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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ARTHUR DAVIS,

Defendant and Appellant.

H039867

(Santa Clara County

Super. Ct. No. C1199830)

**I. INTRODUCTION**

Defendant Michael Arthur Davis appeals after a jury convicted him of annoying or molesting a child and the trial court found that he had a prior sex offense conviction involving a minor victim. (Pen. Code, § 647.6, subd. (c)(2).) The trial court sentenced defendant to a four-year prison term.

On appeal, defendant contends the trial court erred by admitting evidence of his prior rape of a minor pursuant to Evidence Code section 1108. For reasons that we will explain, we will affirm the judgment.

## II. BACKGROUND

### A. *Evidence of Current Offense*

#### 1. **Testimony of K. Doe**

On August 27, 2010, when K. Doe was 13 years old, she called the Super Chat party line. Doe described a party line as a phone service where you make selections from a menu of options, and “[y]ou talk to people, just pretty much make friends.” The Super Chat party line warns the caller that “if you are under the age of 18 you must hang up now.” Doe ignored the warning, as she had when she had called the Super Chat party line on previous occasions. Doe was connected with defendant, and they exchanged phone numbers. Defendant called Doe immediately after their Super Chat conversation ended.

During their phone conversations that day, Doe told defendant her name, that she was in the eighth grade, and that she was 14 years old. Doe added one year to her age so she would seem older and defendant would talk to her. Defendant said he was 24 years old. Defendant told Doe that he had gone to jail for rape. Defendant suggested that Doe take a train to meet up with him. She agreed, although she had no intention of doing so. Defendant told Doe he was masturbating, and Doe could hear him breathing heavily and making slapping noises.

Doe and defendant also exchanged text messages. In one text message, defendant asked, “you swallow, right?”

Doe and defendant also exchanged photographs of themselves via cell phone. In one photograph, defendant was making a “V” with his fingers and putting his tongue through the “V.” Defendant asked Doe for pictures of her breasts, and he said he was going to send Doe a photograph of his penis. Doe never saw the photograph, however. Her mother discovered the photograph and reprimanded Doe, after which Doe did not get her phone back.

Doe spoke with Officer Martin Tracey on August 27, 2010, and he took her cell phone into evidence. The photograph of defendant's penis was on Doe's phone. Doe told Officer Tracey about her conversations with defendant. She stated that she told defendant she was 14 years old and that defendant had told her, "oh that is fine" or "oh that's cool. I don't have a problem with that."

## **2. Investigation**

Detective Russell Chubon interviewed defendant two times. During the first interview, defendant denied communicating with anyone in the San Jose area. During the second interview, defendant repeated this claim and also claimed he had not called the party line in years and that he had never taken a picture of his penis. Detective Chubon then showed defendant photographs of defendant that were found on Doe's phone. Detective Chubon suggested that defendant had "a misunderstanding" and believed Doe was an adult, but defendant continued to deny sending Doe any photographs.

Detective Chubon obtained phone records confirming that there had been phone calls, text messages, and photographs exchanged between Doe's cell phone and a cell phone associated with defendant.

### ***B. Charges and Motion in Limine***

Defendant was charged with annoying or molesting a child after a prior felony conviction of a sex offense involving a minor. (Pen. Code, § 647.6, subd. (c)(2).) The prior sex offense alleged was a rape: "a violation of Penal Code section 261, involving a minor under the age of 16 years." The prior conviction was also alleged to be a "strike." (Pen. Code, §§ 667, subds. (b)-(i), 1170.12.) The trial court subsequently granted defendant's request to bifurcate the prior conviction allegation.

Defendant also filed a motion in limine seeking to exclude his prior rape conviction "[p]ursuant to Evidence Code Section 1108 . . . under Evidence Code Section 352." Defendant noted that the prior case "involved an ongoing dating relationship between [defendant], then 18 years old, and the alleged victim, 13 at the time, [F.D]."

Defendant asserted that the two cases were not similar, pointing out that the present case involved no physical contact and a victim who lied about her age, whereas the prior case involved “an actual sexual relationship.” Defendant argued that admitting the prior rape would confuse the jury, cause undue prejudice, and result in an undue consumption of time. Defendant argued that he was entitled to dispute the truth of the prior rape, which would involve witness examinations and require the jury to resolve facts. He argued that the jury would be invited to view him as a rapist and that admission of the evidence would violate his federal due process rights.

