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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. LEE VINCENT COTTONE, Defendant and Appellant.	G042923 (Super. Ct. No. 06HF1734) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Reversed.

William J. Kopeny for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez, James H. Flaherty III, and Meredith Strong, Deputy Attorneys General, for Plaintiff and Respondent.

Lee Vincent Cottone appeals from a judgment after a jury convicted him of four counts of committing a lewd act upon a child under the age of 14, and found true he had substantial sexual conduct with a child as to all counts. Relying on Penal Code section 26[1] and Evidence Code section 1108, Cottone argues the trial court erroneously admitted evidence that approximately 32 years ago he committed a lewd act on his sister. Cottone argues: (1) section 26 is applicable to Evidence Code section 1108; (2) the prosecutor failed to present clear and convincing evidence Cottone appreciated the wrongfulness of the 32-year old prior sexual misconduct; (3) the prior sexual misconduct evidence was not admissible pursuant to Evidence Code section 1108 because it was irrelevant, remote, and prejudicial; and (4) the trial court was required to submit to the jury the issue of whether Cottone appreciated the wrongfulness of his conduct.

As we explain below, we agree section 26 is applicable to Evidence Code section 1108, and the trial court erred in not submitting to the jury the issue of whether Cottone appreciated the wrongfulness of his prior sexual misconduct. Because the jury, and not the trial court, should have determined whether the prosecutor offered clear and convincing evidence Cottone appreciated the wrongfulness of his prior sexual misconduct, and the evidence of guilt was not overwhelming, we conclude Cottone was prejudiced by the error. We reverse the judgment.

FACTS

B., who was eight years old, lived in the South Bay. During school breaks and summer vacation B. would visit Cottone, her uncle, and Jeanie Cottone (Jeanie), her aunt, in Irvine for multiday visits. B. enjoyed spending time with Jeanie because they would go to the movies, shop, and play games. Because B. was scared to sleep alone, she would sleep between Jeanie, who wore earplugs, and Cottone, in their bed.

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

The first evening she slept in the Cottones' bed, B. woke up because Cottone was touching her vagina, breasts, and buttocks with his hand. B. moved to get Cottone to stop, but she did not tell him to stop. She did not wake up Jeanie, tell her what happened, or say anything to Cottone because she was scared. She did not ask to sleep in the empty bedroom because she was scared to sleep alone.

The next night, the same thing happened. When B. returned home, she did not tell anyone what happened because she was scared.

On her second visit to the Cottone residence, B. again slept with the Cottones. Cottone again touched her vagina, breasts, and buttocks.

When B. was 11 or 12 years old, B.'s sister, K., and B.'s cousin, C., began spending the night at the Cottone residence; this occurred approximately 10 to 15 times. The three girls slept in a bed in the guestroom; B. and C. would sleep on the outside and K. would sleep in the middle. During the night, Cottone would enter the dark room, sit on the bed, and pull back the covers. Cottone would touch B.'s vagina, breasts, and buttocks. B. did not tell her sister or cousin what had happened because she was scared.

B. spent the night at the Cottone residence between two and four days, three to four times a year for approximately four years, and Cottone touched B. inappropriately every time she spent the night.

At some point, B. began telling her mother, J., she did not want to spend the night at her uncle and aunt's house. J. would tell B. that Jeanie was expecting her, and B. would go. B. did not tell her mother why she did not want to spend the night.

A few years later, B. and her mother were going to a family bridal shower. J. was complaining about how Cottone treated her son, and B. said, "'Well, if you think that's bad, you should -- you don't want to know what he ha[d] done to [her][.]'" B. told her mother what had happened.

An information charged Cottone with four counts of committing a lewd act upon a child under the age of 14 (§ 288, subd. (a)) (count 1). The information alleged he had substantial sexual conduct with a child as to all counts (§ 1203.066, subd. (a)(8)). Cottone's first trial ended with a hung jury and a mistrial.

Before his second trial, Cottone moved to exclude evidence of a covertly recorded telephone call and evidence of prior sexual misconduct. The prior sexual misconduct consisted of a 1966 incident where 13- or 14-year-old Cottone allegedly touched the vagina of his five- or six-year-old sister, L. The covertly recorded telephone call concerned a telephone call L. made to Cottone in 2006 to get him to confess to touching her vagina in 1966. The following month, Cottone filed a supplement to his motion. The prosecutor responded to the motion, and Cottone replied.

