagan speculated Detective Jiles rubbed Fagan's DNA on the glove found near the scene.² He "possibly" or "probably" bought the fake beard, but did not recall doing so, and did recall buying a fake mustache. He testified he bought the beard for a Halloween office function, although he did not mention this to the police. He told police he and Betty talked about taking Nicole after Cathy's murder because he loved Nicole. He said "[m]aybe" Betty "would have got Nicole," but it was "kinda far [fetched] to go over and kill a mother to get" Nicole.

Fagan testified Betty was upset about "something that was happening up north with Nicole," but he had concluded there was no legal basis for Betty to obtain custody. Fagan therefore started researching ways for Betty and Nicole to "disappear[]

² The criminalist who swabbed the glove for DNA testified during the prosecution's rebuttal case that no one accessed the evidence envelope containing the glove before she opened it.

without a trace,” but he abandoned the idea after speaking with a criminal defense lawyer. He testified he bought the guns because he “didn’t want to be the last guy running around without something to protect” him if guns were outlawed. He bought the second gun to keep at the office. Told his DNA and gunshot residue was found on a glove near the murder scene, Fagan told detectives he shot the gun in the woods and probably wore the glove, although he could not explain why he would wear a latex glove to shoot a firearm. At trial, Fagan conceded, “the odds were I had not worn gloves [when shooting the firearm], but I couldn’t think of any other possible explanation.”

Fagan admitted he had child pornography on his or his girlfriend’s computer,³ but claimed it was to check the writing sample of an attorney who applied for a position in Fagan’s law firm. The writing sample involved a child pornography case, and files containing child pornography were inadvertently stored in his temporary internet files folder. Computer tracking information revealed Fagan had repeatedly visited child pornography Web sites. Web addresses included the words “littlevirgins” and “underagetop,” others contained variations of the name or word “Lolita,” which Fagan explained was a popular book about “a 14-year-old girl who got involved” with an older man. One of his password protected files was titled “youngest girls.”

Following a trial in December 2012, during which Fagan discharged his retained counsel and represented himself, the jury convicted Fagan as noted above. In February 2013, the court sentenced Fagan to an indeterminate term of 25 years to life for Cathy’s murder, a consecutive term of two years for the section 12022.5 firearm enhancement, and a consecutive term of life with possibility of parole for Carl’s

³ The court had tentatively ruled to exclude this evidence, and barred the prosecutor from mentioning it. Fagan brought the issue up during his direct examination.

attempted murder, with a consecutive term of three years for the section 12022.7 great bodily injury enhancement.

II

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion By Admitting Evidence Fagan Sexually Abused Nicole*

Fagan contends the trial court abused its discretion under Evidence Code section 1101 by admitting evidence he sexually abused Betty's granddaughters. We disagree.

Under Evidence Code section 1101, subdivision (a) evidence that a defendant committed crimes other than those charged may not be admitted to prove a defendant's bad character or disposition. But "[n]othing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

A leading treatise explains how evidence of motive operates logically to prove a material disputed fact. "[I]t is well settled that the proponent may offer the defendant's uncharged misconduct to prove the defendant's motive for the charged crime. Assume that the defendant is charged with murdering the victim. It would be permissible to prove that the defendant had committed a prior rape and that the murder victim knew of the rape. The victim was a potential witness against the defendant. The prior rape

supplies the defendant's motive to kill the murder victim. Again, the ultimate inference may be the defendant's conduct (whether the defendant killed the alleged victim). However, . . . the intermediate inference is not the defendant's personal, subjective character; the intermediate inference is motive This theory of logical relevance is acceptable because it reduces both of the legal relevance dangers forming the traditional justification underlying the prohibition [in section 1101]. . . . Motive is a 'more sharply defined purpose' with 'special probative value.' . . . [M]otive is unique to the defendant; the prosecutor's motive theory of logical relevance has much greater probative value as to the defendant's guilt. The key is establishing that the nonpropensity inference is tenable on the specific facts of the case" (1 Imwinkelried, *Uncharged Misconduct Evidence* (rev. ed. 2013) § 2:21, p. 2-151.)

The prosecution must establish the other acts by a preponderance of the evidence. (*People v. Steele* (2002) 27 Cal.4th 1230, 1245, fn. 2.) We review a trial court's ruling to admit other uncharged criminal acts under Evidence Code section 1101 for abuse of discretion. (*People v. Gray* (2005) 37 Cal.4th 168, 202; *People v. Spector* (2011) 194 Cal.App.4th 1335, 1373 (*Spector*).)