The prosecution filed a trial brief in which it requested the trial court admit defendant’s prior rape conviction. The prosecution described the facts underlying the incident leading to that conviction. The incident had occurred in December of 2004, when defendant was 18 years old. The 13-year-old victim, F.D., had met defendant while at a shopping center with a friend. F.D. and defendant had gone to a park, where they kissed. At the park, defendant had attempted to digitally penetrate F.D.’s vagina, but she had prevented him from doing so. Later that day, at a middle school athletic field, defendant had digitally penetrated F.D.’s vagina despite her asking him to stop. On another occasion, defendant and F.D. had kissed at defendant’s house. F.D. had tried to push defendant away when he began removing her clothing. F.D. had also asked defendant to stop, but he digitally penetrated her and inserted his penis into her vagina. Afterwards, defendant had told F.D. not to tell anyone what had happened, saying that he would go to jail and threatening to kill himself. F.D. had gone to the emergency room the following day, because her vagina was irritated and she feared she had contracted a sexually transmitted disease.

The prosecution noted that defendant had been interviewed by the police after the F.D. incident. Defendant admitted having had sexual intercourse with F.D. “while and after she was pleading with him to stop.” Defendant also admitted knowing F.D. was a middle school student, although he claimed she had lied about her age.

The prosecution represented that F.D. was prepared to testify, and that evidence of the rape would also be introduced through certified conviction records and testimony of the officer who had interviewed defendant.

During a hearing on motions in limine, the prosecutor indicated that he was seeking to introduce a certified copy of defendant's rape conviction "to show propensity" under Evidence Code section 1108, noting that one of the issues at trial was whether defendant's conduct was "motivated by an unnatural, abnormal sexual interest in the child." The prosecutor indicated he planned to call both F.D. and the officer who had interviewed defendant about the rape.<sup>1</sup>

The trial court asked the prosecutor to describe the anticipated testimony about the prior offense. The prosecutor told the court that when defendant met F.D., he asked if she was a virgin and learned that she was 13 years old. Defendant and F.D. had kissed when they first met, and they had dated for about two weeks. The rape had occurred at defendant's house, along with digital penetration and oral copulation, while F.D. was physically and verbally resisting.

Defendant's trial counsel reiterated her opposition to admission of the evidence. She asserted that presentation of the evidence would require "a mini-trial within a trial" and that the cases were different because the incident underlying the current charge did not involve any violence, physical touching, or rape. She argued that the only similarity was that both victims were under the age of 14.

The prosecutor responded that there was evidence defendant told Doe "that he would like to rape an 8th grader" and that he had been in trouble for "molesting little girls." Defendant had also asked both Doe and F.D. if they were virgins. The prosecutor

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<sup>1</sup> The prosecutor initially indicated he would not call witnesses to testify about the prior offense if the parties reached an agreement about what documents were admissible to prove the prior conviction. However, by the time defendant's trial counsel indicated she was willing to enter into a stipulation, the prosecutor had already contacted F.D. and asked her to testify.

argued that the evidence of the prior rape was probative despite the fact that Doe “didn’t get assaulted” because the prior rape would help the jury decide if Doe was credible, and “the entire case is based on [Doe’s] credibility.”

The trial court ruled that the evidence would be admitted, finding it “highly probative” and “not unduly prejudicial.”

### ***C. Evidence of Prior Rape***

On the first day of trial, the prosecution put on evidence of the prior rape. The testimony took up the entire day and is contained in 146 pages of reporter’s transcript.

#### **1. Testimony of F.D.**

F.D. was 21 years old when she testified at trial. She met defendant in December of 2004, when she was in eighth grade. They met at a store in a mall. Her friend had commented that defendant was cute, so F.D. had approached him. They walked around the mall, talking.

F.D. told defendant she was 13 years old and in middle school. Defendant said he was 18 years old. Defendant asked whether her parents would approve if they started a relationship. F.D. liked the idea of having an older boyfriend. She said her parents would not approve, and she agreed when defendant proposed they keep the relationship a secret. Defendant asked if she was a virgin. F.D. said she was a virgin, that she had never had a boyfriend before, and that she did not want to have sex.

