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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.

NICOLE ETHEL McMILLEN,

Defendant and Appellant.

G050269

(Super. Ct. No. 12HF0546)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Edward Rogan, Judge. Affirmed.

Russell S. Babcock, 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, A. Natasha Cortina, Christine Levingston Bergman, and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

Nicole Ethel McMillen appeals from a judgment after the jury convicted her of numerous sexual offenses. McMillen argues the trial court erred by admitting evidence pursuant to Evidence Code section 1108, and she received ineffective assistance of counsel. Neither of her contentions have merit, and we affirm the judgment.

FACTS

An information charged McMillen with the following: Luke-four counts of lewd act upon a child (Pen. Code, § 288, subd. (c)(1), counts 1, 2, 4 & 5), and two counts of oral copulation of minor (Pen. Code, § 288a, subd. (b)(2), counts 3 & 6); and Christopher-oral copulation of minor (Pen. Code, § 288a, subd. (b)(1), count 7).

Before trial, the prosecution filed a trial brief with in limine motions. As relevant here, pursuant to Evidence Code section 1108 (all further statutory references are to the Evid. Code), the prosecution sought to admit Christopher's testimony that when he was a minor he had sexual intercourse with McMillen, charges the prosecution could not pursue because the three-year statute of limitations had run. The prosecution argued the sexual intercourse evidence was relevant because it involved sex with an underage boy, one of the victims in this case, under similar circumstances. The prosecution added the sexual intercourse evidence was not too remote because it occurred at the same time of the charged offense. The prosecution asserted the sexual intercourse evidence was not unduly prejudicial because it was no more inflammatory than evidence McMillen had committed other sexual acts with minors and been unfaithful to her husband.

At a pretrial hearing, the prosecutor clarified she sought to admit evidence McMillen and Christopher had sexual intercourse on the same night as the conduct charged in count 7. The prosecutor added she also sought to admit brief generic testimony McMillen and Christopher had sexual intercourse once a month over the course of 12 to 18 months. Defense counsel objected on the grounds the evidence was not relevant, the victims were dissimilar, the evidence would likely confuse the jury

because of the different burdens of proof, the evidence was unduly prejudicial, and the evidence's lack of specificity made it impossible to defend.

As to the evidence of sexual intercourse in July 2005, the trial court stated it was mindful of its obligations to balance its relevance against any prejudicial effect. The court added it considered the factors articulated in *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), and concluded the evidence was admissible because it was relevant and not unduly prejudicial or time consuming.

Pursuant to counsels' stipulation, the trial court ruled by minute order concerning the admissibility of generic testimony of sexual intercourse between McMillen and Christopher as follows: "After considering the arguments of counsel and multiple factors articulated in [*Falsetta, supra*, 21 Cal.4th 903], and also after weighing carefully the relevant considerations regarding admissibility under . . . section 352, the court finds the [prosecution's] proffered evidence is admissible under . . . section 1108. The [prosecution is] instructed not to elicit any additional information beyond the offer of proof without first giving notice to [McMillen] in a timely manner." At trial, the parties offered the following evidence.

Prosecution

Christopher D.

Christopher, born in January 1989, was 24 years old when he testified at trial. Christopher's mother, Connie M., was McMillen's childhood friend and went to school with her until Connie's family moved out of state after her freshman year of high school. In July 2005, Connie, her husband, and Christopher moved to Twentynine Palms; Christopher was 16 years old and had just finished his sophomore year.

Shortly thereafter, Connie and her family went to McMillen's house in Irvine for the weekend. Both families went to the beach and on the drive home, Christopher realized he left his cell phone at the beach. McMillen offered to take Christopher to get his cell phone on what was about a 90-minute round trip. Their

conversation during the drive turned sexual in nature, including his sexual experiences and the positions he preferred. They stopped at her friend's vacant house so McMillen could have a cigarette. Christopher knew McMillen had recently ended a long-term affair, and he believed McMillen was interested in him. Upstairs they kissed. They returned to McMillen's home and everyone went to bed; Christopher and his brother shared a bed upstairs.