Here, evidence Fagan molested Nicole and her sisters was not admitted to demonstrate an inadmissible aspect of Fagan's character. Rather, the prosecutor offered the evidence to establish Fagan's motive to kill both Cathy and Carl. The prosecutor argued Fagan's obsession with Nicole led him to formulate his murderous plan. Fagan lost his access to Nicole when she reported he sexually abused her because Cathy removed Nicole from Betty's and Fagan's care. Fagan believed Betty might gain custody of Nicole if Cathy died, and Fagan therefore could resume his relationship with Betty and Nicole. As the prosecutor explained before trial, "by taking the lives of Cathy . . . and

Carl . . . , the defendant's girlfriend Betty . . . would most likely gain custody of the children and the defendant would once again have access to the children to resume his molestations." He also explained, Fagan's "plan was to get rid of the parents after he realized that it was going to be a harder task for him to just kidnap Nicole and keep her and being on the run."

Fagan does not challenge the trial court's decision to admit the evidence under Evidence Code section 1101, subdivision (b), but contends the court erred in failing to exclude the evidence under Evidence Code section 352. Where the trial court determines that uncharged conduct is admissible under Evidence Code section 1101, subdivision(b), it must then determine whether the probative value of the evidence is "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404; Evid. Code, § 352.) Fagan cites the general rule that other crimes evidence must be examined with care, received with extreme caution, and if its connection with the crime charged is not clearly perceived, the doubt should be resolved in favor of the accused. (*People v. Guerrero* (1976) 16 Cal.3d 719, 724.) Fagan contends the trial court abused its discretion under section 352 because "the nexus between the uncharged child molestation and the charged crimes of murder and attempted murder [was] weak." We review the trial court's ruling under section 352 for an abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637.) We will not disturb the trial court's exercise of discretion except upon a showing that it "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Fagan contends the “idea that killing Cathy would lead to Betty’s gaining custody of Nicole, which would allow Fagan to resume molesting Nicole, is entirely unreasonable. Fagan could not reasonably have supposed that it could be accomplished.” Fagan asserts that Nicole’s father would gain custody of Nicole if her mother died, and Betty’s chances for custody had been compromised by the sexual abuse allegations against Fagan. He concludes the trial court erred in admitting the evidence because “[n]o reasonable person could have thought that Cathy and Carl’s deaths would improve Betty’s opportunities for contact with her grandchildren.”

We do not find Fagan’s argument persuasive. The trial court reasonably could conclude a person who seriously contemplated kidnapping a child was also capable of acting on a motive almost no one else would consider. Simply put, a motive need not be reasonable or logical. “Using a common-sense standard, the judge must be able to find that the uncharged act *could have induced the charged crime*. The prosecutor does not need to present direct evidence of the defendant’s state of mind, but it must be plausible to believe that the two acts could be causally connected: the uncharged act as cause and the charged crime as effect. [¶] The court must be persuaded that as a matter of common experience and common sense, the alleged motive was strong enough to prompt the charged crime.” (Imwinkelried, *supra*, § 3:16, p.3-104, fns. omitted, italics added.)⁴

⁴ *People v. Foster* (Ill. 1979) 392 N.E.2d 6 supports the trial court’s decision to admit the evidence. There, the defendant had lived with the decedent and her four children for approximately two and a half years. The decedent’s 12-year-old son, Solomon, testified the defendant had forced him to engage in homosexual acts. An acquaintance of the defendant claimed the defendant told her he was distressed by the possibility that the decedent would move to California without him, taking Solomon away from him. The appellate court held the sexual abuse evidence was “relevant [and] central to the establishment of defendant’s motive for killing Solomon’s mother, because

Here, the trial court reasonably could find the probative value of the evidence outweighed any potential prejudice. The prosecution's evidence showed that Fagan and Betty acted as Nicole's mother and father at the time Nicole disclosed the abuse. Nicole lived with them full-time, and only saw her father who lived in the Central Valley, once a year. After Fagan moved out, Betty gained monitored visits, but Cathy opposed her visitation, which threatened Fagan's potential access to Nicole. Cathy also was a witness to Nicole's disclosure that Fagan had sexually abused her, which posed the threat of criminal prosecution to Fagan. With Cathy's death, Fagan might believe that Nicole would return to live with Betty, or at least spend more time with her. Cathy's death also would make it more likely the investigation into the alleged sexual abuse of Nicole would be inconclusive, as Lisa's had been, because Cathy would not be able to testify about Nicole's accusation against Fagan. Fagan had reason to believe Betty would continue to see him despite Nicole's allegations because Betty depended on him financially, and she had continued to see him after he moved out in February 1989.