While sitting on a bench, defendant and F.D. cuddled. F.D. refused when defendant tried to get her to sit on his lap. Defendant tried to touch her breasts and other parts of her body, but she pushed him away. F.D. allowed defendant to sit on her lap, but she pushed him off when he started kissing her neck.

F.D. and defendant exchanged phone numbers, and she called him a few days later. They met up at a park near a school, then went to defendant’s house, then to a different park. At the park, F.D. and defendant further discussed whether F.D.’s parents would approve of their relationship, and they again talked about F.D.’s virginity.

Defendant said he had joined the Navy, that he loved her, and that she should “give him” her virginity because he could leave at any time.

F.D. and defendant kissed in the park, which led to defendant touching F.D.’s body. Defendant then put his hands into her pants. F.D. told defendant she did not like it and asked him to stop. Defendant told her it felt good. F.D. then allowed him to continue, and he put his finger inside her vagina.

On a subsequent occasion, F.D. went over to defendant’s house to watch movies. Defendant “turned on porn,” which made F.D. feel uncomfortable. She asked to see his room to “get away from the porn.” Inside defendant’s bedroom, they began kissing. Defendant put his hands under F.D.’s shirt and felt her breasts. F.D. repeatedly told him she did not want to have sex. Defendant reassured her that they would not. He removed her shirt, saying that he just wanted to see and asking her if she loved him. Defendant similarly coaxed F.D. into allowing him to remove the rest of her clothing. Defendant kissed her “everywhere,” while F.D. continued to say that she did not want to have sex. When defendant put his finger into her vagina, F.D. tried to push him off. Defendant then asked F.D. to suck his penis, but she said no. Defendant then put his mouth on her vagina. Next, defendant tried to put his penis into her vagina, while holding her hands over her head. F.D. tried to move her pelvis away and repeated that she did not want to have sex. Defendant tried to convince her to let him “stick it in,” and he finally “got it in.” F.D. felt “terrible pain” and screamed. Defendant started “humping [her] violently” until she managed to push him off.

After the rape, defendant told F.D. that she could not tell anyone because he would go to jail. Defendant seemed upset and said he was going to kill himself. Defendant paced around the house for about 30 minutes, then “turned the porn back on.” He convinced F.D., who was scared and in shock, to have sex with him again, by saying, “[Y]ou already gave it to me once. You might as well do it again.”

F.D. went to her friend's house afterwards and told her friend what had happened. Later, she began feeling itching and burning, and she got scared that she had a sexually transmitted disease. She eventually went to the hospital, and hospital staff called the police. F.D. told the police defendant had raped her.

## **2. Testimony of Officer Ramsey**

Former police officer Timothy Ramsey interviewed F.D. after the incident. He then interviewed defendant. Defendant waived his rights and agreed to talk. Officer Ramsey asked if defendant had digitally penetrated F.D. Defendant initially denied doing so, then claimed F.D. had consented, then admitted that F.D. had told him "no." Defendant demonstrated how he had put his fingers inside F.D.'s vagina. Defendant also eventually admitted that he had raped F.D. Defendant demonstrated how he had held F.D.'s arms over her head while raping her. Defendant described threatening to kill himself in order to scare her into not saying anything about the rape.

## **3. Documentary Evidence**

The trial court admitted documentation of defendant's rape conviction into evidence: a complaint alleging forcible rape as "Count Four," and defendant's written waiver of rights and entry of plea to the rape charge. The trial court also took judicial notice of defendant's rape conviction.

## **4. Jury Instruction**

Pursuant to CALCRIM No. 1191, the jury was instructed: "The People presented evidence that the defendant committed the crime of rape that was not charged in this case. This crime is defined for you in these instructions. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense. [¶] Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that this fact is true. [¶] If the People have not met this burden of proof, you must disregard this

evidence entirely. [¶] If you decide that the defendant committed the uncharged offense, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that [the] defendant . . . was likely to commit and did commit annoying or molesting a child, as charged here. If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of annoying or molesting a child. The People must still prove the charge beyond a reasonable doubt.”

***D. Defense Evidence***

The defense stipulated that defendant had spoken with Doe on “adult chat lines and through cellular phones,” and that defendant had sent Doe photographs of his face and his penis. The defense theory was that Doe was not telling the truth when she claimed she had told defendant she was 14 years old. Defendant’s trial counsel also argued that F.D. had engaged in consensual sex with defendant. Defendant did not testify.