At an Evidence Code section 402 hearing, L. testified she was born in July 1961. L. stated she started kindergarten in 1966 when she was five years old. She said school started in September and she met her friend, L.P., on the first day of kindergarten. L. stated her home had a basement, and her brothers' bedrooms were in the basement, and her and her sisters' bedrooms were on the ground level. She testified L.P. was at her house when Cottone asked them if they wanted to play a game called, "giggy-giggy." L. stated L.P. went home, and Cottone picked her up and carried her downstairs; they were alone. She said that just outside the doorway to Cottone's bedroom, Cottone put his finger in her underpants and touched her vagina. L. also testified to another incident where L.P. spent the night and Cottone entered L.'s bedroom and put his hands on L.P. L. told Cottone to leave, which he did, before L.P. woke up.

After discussing the applicable case law, the trial court ruled section 26 was applicable to Evidence Code section 1108. The trial court stated the prosecutor rebutted with clear and convincing evidence section 26's presumption by establishing "the minor appreciated the wrongfulness of the charged conduct at the time it was committed." The court opined that based on the uncertainty of the evidence, it appeared Cottone was just

short of his 14th birthday. Concerning the circumstances of the prior sexual misconduct, the court stated Cottone turned the sexual contact into a game. In concluding Cottone appreciated the wrongfulness of his conduct, the court explained: "He attempted to lure the witness downstairs. And it shows to me concealment. He went down to the bedroom area with no one else around. He initially also wanted to play the game with [L.P.], she declined, which to the court, based on what happened, is evidence that he had a propensity for sexual contact with young girls even at a young age." In concluding Cottone appreciated the wrongfulness of his conduct, the court also relied on the incident where Cottone came into her bedroom and touched L.P.

The trial court, after reviewing the moving papers and hearing argument, ruled the evidence of the 1966 incident regarding L. was admissible pursuant to Evidence Code section 1108. The court explained the prior sexual misconduct evidence was highly probative because it was similar to the charged offenses. The court noted the female victims were young family members, and the touching was similar in type (touching of the vagina) and where it occurred (his home). The court stated the prior sexual misconduct evidence was highly probative because defense counsel planned to attack B.'s credibility. The court believed the prior sexual misconduct evidence was less inflammatory than the charged offenses. The court opined the possibility of confusing the issues was slight because the jury was not likely to convict Cottone in this case based on the fact he was not convicted of the prior sexual misconduct, and L.'s testimony would likely be brief. The court correctly stated the issue of whether the prior sexual misconduct evidence was too remote was the critical issue in its analysis. The court stated: "The main big issue is remoteness, the fact that he's lived a blameless life for 32 years and there is no, no doubt about it that is a long time, you know. And if [Cottone] is convicted I don't know what [the] [C]ourt of [A]ppeal will do with that. It's my call in terms of the discretion of the trial court. I'm trying to analyze everything I possibly can to make a fair call on this. It's a tough issue. I'm going to find that there are significant

similarities with respect to the [Evidence Code section] 1108 conduct and these instances here with [B.] that I've already mentioned that in my mind balance out the remoteness or offset it somewhat as to make it more probative." The court concluded it did not believe the evidence would evoke an emotional bias against Cottone. In concluding the probative value of the prior sexual misconduct evidence outweighed any undue prejudice, the court relied on the fact two jurors voted for acquittal in Cottone's first trial.[2]

The prosecutor offered B.'s testimony as detailed above. Defense counsel cross-examined B. thoroughly about when the visits began, when the visits ended, the frequency of the visits, and the number of times Cottone molested her. Defense counsel used B.'s prior testimony to challenge her credibility.

The prosecutor also offered the testimony of Dr. Laura Brodie, a clinical and forensic psychologist, who is an expert in child sexual abuse accommodation syndrome, a syndrome where it is assumed a child was sexually abused to evaluate the child's behavior. Brodie, who was not familiar with the facts of this case, testified it was normal for a child to delay reporting sexual abuse for five years.