At some point, Christopher sent McMillen a text message stating he would like to kiss her again. He went downstairs and found McMillen in the living room. In the kitchen they kissed and then went into the garage and got into the backseat of McMillen's husband's Jeep. McMillen first performed oral sex on Christopher and then got on top of him and they had sexual intercourse. They got dressed and as they got out of the Jeep, its alarm went off. Others, including Connie, came downstairs and found McMillen and Christopher in the kitchen. They said McMillen set off the alarm when she got something out of the Jeep and Christopher was the first to make it downstairs.

McMillen's relationship with Christopher continued. She bought him an expensive bracelet and a couple shirts. She also gave him \$400 because he was having troubles with Connie. They kept their relationship a secret. McMillen sent pictures of herself in lingerie to Christopher, and she got breast implants.

During the Fall 2005, Connie grew suspicious of Christopher—he was an unemployed teenager but he had money in his wallet and new clothes Connie had not bought for him. One weekend in September 2005, McMillen and her family visited Connie in Twentynine Palms. Christopher was acting suspicious. He was supposed to go to a friend's house, but he stayed at the house until McMillen left and after telling Connie he was going to his friend's house, Connie saw him at the movie theater. Connie took Christopher's cell phone to punish him. On his cell phone, Connie found a photograph of Christopher kissing McMillen in Christopher's bedroom. Connie checked the call history and saw numerous calls between Christopher and McMillen. Despite Christopher

minimizing the incident, Connie grew more suspicious. Connie called McMillen and confronted her, but McMillen also minimized the encounter.

In October 2005, Connie called the San Bernardino County Sheriff's Department. Christopher later told a deputy sheriff he and McMillen had kissed just one time.

Christa Aufdemberg testified she worked with McMillen and in Fall 2005 they were in Las Vegas for a convention. McMillen told her that she had to return home to speak with police because she was being accused of having a sexual relationship with a friend's son. McMillen went home and when she returned, she told Aufdemberg the allegations were untrue. After they returned home, McMillen told her that she did have sexual intercourse with him on multiple occasions. In August 2007, Aufdemberg and McMillen had a serious "falling out."

McMillen and Christopher continued their sexual relationship after Connie found the photograph on Christopher's cell phone. They had sexual intercourse about 10 times over the course of his junior and senior years in high school at various locations, including his house when everyone was asleep, her house after he would skip school, and hotels. On one occasion, Christopher paid for the hotel in Yucca Valley, and McMillen paid for the other hotels. Christopher told a detective he did not feel like a victim but instead the aggressor because he was mature for his age, liked older girls, and had already had sex when he first met McMillen.

Luke P.

Luke, born in June 1997, was 16 years old at the time of trial and 14 years old his freshman year. In December 2011 and January 2012, Luke was friends with N.T. and McMillen's son N.M. N.M. had a younger brother, J.M., and a younger sister, E.M. Luke spent a lot of time at the McMillen house after school and on the weekends. McMillen acted like "one of the guys," saying sexually inappropriate things and describing herself as a "wet dream." The patriarch, Joseph McMillen, would keep to

himself. In January 2012, McMillen became more assertive and during one of Luke's visits to her house, McMillen told him a 16-year-old African American boy who looked 20 years old kissed her.

On or about January 2, 2012, while N.M. and N.T. were playing, McMillen led Luke up to her bedroom and sat on his lap. They stroked and touched each other over their clothes; Luke became aroused. He returned downstairs and tried to act normal.

On or about January 7, 2012, Luke arrived at the McMillen house before N.M. and their friends. After McMillen and Luke flirted downstairs, they went upstairs into the bathroom. McMillen unbuttoned and pulled down his pants and underwear, sat on the toilet, and performed oral sex on Luke until he ejaculated in her mouth; she spit the semen into a green towel. After McMillen left to pick up N.M., Luke sent her a text message apologizing and saying it would never happen again. When McMillen returned, Luke asked her if she read the text message, and she laughed and told him his semen tasted "citrusy."

On January 15, 2012, McMillen and Luke were in the kitchen when she told him, "I want to fuck you on this countertop." Luke was standing behind McMillen as she rubbed her buttocks against his groin area. J.M. walked in and asked, "What are you guys doing?" McMillen followed J.M. outside, took him to McDonalds, and returned home about 20 minutes later.