The defense called Doe’s father, who had looked through the text messages on Doe’s cell phone on August 27, 2010. He questioned Doe about the photographs she had exchanged with defendant, but Doe did not mention a photograph of her breasts.

The defense recalled Officer Tracey, who recalled Doe telling him that defendant had sent text messages saying “I’m really horny” and “I love to rape little girls.” Doe claimed to have been scared by these messages—which were not found on her cell phone—and to have stopped communicating with defendant. However, Doe might have been referring to oral statements defendant made during phone conversations.

***E. Verdicts and Sentencing***

The jury found defendant guilty of annoying or molesting a child in violation of Penal Code section 647.6, subdivision (c)(2), and the trial court found the prior conviction allegations true. At the sentencing hearing, the trial court granted defendant’s

motion to strike the “strike” allegation (Pen. Code, §§ 667, subds. (b)-(i), 1170.12), and it imposed a four-year prison term.

### III. DISCUSSION

Defendant contends the trial court erred by admitting the evidence of his rape of F.D. He contends the error in admitting this evidence deprived him of due process.

#### A. *Relevant Legal Principles*

Evidence Code 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 Section 1101, if the evidence is not inadmissible pursuant to Section 352.” Evidence Code section 1108 was enacted “to expand the admissibility of disposition or propensity evidence in sex offense cases.” (*People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*)). “Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant’s possible disposition to commit sex crimes.” (*Id.* at p. 915.) Under Evidence Code section 1108, evidence of prior sexual offenses may be considered for any relevant purpose, “subject only to the prejudicial effect versus probative value weighing process required by section 352.” (*People v. Britt* (2002) 104 Cal.App.4th 500, 505.)

Evidence Code section 352 provides that 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.” In cases involving Evidence Code section 1108, trial courts “must engage in a careful weighing process under section 352.” (*Falsetta, supra*, 21 Cal.4th at p. 917.)

In *Falsetta*, the court explained that various factors inform “the trial court’s discretionary decision to admit propensity evidence under sections 352 and 1108.” (*Falsetta, supra*, 21 Cal.4th at p. 919.) “Rather than admit or exclude every sex offense a

defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.” (*Id.* at p. 917.)

We review the trial court's decision to admit evidence under Evidence Code sections 1108 and 352 for an abuse of discretion. (*People v. Story* (2009) 45 Cal.4th 1282, 1295.) Under this deferential standard, the trial court's ruling will be reversed only if it was “ ‘ ‘arbitrary, whimsical, or capricious as a matter of law. [Citation.]” [Citation.]’ [Citation.]” (*People v. Robertson* (2012) 208 Cal.App.4th 965, 991 (*Robertson*).

### ***B. Analysis***

Defendant contends the prior offense was inflammatory and prejudicial because it involved defendant “targeting and repeatedly assaulting and raping a middle schooler,” and it invited the jury to assume that defendant was “again grooming a minor for exploitation.” Defendant contends that although the jury learned defendant had been convicted of rape, the jury was likely to conclude that defendant was not sufficiently punished for his “many transgressions against F.D.” and would feel compelled to punish him further. He argues that presentation of the evidence consumed a large portion of the trial. He contends the rape was only “minimally relevant to the crime alleged” and argues that the two offenses were only superficially similar. Finally, defendant contends that because the rape occurred six years before the charged offense, it was remote.

Defendant relies extensively on *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*). In *Harris*, the defendant was a mental health nurse who was charged with

several sex offenses that involved him “preying on women who were vulnerable due to their mental health condition.” (*Id.* at p. 730.) Evidence of a prior offense, for which defendant was convicted of “burglary with the infliction of great bodily injury,” was admitted at trial. (*Id.* at p. 735.) The charged sex crimes, which included sexual battery and penetration with a foreign object, involved “a breach of trust by a caregiver,” and the “abuse the victims suffered” was “unfortunately, not unusual or shocking.” (*Id.* at p. 738.) Testimony about the prior offense, on the other hand, “described a viciously beaten and bloody victim who as far as the jury knew was a stranger to the defendant.” (*Ibid.*)