The prosecutor offered the testimony of L., Cottone's sister, who stated she is eight to nine years younger than Cottone; Cottone was 56 years old at the time of trial. L. testified to the following: when she was five or six years old she was in the kitchen with her friend and Cottone, and she did not think anyone else was home. Cottone asked them if they wanted to go into the basement and play a game called "giggy giggy." Her friend went home. Cottone picked up L., put her on his shoulder, and carried her downstairs. When they were in the basement, just outside one of the bedrooms, Cottone

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[2] With respect to admission of the covertly recorded telephone conversation, the trial court stated that although it ruled the evidence admissible in the first trial, the court would not admit it in the trial.

put his finger in her underwear and touched her vagina. L. did not think he put his finger inside her vagina.

Cottone offered C.'s testimony. C., 14 years old at the time of trial, testified Cottone was her grandfather. C. confirmed she frequently spent the night at her grandfather's home with B. and K. and the three girls slept together either in a bedroom, in the hallway, or on the sofa. She stated Cottone never tried to touch her or touched her inappropriately. She said B. never told her that Cottone touched her inappropriately.

Cottone also offered the testimony of his cousins, who were in their mid-20s at the time of trial. They testified that when they were young girls, approximately the same age as B., they frequently spent the night at Cottone's house, and he never touched either of them inappropriately.

Finally, Cottone offered his wife's testimony. Jeanie testified that beginning in 1999 and for the next couple years, B. frequently asked to join Cottone in various outings. Jeanie claimed she did not wear earplugs when B. spent the night.

The jury convicted Cottone of all counts and found true the enhancement allegations. The trial court sentenced Cottone to six years in prison.

DISCUSSION

The facts before us can be summarized as follows: To prove Cottone sexually molested B. in 1998 to 2001, the prosecutor sought to admit evidence that in 1966, 13-year-old Cottone engaged in similar conduct with his five-year-old sister, L. The trial court ruled L.'s testimony was admissible for the reasons we discuss in detail above. On appeal, Cottone argues the trial court erroneously admitted the evidence.

I. Does section 26 apply to Evidence Code section 1108?

Based on Evidence Code section 1108's plain language, Cottone argues section 26 is applicable to Evidence Code section 1108. We agree.

Evidence of uncharged acts is generally inadmissible to prove criminal disposition. (Evid. Code, § 1101, subd. (a).) However, 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 [Evidence Code] [s]ection 1101, if the evidence is not inadmissible pursuant to [Evidence Code] [s]ection 352." (Italics added.) Evidence Code section 1108, subdivision (d)(1), defines "'sexual offense'" as "a *crime* under the law of a state or of the United States that involved any of the following . . . ." (Italics added.) One of those *crimes* is the commission of a lewd or lascivious act on a child under 14 years of age with the intent of arousing the passions of the perpetrator or the victim (§ 288, subd. (a)). Evidence of uncharged conduct need only be proved by a *preponderance of the evidence*. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1015.)

Section 26 states: "All persons are capable of committing crimes except those belonging to the following classes: [¶] One—Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness." Section 26 provides a rebuttable presumption that a child under 14 years of age cannot commit a crime unless it is shown by clear and convincing proof that the child understood the wrongfulness of his conduct at the time he engaged in it. (*People v. Lewis* (2001) 26 Cal.4th 334, 378 (*Lewis*).) The "'clear proof'" standard articulated in section 26 requires "the [prosecutor] prove by *clear and convincing evidence* the minor appreciated the wrongfulness of the charged conduct at the time it was committed." (*In re Manuel L.* (1994) 7 Cal.4th 229, 232 (*Manuel L.*), italics added.)

There are no published cases on the issue before us—whether section 26 is applicable when a prosecutor seeks to admit evidence of a prior uncharged sexual offense

pursuant to Evidence Code section 1108. In answering this question, the plain language of Evidence Code section 1108 is dispositive.

"A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citations.] In construing a statute, our first task is to look to the language of the statute itself. [Citation.] When the language is clear and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute according to its terms. [Citations.]" (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387-388.)

Evidence Code section 1108 authorizes the admission of evidence of another *sexual offense* when a defendant is charged with committing a sexual offense. Evidence Code section 1108, subdivision (d)(1), defines "'sexual offense'" as "*a crime*." Thus, the plain language of Evidence Code section 1108 mandates that for evidence of a prior sexual offense to be admissible in a case involving a sexual offense, the prior sexual offense must be a *crime*.