On January 21, 2012, McMillen sat on the couch between Luke and N.M. with a blanket over them while watching a movie. McMillen began touching him over his clothes and then moved her hand underneath his shorts and stroked his penis. She continued touching him on and off throughout the movie. At one point she got up to make them cookies and returned to her same location on the couch.

On February 8, 2012, Luke was having lunch with N.M. upstairs. They brought their dishes downstairs to the kitchen. N.M. went back upstairs to get ready for lacrosse practice and Luke stayed downstairs. When N.M. left, McMillen tickled and

touched Luke and he did the same back to her. McMillen pulled down Luke's pants and performed oral sex on him for a few minutes. McMillen stopped right before Luke ejaculated, and Luke ejaculated on the McMillen's dog that was next to McMillen. McMillen cleaned the dog before taking the boys to practice. After each incident, Luke felt guilty, in part because he betrayed his friend, but he continued going to the McMillen house.

On February 12, 2012, Luke was at the McMillen house for a sleepover with other boys. Luke was trying to stay away from McMillen and not talk to her, but she was "bugging" him. N.M. and J.M. told McMillen to leave him alone, but McMillen kept bothering him. Luke threatened to tell a secret about McMillen if she did not leave him alone; he told one of the boys that McMillen smoked. The next morning, McMillen asked Luke what he told the boy. Luke ignored her and walked into the garage. McMillen grabbed him by the arm and he yelled at her and called her a pedophile; she started to cry. E.M. opened the interior door to the garage and closed it. Luke did not want to upset E.M. so he tried to calm down and went back inside the house to wait for his mother to pick him up. When his mother arrived, Luke was upset and could not look at her. Luke later told his parents about what had happened.

On February 18, 2012, Luke and his parents went to the Irvine Police Department and an officer interviewed Luke in the presence of his parents. Detective Erika Hutchcraft first spoke with the officer and then with Luke and his parents. While Luke was at the police station, McMillen sent Luke a text message saying, "I'm sorry." Luke answered the text message and told her he needed to talk immediately to set up a pretext telephone call. McMillen called Luke. Their conversation was recorded and played for the jury. During the telephone call Luke asked McMillen to promise never to touch him again. She responded, "Never, never, never, never[,] and "It's like it never happened, it will never happen."

N.T., 16 years old at trial, had known N.M. and Luke for about six years and would go to the McMillen house frequently. N.T. recalled being at the McMillen house when McMillen and Luke went upstairs together and were gone about 10 minutes. When they came downstairs, Luke's demeanor changed, he was being more physical and pushy. McMillen told N.T. that she did not feel comfortable around Luke and did not want to be alone with him. She said that when they were upstairs, Luke said he would not let her out of their room until she performed oral sex on him. McMillen never said she went through with it but that he was playing around and scaring her. She asked N.T. to get Luke out of the house, and they went to the park across the street. N.T. also remembered a sleepover at the McMillen house and Luke was acting strange and paranoid about others being alone with McMillen. For example, whenever N.T. was speaking privately with McMillen, Luke would interject himself into the conversation.

Defense

McMillen testified. She denied having sexually explicit conversations with Christopher during the car ride to pick up his cell phone. She also denied having any sexual contact with him other than the kiss depicted in the photograph on his cell phone. McMillen did not tell Aufdemberg that she had a sexual relationship with Christopher, and McMillen and Aufdemberg's relationship ended on bad terms.

McMillen testified concerning each of Luke's allegations and provided alibi evidence. First, McMillen stated Luke was not at her house on January 2, 2012, because she was picking up her daughter in Del Mar and then in Fullerton with family. Family members confirmed they had seen her that day. Second, Luke was not at her house on January 7, 2012, because she was in La Habra with family. A family member confirmed this. Third, Luke was not at her house January 15, 2015, because she was at her son's lacrosse tournament most of the day. Joe confirmed this. Fourth, McMillen, N.M., and Luke sat on the couch together and watched a movie on January 21, 2015, but she did not share a blanket with Luke and she never reached underneath his blanket and

touched him. N.M. did not see McMillen do anything inappropriate to Luke. Fifth, McMillen was never alone with Luke in her house on February 8, 2105.