Evidence that Fagan sexually abused Nicole formed the basis for Fagan's motive to kill Cathy. The evidence supported the conclusion Fagan was *sexually* obsessed with Nicole and therefore would kill her mother for the chance to reunite with her and Betty. For this same reason, we reject Fagan's argument the trial court abused its discretion by failing to limit the motive evidence to Fagan's belief that "killing Cathy and Carl would lead to Betty's gaining custody of her grandchildren, period. The court should have allowed evidence of the less prejudicial theory but excluded the evidence of child molestation." But evidence of Fagan's perverse sexual obsession with Nicole explains why he would stoop to murder. Based on our review of the record, we cannot

that testimony tended to establish a reason why defendant would fear the decedent's taking Solomon away from him" (*Id.* at p. 374.)

say the court abused its discretion by concluding the probative value of the evidence of motive outweighed any potential prejudice.

Citing *People v. Alcala* (1984) 36 Cal.3d 604, 635, Fagan asserts “When there is sufficient evidence of motive, it is error to admit additional, prejudicial evidence to demonstrate that the motive is stronger than might otherwise be thought” and the court should have “sever[ed] relevant from irrelevant portions of evidence . . . to protect” him from “undue prejudice.” In *Alcala*, the defendant was charged with the kidnapping and murder of a young girl. The trial court admitted evidence that on prior occasions the defendant enticed other young girls into his car, took them to isolated places, and subjected them to forced sexual activity and violence. The Supreme Court “reject[ed] any implication that the prior crimes were admissible to establish a *motive* for [the charged] premeditated murder. Common sense indicates that one who commits a felony upon another wishes to avoid its detection. That may lead him to the calculated murder of his victim. Here, the jury could consider the possibility that defendant killed [the girl] in cold blood to prevent her from naming him as her kidnaper. [] [¶] However, the prosecutor argued in effect that defendant’s prior crimes increased his incentive to eliminate [her] as a witness, since they might result in more severe punishment for the current offense. We cannot accept the notion that evidence of past offenses is admissible on this basis. If it were, one’s criminal past could always be introduced against him when he was accused of premeditated murder in the course of a subsequent offense. . . . The prejudicial effect of the prior-crimes revelations would vastly outweigh their slight and speculative probative value.” (*Id.* at pp.634-635.) *Alcala* has no application here because

Fagan’s prior sex crimes related to children of the murder victim, not to unrelated third parties.⁵

Fagan also complains the prosecution exploited the evidence he molested Nicole, but the record shows he took no action to limit the “quantity and the repetition of the evidence of abuse.” Nor did he object to the “pattern of questioning in which a witness was asked whether she remembered making a statement in 1989, and the text of the statement was read at length, and later a detective was asked whether she remembered the witness making the statement in 1989, and the statement was again read at length.” He also did not object to the court’s decision to instruct the jury “on the elements of the offense of lewd act on a child.” We therefore need not address whether error occurred in these instances.

We also note the court instructed the jury on motive and the limited purpose of the molestation evidence. “The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict you may, however, consider whether the defendant had a motive. [¶] Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show that the defendant is not guilty.” The court told the jury “Do not consider [the sexual abuse] evidence for any other purpose except for the limited purpose of motive. [¶] Do not conclude from this evidence that the defendant has a bad character

⁵ The child pornography found on Fagan’s computer long after the murder did not provide a motive for the charged crimes. The trial court excluded this evidence. But Fagan inexplicably testified about the evidence during his direct examination, which “opened the door” to allow the prosecutor to cross-examine him about the subject. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1185 [defendant cannot challenge the admissibility of evidence he elicited himself].) Fagan’s testimony suggested he did not have an obsessive sexual interest in Nicole, but the child pornography evidence, especially the “Lolita” references, rebutted his testimony and undermined his credibility as a witness.

or is disposed to commit [a] crime. [¶] If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all of the other evidence. It is not sufficient by itself to prove that the defendant is guilty”⁶ These instructions mitigated the risk the jury might use the evidence for an improper purpose.