Section 26 creates a rebuttable presumption that a child under 14 years of age cannot commit a crime absent clear and convincing evidence the child appreciated the wrongfulness of his conduct. Based on Evidence Code section 1108's plain language, we conclude section 26 is applicable when a prosecutor seeks to admit evidence a person under the age of 14 committed a prior sexual offense pursuant to Evidence Code section 1108 to prove a defendant had the propensity to commit the charged offense.

The Attorney General argues section 26 does not apply to evidence admitted pursuant to Evidence Code section 1108 because (1) "[s]uch evidence is admitted to show propensity, and is relevant to the issues of identity and credibility[,]" and (2) Evidence Code section 352 provides the necessary safeguard. Neither contention is persuasive.

As to its first claim, the Attorney General confuses Evidence Code section 1108 with Evidence Code section 1101, subdivision (b). Evidence Code section 1101, subdivision (a), prohibits the admission of propensity evidence, but Evidence Code section 1101, subdivision (b), permits admission of other bad acts evidence not amounting to a crime to prove among other things, intent, planning, knowledge, or identity. Evidence Code section 1108, however, represents a legislative determination evidence of prior sexual *crimes* is admissible in the prosecution of sex crimes as propensity evidence. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*).) Thus, for prior sexual offense evidence to be admitted the offense must be a crime, and to be a crime, a child under 14 years of age must appreciate the wrongfulness of his conduct.

With respect to its second claim, arguably Evidence Code section 352 does provide the necessary safeguards to ensure a defendant appreciated the wrongfulness of his prior sexual misconduct in a sexual offense case. For example, when evaluating whether the undue prejudice of the evidence outweighs its probative value, a trial court may conclude the prior sexual misconduct evidence is of little probative value because the defendant was too young to appreciate the wrongfulness of his conduct and the emotional bias invoked by the prior sexual misconduct outweighs its slight probative value. But as we explain above, Evidence Code section 1108's plain language requires prior sexual misconduct evidence to be a "crime." Therefore, we conclude the trial court correctly concluded section 26 is applicable to Evidence Code section 1108.

II. Was there clear and convincing evidence Cottone appreciated the wrongfulness of his prior sexual misconduct and did the trial court err in not submitting the issue to the jury?

Cottone contends the trial court erroneously concluded clear and convincing evidence demonstrated he appreciated the wrongfulness of his conduct because he thought he was playing a game, he did not attempt to conceal his conduct, and the subsequent incident with L.P. was irrelevant to his prior conduct. Relying on *Lewis, supra,* 26 Cal.4th 334, Cottone also argues the trial court erroneously failed to instruct the

jury on the issue of whether he appreciated the wrongfulness of his conduct. We express no opinion on whether clear and convincing evidence established nearly 14-year-old Cottone appreciated touching his sister's vagina was wrong because the trial court should have submitted the issue to the jury.

"[S]ection 26 articulates a presumption that a minor under the age of 14 is incapable of committing a crime. [Citations.] To defeat the presumption, the People must show by 'clear proof' that at the time the minor committed the charged act, he or she knew of its wrongfulness." (*Manuel L., supra,* 7 Cal.4th at pp. 231-232, fn. omitted.) "Although a minor's knowledge of wrongfulness may not be inferred from the commission of the act itself, 'the attendant circumstances of the crime, such as its preparation, the particular method of its commission, and its concealment' may be considered. [Citation.] Moreover, a minor's 'age is a basic and important consideration [citation], and, as recognized by the common law, it is only reasonable to expect that generally the older a child gets and the closer [he] approaches the age of 14, the more likely it is that [he] appreciates the wrongfulness of [his] acts.' [Citation.]" (*Lewis, supra,* 26 Cal.4th at p. 378.)

In *Lewis, supra,* 26 Cal.4th at pages 376-377, a capital case, the trial court admitted evidence that when defendant was 13 years and nine months old, he and two friends murdered a man as an aggravating factor pursuant to section 190.3, subdivision (b). Defendant argued: (1) it violated due process to determine whether defendant appreciated the wrongfulness of his conduct nearly 16 years after the fact; (2) the trial court should have determined as a preliminary fact whether defendant appreciated the wrongfulness of his conduct; and (3) the jury instructions were improper. (*Lewis, supra,* 26 Cal.4th at pp. 377-378.)