McMillen also testified concerning a number of encounters with Luke that portrayed him as the aggressor. On January 16, 2012, McMillen was home with N.M., Luke, and N.T. McMillen believed she and Luke were playing a game so she chased him as he ran into her bedroom and when she got into her bedroom, he shut the door and grabbed her underneath her arms. Luke fondled her breasts and told her that she was not leaving until she “sucked his dick.” McMillen eventually escaped her room and told N.T. what happened, never to leave her alone with Luke, and to get Luke out of the house. McMillen later told a friend about this incident. The friend thought it odd that a couple weeks later she was at McMillen’s house and saw McMillen and Luke together.

On January 27, 2012, McMillen, Luke, and E.M. were at the McMillen house. As Luke had just finished soccer practice, he took a shower and called for McMillen because he needed a towel. McMillen went into the bathroom to get him a towel, and he grabbed her and locked the door. Luke told her that she was going to “suck his dick” and if she said anything, he would accuse her of molesting him. He took out his penis and tried shoving it into her mouth, but she kept her hands over her mouth and he eventually stopped.

On February 10, 2012, McMillen was in the kitchen doing dishes when Luke approached her from behind and grabbed her breast and then her shoulders. When J.M. walked in, Luke took his hands off her and said he was rubbing her back. There was no rubbing between their bodies.

McMillen stated her children used her cell phone frequently, a point N.M. confirmed, and Luke would often call her and ask to come over. McMillen stated she never touched Luke for purposes of arousal. She also said she was afraid of Luke. Joe testified that after two court hearings Luke did a “NFL game” victory dance as he was leaving the courtroom.

The jury convicted McMillen of all the counts. The trial court sentenced McMillen to three years and four months in prison as follows: middle term of two years on count 7; and consecutive eight month terms on counts 1 and 2. The court imposed concurrent two year terms on counts 3, 4, 5, and 6.

DISCUSSION

I. Section 1108

McMillen argues the trial court erred by admitting evidence she and Christopher engaged in sexual intercourse about 10 times over the course of two years (the uncharged sexual intercourse evidence) pursuant to section 1108.¹ We disagree.

Section 1101, subdivision (a), prohibits admission of evidence of an uncharged offense to prove criminal disposition. However, section 1108 creates an exception to this general prohibition in cases involving sexual offenses. Section 1108, subdivision (a), states, “In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by [s]ection 1101, if the evidence is not inadmissible pursuant to [s]ection 352.”

Section 352 provides: “The court in its discretion may 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.” For purposes of section 352, “prejudice” means “evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [Citation.]” (*People v. Heard* (2003) 31 Cal.4th 946, 976.) We review the trial

¹ McMillen does not dispute the trial court properly admitted evidence she and Christopher had sexual intercourse on the same night as the conduct charged in count 7 in July 2005.

court's admission of evidence pursuant to sections 1108 and 352 for an abuse of discretion. (*People v. Wesson* (2006) 138 Cal.App.4th 959, 969.)

In weighing the probative value and the prejudicial effect of defendant's past misconduct, the trial court must consider several factors in deciding whether to admit the evidence. These factors include the following: (1) the nature and relevance of the prior acts; (2) whether the conduct was remote in time; (3) the degree of certainty the acts occurred; (4) the potential for misleading or confusing the jurors from their main inquiry; (5) the similarity of the evidence to the charged crime; (6) its prejudicial impact on the jury; (7) the burden on the defendant in meeting this evidence; and (8) the availability of less prejudicial alternatives. (*Falsetta, supra*, 21 Cal.4th at p. 917.)

A. *Merits*

Before we address each of the *Falsetta* factors, we address McMillen's preliminary claim the trial court erred by not specifically weighing each of the *Falsetta* factors. "[A] court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under . . . section 352. [Citations.]" (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169.) Here, our review of the record establishes the trial court was well aware of its responsibilities under section 352 and *Falsetta*. The court mentioned both in its minute order concluding the evidence was admissible and the record demonstrates the trial court undertook the weighing process in reaching its decision.