In *Harris*, the appellate court held that the prior offense should not have been admitted. First, the prior offense evidence was “inflammatory *in the extreme*” and “of a significantly different nature and quality” than the charged offenses, since the prior offense involved a “violent and perverse attack on a stranger.” (*Harris, supra*, 60 Cal.App.4th at p. 738.) Moreover, in an attempt to prevent the jury from hearing certain details of the prior offense, the evidence presented was “incomplete and distorted,” which “must have caused a great deal of speculation as to the true nature of the crime.” (*Ibid.*) Second, there was a possibility of jury confusion. Although the jury learned of the defendant’s burglary conviction, it could have concluded that the defendant had escaped “appropriate rape charges,” and thus might have been inclined to punish him by convicting him of the charged offenses. (*Ibid.*) Third, the prior offense was remote, since it had occurred 23 years earlier. (*Id.* at p. 739.) Fourth, the prior offense did not have probative value as to the issues in the current case, since it “did little more than show defendant was a violent sex offender” and thus did not bolster the credibility of the current victims. (*Id.* at p. 740.) The only factor that weighed in favor of admission was the fact that the evidence did not consume a significant amount of time—the actual testimony took up only 25 pages of transcript. (*Id.* at p. 739.)

The People cite a number of cases in support of their position that the prior offense evidence was properly admitted, including *People v. Frazier* (2001) 89 Cal.App.4th 30

(*Frazier*). In *Frazier*, the charged offenses were a lewd act on a child and, as here, annoying or molesting a child. (*Id.* at p. 32.) The defendant had touched the bare buttocks of his nine-year-old niece while she was in bed. (*Id.* at p. 33.) Evidence of the defendant's prior offenses against three other victims was admitted pursuant to Evidence Code section 1108. (*Frazier, supra*, 89 Cal.App.4th at p. 33.) Each of the victims was either a cousin or a niece of the defendant, and the evidence showed similar touchings as to two of the victims. (*Ibid.*) The third victim, however, alleged that the defendant had sodomized her and committed forcible oral copulation. (*Ibid.*)

The *Frazier* court found no abuse of discretion by the trial court's admission of the uncharged offense evidence. First, the evidence of the sodomy and forcible oral copulation was not unduly prejudicial despite the fact that those crimes were more serious than the charged offenses and had occurred 15 or 16 years earlier, and even though evidence that could have impeached that victim was no longer available. (*Frazier, supra*, 89 Cal.App.4th at p. 40.) Second, while there was a risk that the jury might punish the defendant for his uncharged crimes, the risk was "counterbalanced" by the jury instructions, which required proof of each element of the charged offenses beyond a reasonable doubt. (*Id.* at p. 42.) Third, the evidence did not consume an undue amount of time even though the testimony regarding the uncharged offenses took up 182 pages of reporter's transcript, which was 27 percent of the total trial transcript. (*Ibid.*)

We proceed to consider the various factors relevant to admissibility of the prior offense evidence. In doing so, we focus on the record before the trial court at the time it ruled on the motions in limine. (See *Robertson, supra*, 208 Cal.App.4th at p. 991.)

First, the evidence was relevant to the primary issue in the current case: Doe's credibility. Because the F.D. incident involved defendant engaging in a sexual relationship with a 13-year-old girl, it was relevant to the credibility of Doe's assertion that she told defendant she was 14 years old, and that he nonetheless continued to communicate with her. The evidence of defendant's prior sex offenses with a 13-year-

old girl were also relevant to the issue of whether, in communicating with Doe, defendant was “ ‘*motivated by an unnatural or abnormal sexual interest or intent with respect to children,*’ ” as required for a violation of Penal Code section 647.6. (See *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127.)

Second, the prior offenses were not particularly remote, having occurred six years before the current offense. Although “[r]emote prior conduct is, at least theoretically, less probative of propensity than more recent misconduct,” this is less true if the defendant has not “led a substantially blameless life in the interim [citation].” (*People v. Johnson* (2010) 185 Cal.App.4th 520, 534 & fn. 12 [domestic violence offenses that had occurred 10 years before charged domestic violence offenses were not remote where defendant had been convicted of drug and weapons offenses in the interim and “both drugs and weapons were involved in defendant’s pattern of domestic violence”].) As the Attorney General points out, the trial court was aware of evidence that defendant had allegedly committed another sexual offense between the F.D. and Doe offenses,<sup>2</sup> and thus the trial court “correctly dismissed any potential remoteness” of the offense involving F.D. (See *People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1106 (*Dejourney*) [offenses that had occurred seven years before charged offense were not remote where defendant had spent much of that time in prison]; see also *Frazier, supra*, 89 Cal.App.4th at p. 40 [offenses that had occurred 15 or 16 years before charged offenses were not remote]; *Robertson, supra*, 208 Cal.App.4th at p. 992 [remoteness of prior offense that had occurred over 30 years prior to current offenses was balanced out by “the striking