With respect to defendant's first claim, the *Lewis* court stated: "A trier of fact making a section 26 determination does not attempt to read the mind of the minor, but considers the objective attendant circumstances of the crime—such as its preparation,

the method of its commission, and its concealment—to determine whether the minor understood the wrongfulness of his or her conduct. [Citation.] . . . [Citation.] Though deliberating nearly 16 years after [the] murder, the jury and trial court could ascertain the circumstances of the crime from the testimonial witnesses." (*Lewis, supra,* 26 Cal.4th at p. 379.)

As to defendant's second claim, the *Lewis* court opined: "We also reject defendant's related argument that the trial court should have determined that defendant's knowledge of wrongfulness was a preliminary fact that the trial court should have decided before submitting evidence of [the] murder to the jury. Assuming the trial court was required to do so, any failure by the court to make such finding as a 'preliminary fact,' as defendant contends, was harmless because the trial court later determined that defendant had known the wrongfulness of the act. Defendant fails to point to any prejudice based on this evidentiary sequence. Indeed, a trial court has discretion to 'admit conditionally the proffered evidence . . . subject to evidence of the preliminary fact being supplied later in the course of the trial.' [Citation.] We reject defendant's unsupported claim that determining a minor's capacity under section 26 should be considered the same as determining the admissibility of a confession as a foundational or preliminary fact. [Citation.]" (*Lewis, supra,* 26 Cal.4th at p. 380.)

Finally, as to defendant's third claim, the *Lewis* court concluded the trial court did not err in instructing the jury with the language of section 26. (*Lewis, supra,* 26 Cal.4th at p. 380.) Although *Lewis* did not address the same issue we have,[3] we find it instructive.

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[3] Our research uncovered no published case addressing the issue we face *here*—whether the trial court should have submitted to the jury the issue of whether Cottone appreciated the wrongfulness of his conduct. This is understandable as section 26's rebuttable presumption concerning minors is most often litigated in juvenile court where a minor is not entitled to a jury trial. (*McKeiver v. Pennsylvania* (1971) 403 U.S. 528; *Alfredo A. v. Superior Court* (1994) 6 Cal.4th 1212, 1225.)

The *Lewis* court concluded the trial court was not required to find as a preliminary fact that defendant appreciated the wrongfulness of his conduct before submitting the issue to the jury. Thus, the *Lewis* court clearly rejected the Attorney General's argument here that the trial court was not required to submit to the jury the issue of whether Cottone appreciated the wrongfulness of his prior sexual misconduct. We interpret *Lewis* as holding that pursuant to section 26, the issue of whether a minor appreciates the wrongfulness of his conduct is a question for the trier of fact.

Here, the trial court instructed the jury with CALCRIM No. 1191, "Evidence of Uncharged Sexual Offense," on the proper use of prior sexual misconduct evidence, including that the jury may consider this evidence only if the prosecutor proved by a preponderance of the evidence Cottone committed the prior sexual misconduct. But the trial court did not instruct the jury on the issue of whether Cottone appreciated the wrongfulness of his prior sexual misconduct. It does not appear from the record before us that Cottone requested the jury be instructed on that issue but a trial court has a sua sponte duty to instruct the jury on the general legal principles closely and openly connected with the facts in the case (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824). Based on *Lewis, supra,* 26 Cal.4th 334, the trial court should have instructed the jury it had to determine by clear and convincing evidence whether Cottone appreciated the wrongfulness of his conduct when he touched his sister's vagina in 1966.

Although we have concluded the trial court erred in failing to instruct the jury on the issue of whether Cottone appreciated the wrongfulness of his conduct, we must now determine whether he was prejudiced by the court's error. We conclude he was prejudiced.