1. *Nature and Relevance of Prior Acts*

McMillen argues the uncharged sexual intercourse evidence "was of limited relevancy" because it was "not the type of sexual conduct for which [she] was charged." "[E]vidence of a 'prior sexual offense is indisputably relevant in a prosecution for another sexual offense.' [Citation.]" (*People v. Branch* (2001) 91 Cal.App.4th 274, 282-283 (*Branch*)). Unlawful sexual intercourse with a person under 18 (Pen. Code,

§ 261.5) is a sexual offense as defined by section 1108, subdivision (d)(1)(a), and thus, it is relevant in a prosecution of sexual offenses. Evidence McMullen had unlawful sexual intercourse with a minor who was her friend's son had probative value in determining whether McMullen engaged in other unlawful sexual conduct with that minor and another minor who was her son's friend. Thus, the uncharged sexual intercourse evidence was relevant.

2. *Remoteness*

McMillen asserts the uncharged sexual intercourse evidence was too remote as evidenced by the fact the statute of limitations prevented it from being charged. "Remoteness of prior offenses relates to 'the question of predisposition to commit the charged sexual offenses.' [Citation.] In theory, a substantial gap between the prior offenses and the charged offenses means that it is less likely that the defendant had the propensity to commit the charged offenses." (*Branch, supra*, 91 Cal.App.4th at p. 285.) "No specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible. [Citation.]" (*Id.* at p. 284.) Courts have found previous sexual offenses up to 30 years old not to be so remote in time as to preclude admission where the prior sexual misconduct and the charged offenses are similar. (*Branch, supra*, 91 Cal.App.4th at pp. 284-285 [30-year gap between offenses was not remote where prior and current offenses "remarkably similar"]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [15- to 22-year gap was not remote where prior and current acts similar]; *People v. Soto* (1998) 64 Cal.App.4th 966, 991 [passage of 20 to 30 years did not automatically render prior incidents prejudicial where prior sexual offenses and charged offenses similar].)

Here, McMullen and Christopher engaged in sexual intercourse from July 2005 to approximately August 2007. The prosecution first filed charges in February 2012. Although this was after the three-years statute of limitations had expired (Pen. Code, §§ 261.5, 800), it does not establish the uncharged sexual intercourse evidence was

too remote to be relevant. The conduct at issue occurred after the incident charged in count 7. Additionally, sexual offenses that occurred no more than seven years before trial cannot be considered too remote when other appellate courts have concluded sexual offenses 30 years old were not too remote where similar. Thus, McMillen's claim the uncharged sexual intercourse evidence was too remote is meritless.

3. Degree of Certainty Acts Occurred

McMillen claims there was uncertainty concerning the uncharged sexual intercourse evidence because there was no objective proof such as hotel receipts or records and therefore the evidence was weak. There will always be less "certainty" than there would be if there had been a conviction. Here however there was sufficient certainty the uncharged sexual intercourses occurred. Christopher testified he and McMillen had sexual intercourse at her house, his house, and hotels. He stated this occurred about 10 times over his junior and senior year and their relationship ended when he went to college. He said he paid for one of the hotels, in Yucca Valley, and McMillen paid for the others. Contrary to McMillen's claim otherwise, the uncharged sexual intercourse evidence was sufficiently certain to be admissible.

4. Potential for Misleading or Confusing Jurors

McMillen contends the uncharged sexual intercourse evidence had the potential to confuse the jury because it involved Christopher yet it was not being charged. It is possible the risk of juror confusion may increase when uncharged offenses are introduced as evidence. "If the prior offense did not result in a conviction, that fact increases the danger that the jury may wish to punish the defendant for the uncharged offenses and increases the likelihood of confusing the issues 'because the jury [has] to determine whether the uncharged offenses [in fact] occurred.' [Citation.]" (*Branch, supra*, 91 Cal.App.4th at p. 284.) "This risk, however, is counterbalanced by instructions on reasonable doubt, the necessity of proof as to each of the elements of a lewd act with a

minor, and specifically that the jury ‘must not convict the defendant of any crime with which he is not charged.’” (*People v. Frazier* (2001) 89 Cal.App.4th 30, 42 (*Frazier*).