B. *State and Federal Due Process Rights and Rights to Fair Trial*

Fagan also argues admitting evidence of uncharged child molestation denied him his federal and state rights to due process of law and fair trial. He waived any potential constitutional claims because he failed to raise them below. (*People v. Carpenter* (1997) 15 Cal.4th 312, 385.) Additionally, Fagan failed to provide authority showing that admission of uncharged crimes evidence violates a defendant’s constitutional rights. Constitutional prohibitions on the admission of character or criminal propensity evidence are limited to evidence that is not material to any legitimate issue. (*People v. Catlin* (2001) 26 Cal.4th 81, 123.) Because the trial court properly admitted the evidence under well-settled principles of state evidentiary law (§ 1101, subd. (b); § 352), no federal claim arises.

C. *The Trial Court Did Not Prejudicially Err By Instructing The Jury It Could Consider How The Passage Of Time Affected The Evidence*

The prosecution proposed the following special instruction: “The fact that criminal charges were not filed against the defendant until 2009 should not enter your deliberations and should not be considered by you in any way.” Fagan stated he had no

⁶ The court told the jury to “consider the similarity or lack of similarity between the uncharged offenses and the charged offenses.” This portion of the standard instruction is not applicable where the uncharged acts are admissible to show motive. Dissimilar acts may furnish the motive for the charged crime. We discern no prejudice to Fagan by inclusion of this language in the jury instructions, however.

objection. Later, the court on its own motion stated it intended to “make the instruction on your criminal charges a little more neutral,” and modified the instruction to read: “The reason why the District Attorney did not file criminal charges against the defendant until 2009 should not enter your deliberations and should not be considered by you in any way. You may consider how the passage of time could affect the evidence.” Fagan and the prosecutor both stated, “That’s fine.”

Fagan now argues the instruction erroneously invited the jury to apply a lesser degree of proof on an older offense than a more recent charge, explaining “The instruction could be taken to explain away what would otherwise be viewed as defects in the prosecution’s case.” He suggests the instruction relieved the prosecution of its burden to prove beyond a reasonable doubt each essential element of the charged offense, a violation of his rights under both the United States and California Constitutions. (See *Neder v. United States* (1999) 527 U.S. 1, 4.)

Although Fagan did not object to the instruction, instructional error affecting a defendant’s substantial rights may be reviewed on appeal even in the absence of an objection. (§ 1259.) The parties have not cited any authority, nor have we found any, that has either embraced or rejected the identical instruction. One standard instruction, provided in this case, advised the jury to consider the passage of time in evaluating eyewitness identification testimony. (CALCRIM No. 315 [“In evaluating identification testimony, consider the following questions . . . How much time passed between the event and the time when the witness identified the defendant?”])

The challenged instruction neutrally advises the jury it “may” consider the passage of time in evaluating the evidence, similar to CALCRIM No. 315, and did not

reference defects in the prosecution's case. Nor did it invite the jury to accept a lesser degree of proof based on the passage of time.

The trial court directed the jury to consider the jury instructions as a whole and we presume the jury followed the court's directive. Here, the court instructed the jury criminal charges did not constitute evidence the charges were true, Fagan was presumed to be innocent and the prosecution was required to prove his guilt beyond a reasonable doubt, and proof beyond a reasonable doubt was proof that left the jury with an abiding conviction that the charge was true. The jury was also told it must impartially compare and consider all of the evidence received at trial and "[u]nless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty." The jury was also advised that before it could rely on "circumstantial evidence to conclude a fact necessary to find" Fagan "guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt," and "before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty." In the eyewitness identification instruction, the jury was told "[t]he People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find that the defendant is not guilty." Another instruction told the jury to consider Fagan's character evidence "along with all the other evidence in deciding whether the People have proved that the defendant is guilty beyond a reasonable doubt" The court also told the jury that the prosecution must prove that Fagan committed the crimes, and that while Fagan contended he "was somewhere else when the crimes were committed . . . The People must prove that the

defendant was present and committed the crimes” and Fagan did “not need to prove he was elsewhere at the time of the crime. [¶] If you have a reasonable doubt about whether the defendant was present when the crime was committed, you must find him not guilty.” Given the total package of instructions, the challenged instruction could not have relieved the prosecution of the burden of proving beyond a reasonable doubt each essential element of the charged offenses.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.