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<sup>2</sup> In its trial brief, the prosecution sought to introduce evidence that defendant had sexually assaulted K.D. in October of 2010. K.D. and defendant had been dating for a few weeks at the time of the assault. Defendant had commented to her, “I love how you look like a 14 year-old. Your body is tight like that.” Defendant had photographed K.D. while she orally copulated him. After K.D. discovered that defendant was a registered sex offender, she confronted him, and he raped her. K.D. reported the rape to the police, but charges were not filed. The trial court excluded evidence of the incident pursuant to Evidence Code section 352.

similarities” between the offenses].) There was also no showing here that evidence that could have impeached F.D. was no longer available due to the passage of time. (See *Frazier, supra*, at p. 40.)

Third, defendant’s no contest plea in the prior rape case made it unlikely the jury would be distracted or confused by the prior conviction evidence, because the jury learned that defendant had been convicted of rape. (See *People v. Wesson* (2006) 138 Cal.App.4th 959, 970.) Although defendant expresses the concern that jurors might have believed defendant was not sufficiently punished for his “many transgressions against F.D.” and would feel compelled to punish him further, the jury instructions made it clear that a finding that defendant committed the uncharged rape was “only one factor to consider along with all the other evidence” in determining whether defendant was guilty of the charged offense, that the prior offense was “not sufficient by itself to prove that the defendant is guilty of annoying or molesting a child,” and that the People were still required to prove the charged offense “beyond a reasonable doubt.” (See *Frazier, supra*, 89 Cal.App.4th at p. 42.) We must presume the jury followed those instructions. (See *People v. Merriman* (2014) 60 Cal.4th 1, 48-49.)

Fourth, although the evidence of the prior offense was more serious than the charged offense, it was not “inflammatory *in the extreme*” as it did not involve the kind of violence and injury that was present in the prior offense at issue in *Harris*. (See *Harris, supra*, 60 Cal.App.4th at p. 738.) Likewise, although the prior offense and the charged offenses were dissimilar in terms of the criminal acts, they did share some significant similarities, particularly the fact that defendant expressed interest in a relationship with both victims despite being told that they were 13 and 14 years old and the fact that defendant tried to coax both victims to come to his house.<sup>3</sup>

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<sup>3</sup> In seeking to admit the evidence, the prosecutor had asserted that the evidence would show that defendant had asked both victims if they were virgins, but this evidence was not elicited at trial.

Finally, although the testimony about the prior offense took up 146 pages of reporter's transcript and an entire day of the trial, which lasted four days,<sup>4</sup> we cannot say as a matter of law that the evidence consumed an undue amount of time. As noted above, the *Frazier* case involved a similar amount of time and a similar percentage of the trial, but the appellate court found no abuse of discretion. (See *Frazier, supra*, 89 Cal.App.4th at p. 42.)

In sum, our review of the record reveals no abuse of discretion by the trial court in this case. The trial court's decision to admit the evidence of defendant's prior offense under Evidence Code section 1108 was not " "arbitrary, whimsical, or capricious as a matter of law." ' ' (Robertson, *supra*, 208 Cal.App.4th at p. 991.) "Accordingly, [defendant's] due process claim premised upon such an error is also without merit. [Citation.]" (*Dejourney, supra*, 192 Cal.App.4th at p. 1106.)

#### **IV. DISPOSITION**

The judgment is affirmed.

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<sup>4</sup> F.D. and Officer Ramsey testified on July 13, 2012, the first day that the jury heard evidence. Doe and Officer Tracey testified on July 16, 2012. Detective Chubon and the defense witnesses testified on July 17, 2012. On July 18, 2012, the jury was instructed, heard arguments, deliberated, and returned its verdict.