Based on the entire record, we cannot conclude beyond a reasonable doubt the trial court's failure to instruct the jury on whether Cottone appreciated the wrongfulness of his conduct did not contribute to the verdict. (*People v. Frazier* (2001) 89 Cal.App.4th 30, 37-38 (*Frazier*) [*Chapman v. California* (1967) 386 U.S. 18, standard

of review applicable where defendant argued CALJIC No. 2.50.01 lowered prosecutor's burden of proof by permitting jury to convict defendant of charged offense based solely on prior sexual offense]; *People v. James* (2000) 81 Cal.App.4th 1343, 1360-1361 [same with respect to CALJIC No. 2.50.02]; but see *Falsetta, supra,* 21 Cal.4th at pp. 924-925 [any error failing to instruct jury on how to use propensity evidence harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836].)[4]

The evidence was not overwhelming, and essentially boiled down to a credibility contest between B. and Cottone. The jury heard B.'s testimony about how over the course of approximately four years Cottone touched her vagina, breasts, and buttocks every time she spent the night at Cottone's. But the jury also heard evidence there was someone in the bed other than Cottone and B. every time B. spent the night, which understandably makes one wonder why neither Jeanie, K., nor C. ever saw any inappropriate touching. Further, the jury heard evidence B. repeatedly asked to join Cottone on numerous outings during the time she claimed Cottone was sexually molesting her. And Cottone's first trial ended in a hung jury, and in that case, the trial court admitted the evidence Cottone touched L. many years ago. Based on the record before us, we cannot conclude beyond a reasonable doubt the instructional error was harmless.

Because we have concluded the trial court erred in not submitting to the jury the issue of whether Cottone appreciated the wrongfulness of his prior sexual misconduct, and failed to instruct the jury accordingly, we need not address Cottone's claim insufficient evidence supports the trial court's finding the prosecutor presented clear and convincing evidence on the issue, or whether there was sufficient evidence for the jury to make that determination. That is for the jury to decide at Cottone's third trial.

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[4] Cottone argues the error is reversible under any standard of review. The Attorney General does not address the prejudice argument. Our research uncovered no published case addressing the applicable standard of review (see fn. 2).

III. Did the trial court properly admit L.'s testimony pursuant to Evidence Code section 1108?

Cottone argues the trial court erroneously admitted L.'s testimony because the evidence was not similar to the charged conduct and it is uncertain whether and what occurred, the evidence was unduly prejudicial, and the evidence was too remote. None of his contentions have merit.

In *People v. Harris* (1998) 60 Cal.App.4th 727, 737-741, the court articulated the following factors to determine whether evidence of prior sexual acts was properly admitted pursuant to Evidence Code section 1108: (1) the probative value of the evidence; (2) the inflammatory nature of the evidence; (3) the possibility of confusion of the issues; (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses; and (5) remoteness in time of the uncharged offenses.

Evidence Code section 352, however, authorizes a trial court to exclude prior sexual offenses evidence offered pursuant to Evidence Code section 1108. Evidence Code 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."

"The two crucial components of [Evidence Code] section 352 are 'discretion,' because the trial court's resolution of such matters is entitled to deference, and 'undue prejudice,' because the ultimate object of the [Evidence Code] section 352 weighing process is a fair trial." (*Harris, supra*, 60 Cal.App.4th at p. 736.) We are mindful that "'"[t]he prejudice which [Evidence Code section 352] is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." [Citations.] "Rather, the statute uses the word in its etymological sense of 'prejudicing' a person or cause on the basis of extraneous factors."' [Citation.] Painting a person faithfully is not, of itself, unfair." (*Harris, supra,* 60 Cal.App.4th at

p. 737.) We review the trial court's admission of evidence pursuant to Evidence Code sections 1108 and 352 for an abuse of discretion. (*People v. Wesson* (2006) 138 Cal.App.4th 959, 969.)

A. Relevance

"[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.) "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, fn. omitted.) However, "if the prior offenses are very similar in nature to the charged offenses, the prior offenses have greater probative value in proving propensity to commit the charged offenses." (*Branch, supra,* 91 Cal.App.4th at p. 285.)

Although evidence of past sexual misconduct need not be sufficiently similar to the charged misconduct, here, the evidence Cottone touched L.'s vagina was sufficiently similar to the charged offenses. In both cases, Cottone inappropriately touched a relative, first his sister and later his niece. And both cases involved the same type of touching. In both cases, Cottone touched their vaginas; he did not put his finger inside their vaginas. Cottone's claim it is uncertain whether and what occurred is a factual determination to be made by the jury. Thus, evidence Cottone touched L.'s vagina was relevant to prove he touched B.'s vagina.

B. Inflammatory

In *Harris*, the court, relying on *People v. Ewoldt* (1994) 7 Cal.4th 380, "deemed it important in evaluating prior uncharged acts pursuant to [Evidence Code] 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.'" (*Harris, supra,* 60 Cal.App.4th at pp. 737-738.)