The uncharged sexual intercourse evidence involved just one type of crime, statutory rape, and concerned just one victim, Christopher, who was a named victim in the case. This was not a case where the jury had to keep track of different uncharged crimes concerning victims who were not directly involved in the case. Additionally, the uncharged sexual intercourse evidence did not consume much time, about 23 questions covering just five pages of the reporter’s transcript. Finally, any remaining risk of confusion was sufficiently countered by the trial court’s instructions. The trial court instructed the jury on the elements of the charged and uncharged offense, reasonable doubt, and the proper use of evidence of prior sexual offenses. There is nothing in the record to indicate the jury was confused by Christopher’s testimony concerning the uncharged sexual intercourse evidence. (*Branch, supra*, 91 Cal.App.4th at p. 284.)

5. *Similarity of Evidence to Charged Crimes*

McMillen argues the uncharged sexual intercourse evidence, which concerned planned trysts at hotels, was dissimilar to the charged offenses, which concerned spontaneous touching and oral sex at her home. “The charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under Evidence Code section 1101, otherwise Evidence Code section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in [Evidence Code] section 1108.” (*Frazier, supra*, 89 Cal.App.4th at pp. 40-41.)

As we explain above, unlawful sexual intercourse is a sexual offense as defined by section 1108 and thus it is sufficiently similar to the charged sexual offenses. Additionally, both the uncharged sexual intercourse evidence and the charged offenses involved minor boys who were family friends and were entrusted to McMillen’s care. The evidence at trial demonstrated McMillen violated this trust by preying on minor boys who stayed in her home and were vulnerable to an attractive, experienced woman. Thus,

the uncharged sexual intercourse evidence were sufficiently similar to the charged offenses.

6. Prejudicial Impact on Jurors

McMillen asserts the uncharged sexual intercourse evidence was unduly prejudicial because it “portrayed [her] as a person of bad sexual morality who would have a long term affair with the younger [Christopher], in contrast to the couple of brief acts of alleged sexual misconduct that were charged.” She also asserts the uncharged sexual intercourse evidence “would unfairly spill over into the case on the offenses involving Luke.” In *People v. Harris* (1998) 60 Cal.App.4th 727, 737-738, the court “deemed it important in evaluating prior uncharged acts pursuant to section 352, whether ‘[t]he testimony describing the defendant’s uncharged acts . . . was no stronger and no more inflammatory than the testimony concerning the charged offenses.’”

Here, the uncharged sexual intercourse evidence was no more inflammatory than the charged offenses. The uncharged sexual intercourse evidence consisted of testimony McMillen and Christopher engaged in sexual intercourse about 10 times over the course of two years at McMillen’s house, Christopher’s house, and hotels. Although evidence Christopher on occasion missed school to meet McMillen to engage in sexual intercourse is troubling, this evidence was no more inflammatory than the other evidence involving Christopher or the evidence concerning Luke. Christopher testified he was the aggressor and he did not feel like the victim.

Conversely, the evidence established McMillen was the aggressor with Luke. On one occasion, 41-year-old McMillen told 14-year-old Luke that she wanted to “fuck” him on the countertop. The last time Luke was at the McMillen house, he was in tears when his mother picked him up. As to McMillen’s claim the uncharged sexual intercourse evidence unfairly “spill[ed] over” into Luke’s case, that is what section 1108 allows, admission of sexual propensity evidence, subject to section 352. Thus, the

uncharged sexual intercourse evidence was no stronger and no more inflammatory than the testimony concerning the charged offenses.

7. Burden on Defendant in Meeting Evidence

McMillen claims the uncharged sexual intercourse evidence was so generic it was impossible to defend against. While the lack of sordid details usually benefits a defendant at trial, McMillen claims the lack of specificity prevented her from presenting a defense. To the contrary, Christopher was a named victim, and McMillen knew she would have to defend against count 7 and the uncharged sexual intercourse evidence. McMillen admitted she kissed Christopher, the encounter depicted in the photograph on the cell phone. She denied all other sexual conduct with Christopher. We presume that had the prosecution been allowed to present a detailed account of all the uncharged encounters, McMillen would complain the evidence was overkill. The uncharged sexual intercourse evidence was sufficiently specific McMillen could defend against it through her denial she did not engage in sexual relations with Christopher.