Here, the evidence Cottone touched his sister's vagina was no more inflammatory than the charged offenses. The incident involved a touching, not a penetration, and occurred one time. This was less inflammatory than the charged offenses, which involved multiple touchings of B.'s vagina, breasts, and buttocks over an approximately four-year period. Evidence Cottone touched L.'s vagina one time would not evoke an emotional bias against him.

C. Confusion of the Issues

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.'" (*Frazier, supra,* 89 Cal.App.4th at p. 42.)

Cottone does not contend admission of L.'s testimony would confuse the issues. The prior sexual misconduct evidence concerned one victim, not involved in the charged offenses, on one occasion. Additionally, 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 offenses, 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 L.'s testimony. (*Branch, supra,* 91 Cal.App.4th at p. 284.)

D. Amount of Time

"Conceivably a case could arise in which the time consumed trying the uncharged offenses so dwarfed the trial on the current charge as to unfairly prejudice the defendant . . . and we cannot say spending less than a third of the total trial time on these issues was prejudicial as a matter of law." (*Frazier, supra,* 89 Cal.App.4th at p. 42 [uncharged offense evidence that comprised 27 percent of the total trial transcript did not consume an unreasonable amount of time].) Cottone does not contend admission of L.'s testimony consumed too much time. Indeed, L.'s testimony consists of four pages of reporter's transcript, and required one additional jury instruction.

E. Remoteness

"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. "[S]ignificant similarities between the prior and the charged offenses may 'balance[] out the remoteness.' [Citation.]" (*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, 992 [passage of 20 to 30 years did not automatically render prior incidents prejudicial where prior sexual offenses and charged offenses similar].) However, where the prior sexual misconduct and the charged offenses are not similar, courts have excluded prior sexual misconduct evidence where the passage

of time renders the prior sexual misconduct evidence of little probative value, and of high undue prejudice. (*People v. Abilez* (2007) 41 Cal.4th 472, 535 [prior offense evidence inadmissible where lack of similarities between prior and current offenses bolstered by remoteness of prior offense]; *Harris, supra,* 60 Cal.App.4th at p. 739 [prior sexual misconduct evidence inadmissible where 23-year-old prior offense and charged offenses totally dissimilar and defendant led blameless life].)

Although the trial court was concerned the prior sexual misconduct evidence was possibly too remote to have any probative value, the court clearly wrestled with the issue and painstakingly provided its reasoning on the record for its finding the evidence was not too remote. The court concluded the similarities of the prior sexual misconduct evidence to the charged offenses outweighed the remoteness. We agree the passage of 32 years does not automatically make the prior sexual offenses too remote when the prior sexual misconduct and the charged offenses are similar. But 32 years is a long time, and if the prior sexual misconduct evidence were not similar we likely would reach a different result. Because it is solely within the trial court's discretion to determine whether prior sexual misconduct evidence is too remote, and where the record demonstrates the court wrestled with the issue and exercised its discretion, we will not disturb the court's ruling on appeal.

As in *Branch, supra,* 91 Cal.App.4th 274, which contrary to Cottone's assertion otherwise was an Evidence Code section 1108 case, the passage of 30 years did not render the prior sexual misconduct evidence too remote where the prior sexual misconduct and the charged offenses are similar. Finally, Cottone's reliance on *Harris, supra,* 60 Cal.App.4th 727, for the proposition a 23-year-old prior offense was too remote is misplaced. In that case, the court found "striking dissimilarities" between the prior offense and the charged offense. Here, on the other hand, the incidents were similar. Thus, the trial court properly admitted L.'s testimony.

IV. Were Cottone's Sixth Amendment confrontation rights violated when the trial court ruled the covertly recorded telephone call inadmissible and "suggested" it would reconsider its ruling if defense counsel placed L.'s credibility in issue?

Because we have concluded Cottone was prejudiced for the reasons stated above, we need not address Cottone's claim the trial court denied his Sixth Amendment right to cross-examine L. by suggesting it may admit evidence of the covertly recorded telephone call if defense counsel placed her credibility in issue.

DISPOSITION

The judgment is reversed.

CERTIFIED FOR PUBLICATION

O'LEARY, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.