8. Availability of Less Prejudicial Alternatives

McMillen contends admission of the uncharged sexual intercourse evidence was unnecessary because the trial involved offenses against two victims and thus there was already other acts evidence the jury could consider. McMillen's point is well taken. When considering the charges against Luke, the jury could consider evidence McMillen had sexual intercourse with Christopher in the Jeep in the garage. When considering the charges against Christopher, the jury would naturally consider the evidence concerning Luke. Although the uncharged sexual intercourse evidence was arguably cumulative considering there were two named victims, on balance, and when considering all the *Falsetta* factors, the uncharged sexual intercourse evidence's probative value outweighed any prejudicial effect.

B. Harmless Error

Contrary to McMillen's claim otherwise, we review trial court rulings pursuant to sections 352 and 1108 under the test delineated in *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Jandres* (2014) 226 Cal.App.4th 340, 357.) We have concluded the trial court did not err by admitting the uncharged sexual intercourse evidence pursuant to section 1108. Even were we to conclude the trial court erred, we would conclude it was not reasonably probable McMillen would have obtained a better result absent admission of the uncharged sexual intercourse evidence. Christopher offered compelling testimony McMillen performed oral sex on him in the garage while in the Jeep. Connie's testimony provided corroboration McMillen's and Christopher's relationship far exceeded that of what one would expect of an adult friend and a child. And Luke offered compelling testimony McMillen preyed on him, sexually abused him, and left him in emotional turmoil. Finally, McMillen's statements to Aufdemberg concerning Christopher and McMillen's statements to Luke on the covert telephone call provide further support of her guilt. Thus, McMillen was not prejudiced by admission of the uncharged sexual intercourse evidence.

C. Due Process

Conceding the California Supreme Court in *Falsetta, supra*, 21 Cal.4th 903, resolved this claim against her, McMillen argues the issue of whether the admission of propensity evidence pursuant to section 1108 violates due process should be reconsidered. We are bound by California Supreme Court precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) McMillen's due process claim is meritless. Therefore, the trial court properly admitted the uncharged sexual intercourse evidence.

II. Ineffective Assistance of Counsel

McMillen contends she received ineffective assistance of counsel because her trial counsel did not file a pretrial motion to sever count 7 from counts 1 through 6

and counsel did not request a limiting instruction prohibiting the cross-admissibility of evidence. Neither contention has merit.

“To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel’s performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. [Citation.]” (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93.) To determine whether defense counsel was ineffective, we must determine whether the trial court would have granted a pretrial motion to sever or given the jury a limiting instruction.

“In relevant part, section 954 provides ‘if two or more accusatory pleadings are filed’ charging ‘two or more different offenses of the same class of crimes or offenses . . . the court may order them to be consolidated.’ [Citation.] . . . ‘Thus, defendant must show that a substantial danger of prejudice compelled severance. [Citation.] We ask whether the denial of severance was an abuse of discretion, given the record before the trial court. [Citation.] A pretrial ruling that was correct when made can be reversed on appeal only if joinder was so grossly unfair as to deny due process.’ [Citation.] [¶] “‘Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a ‘weak’ case has been joined with a ‘strong’ case, or with another ‘weak’ case, so that the ‘spillover’ effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.’” [Citation.]” (*People v. Geier* (2007) 41 Cal.4th 555, 574-575 (*Geier*), overruled on other grounds in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305.)

Here, McMillen concedes the charges against Luke and Christopher were of the same class. Thus, consolidation was proper unless McMillen demonstrated “a substantial danger of prejudice compelled severance.” (*Geier, supra*, 41 Cal.4th at p. 575.) That she could not do.

A. *Cross-Admissible*

Evidence concerning Christopher and evidence concerning Luke would have been cross-admissible in separate trials. As we explain above, the trial court properly admitted the uncharged sexual intercourse evidence pursuant to section 1108. And McMillen concedes, “Christopher’s testimony should have been limited to the single incident in July 2005 and ended at the clean breaking point when the car alarm went off and the parties were nearly caught.” Thus, evidence concerning McMillen and Christopher’s sexual conduct would have been admissible pursuant to section 1108 in a separate trial involving Luke.

The issue remains whether evidence concerning Luke would have been admissible pursuant to section 1108 in a separate trial involving Christopher. McMillen does not discuss each of the *Falsetta* factors but instead limits her argument to essentially the offenses were dissimilar. We will briefly discuss each of the *Falsetta* factors.

Both offenses involving Luke, lewd act upon a child (§ 288, subd. (c)(1)), and oral copulation of minor (§ 288a, subd. (b)(2)), are sexual offenses for purposes of section 1108 (§ 1108, subd. (d)(1)(A)), and thus they were relevant in a trial concerning Christopher. Evidence concerning Luke was not too remote because the offenses occurred in 2012. Luke’s testimony was sufficiently certain—he recounted the dates the incidents occurred and provided details as to circumstances of each of the incidents. As we explain above, the risk of misleading or confusing the jury was low because the trial court properly instructed the jury on the appropriate burdens of proof, elements of the offenses, and proper use of uncharged sexual offense evidence. The evidence concerning Luke was sufficiently similar to the evidence concerning Christopher to be admissible

because they included qualifying sexual offenses involving minor boys who were family friends and were entrusted to McMillen's care. Although the evidence established McMillen pursued Luke to the point Luke was distraught, the evidence also demonstrated McMillen had a two-year affair with Christopher, a high school student, and therefore, the evidence concerning Luke was no more inflammatory. The burden on McMillen in meeting this evidence was relatively low as evidenced by the fact she presented detailed alibi evidence refuting Luke's testimony regarding the dates the incidents occurred. Finally, as we explain above, there were less prejudicial alternatives because in a trial involving Christopher, we conclude it likely a trial court would not admit all the evidence concerning Luke. On balance, considering the *Falsetta* factors, the probative value of the evidence concerning Luke outweighed any prejudicial effect and would have been admissible pursuant to section 1108 in a separate trial involving Christopher.

B. Inflame the Jury

As we have explained above, we conclude evidence concerning Christopher would not inflame the jury in a separate trial involving Luke and evidence concerning Luke would not inflame the jury in a separate trial involving Christopher. McMillen engaged in a two-year affair with Christopher, who was a high school student and apparently a willing participant, but the jury heard evidence Christopher deceived his mother, skipped school, and on at least one occasion paid for a hotel room. McMillen's relationship with Luke was much shorter, just a couple months, but she preyed on him, causing him such emotional turmoil he wanted to stay away from the McMillen house but could not. We cannot say the evidence concerning either victim would unduly inflame the jury in a separate trial for the other victim.

C. Weak Case/Strong Case

Contrary to McMillen's claim otherwise, this is not a case where the prosecutor has joined a weak case, Luke's case, with a strong case, Christopher's case. The evidence concerning both was strong. Christopher testified McMillen performed

oral sex on him in the Jeep in the garage in July 2005. Again, there was other evidence, McMillen's statements to Aufdemberg, cell phone records, a photograph, and gifts, corroborating the fact their relationship was more than just friends. The evidence concerning Luke was strong as well. Luke provided detailed testimony about six incidents where McMillen touched him inappropriately. And again, there was other evidence, cell phone records and McMillen's statements during the covert call, corroborating the fact their relationship was sexual in nature. That there was other evidence portraying Luke as calculating and aggressive and undermining his version of the events does not discount from the strength of his testimony. Based on the entire record, we conclude both cases were equally strong.

In conclusion, had defense counsel filed a pretrial motion to sever count 7 from counts 1-6, we are confident the trial court would have denied that motion, and McMillen's due process right to a fair trial was not violated. (*People v. Price* (1991) 1 Cal.4th 324, 387 [“[c]ounsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile”].)

Finally, McMillen's complaint defense counsel did not request a pinpoint instruction informing the jury it could not consider evidence concerning Christopher when determining Luke's guilt “and vice versa” is meritless. As we explain above the evidence was cross-admissible pursuant to section 1108. And the trial court instructed the jury with CALCRIM No. 1191, on the proper use of uncharged sexual offense evidence.

Thus, McMillen has not demonstrated defense counsel was ineffective by failing to file a pretrial motion to sever or request further jury instructions. Because we have concluded trial counsel was not deficient, we need not address whether McMillen was prejudiced. If we were to address prejudice, we would conclude there was not a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different because of the strength of the evidence as to both victims.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.