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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. FIDEL GALLARDO, Defendant and Appellant.	B257692 (Los Angeles County Super. Ct. No. NA090230)

APPEAL from a judgment of the Superior Court of Los Angeles County. John David Lord, Judge. Affirmed in part and reversed in part, and remanded.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Fidel Gallardo appeals from the judgment of his convictions of first degree burglary, assault with intent to commit a felony, forcible lewd act upon a child, and assault with intent to commit a felony during the commission of a first degree felony. Appellant asserts multiple errors, including ineffective counsel, juror misconduct, and the trial court's improper admission of evidence and failure to properly instruct the jury. As we shall explain, only appellant's claim concerning his conviction of assault with intent to commit a felony and his contention regarding the court's failure to instruct on attempted forcible lewd act have merit. Accordingly, we reverse the judgment as to those matters, and affirm in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2011, Maribel V. and her children lived in an apartment on Paramount Boulevard in Long Beach. On the night of September 30, Maribel V. and her boyfriend J.L. went to sleep in a bedroom, and Maribel V.'s 10-year-old daughter T. fell asleep on the living room couch while watching television. Appellant's son, Miguel Anguiano, lived in the apartment next door to Maribel V., and on the evening of September 30, appellant smoked cigarettes and drank beer outside, next to the unlocked living room window of Maribel V.'s apartment.

At approximately 1:00 a.m. on October 1, 2011, T. woke up to find a stranger, whom she later identified as appellant, next to her, trying to pull down her pants. Light from the television and dining area illuminated appellant's face. Appellant asked T. if her parents were home. When she tried to get away, appellant pushed her down, holding her on the couch. Appellant pulled down T.'s jeans. She tried to scream, but appellant put his hand over her mouth, instructing her, "Don't yell." When T. nodded her head, appellant removed his hand from her mouth and pulled down her underpants to below her knees. T. screamed again, waking Maribel V. and J.L., who ran into the living room where they saw appellant as he struggled to open the front door of the apartment. Appellant escaped and ran towards Paramount Boulevard.

When police arrived, T. described appellant. Although Maribel V. and J.L. only saw appellant from behind, they both described his clothing. Police broadcast a description of appellant to patrol officers.

Approximately 10 minutes later, an officer in a patrol car saw appellant, who matched the preliminary description of the suspect, two blocks away from Maribel V.'s apartment. Appellant told the officer that he had walked from his son's apartment on Paramount Boulevard, and was walking to a liquor store. The officer detained appellant and brought him to Maribel V.'s apartment complex for a field show-up. At separate field show-ups, T., Maribel V., and J.L. identified appellant as the assailant.

An information charged appellant with first degree burglary (Pen. Code,[1] § 459; count 1), assault with intent to commit a felony (rape, sodomy or oral copulation) (§ 220, subd. (a)(1); count 2), forcible lewd act upon a child under the age of 14 years (§ 288, subd. (b)(1); count 3), assault with intent to commit a felony (rape, sodomy or oral copulation) during the commission of a first degree burglary (§ 220, subd. (b); count 4), and a number of special allegations. Appellant pleaded not guilty.

Appellant testified at trial, denying that he had any contact with T. He did, however, admit that he was at his son's apartment on the night of the crimes. Appellant also explained that as he prepared to go to sleep, he realized he had left his cell phone and wallet in his truck. He left the apartment to retrieve the items and to look for cigarettes. When he discovered that he did not have any cigarettes in his truck, he decided to walk to a nearby mini-market to buy cigarettes and something to eat.

The jury found appellant guilty on all counts and found the special allegations to be true. The trial court denied the defense motion for new trial. The trial court sentenced appellant to a total term of 25 years in state prison.

Appellant filed a timely appeal.

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

DISCUSSION

I. *Appellant Has Not Demonstrated That His Counsel Was Ineffective For Failing To File A Motion To Suppress The Identifications From The Field Show-ups.*

Appellant claims that his counsel was ineffective in failing to seek suppression of the identification evidence from the field show-ups. As we shall explain, appellant has not demonstrated that he suffered prejudice as a result of his counsel's representation.

In general, an appellate court will not reverse a judgment based on a claim of ineffective assistance of counsel unless the defendant establishes both: "(1) that counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.]'" (*People v. Foster* (2003) 111 Cal.App.4th 379, 383, italics omitted; *Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 694.) A court may proceed directly to the issue of prejudice if it is easier to dispose of an ineffectiveness claim on that basis. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

A. *Factual Background*

The police conducted three separate field show-ups in this case within the hour after Maribel V. called the police. Maribel V., J.L., and T. received and signed standard field show-up admonitions before viewing appellant, who stood handcuffed in front of the apartment complex on Paramount Boulevard, next to a police officer and a police car. Both Maribel V. and J.L. identified appellant based on his clothing, and T. identified appellant based on his face. T. also identified appellant as the perpetrator during the trial.

B. *Analysis*

Both parties agree that a single person field show-up is not inherently unfair. (*People v. Bisogni* (1971) 4 Cal.3d 582, 587.) A field show-up, however, has constraints. If it suggests the identity of the person to be identified in advance, then the procedure is unjust. (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) Due process requires "the exclusion of identification testimony only if the identification procedures used were

unnecessarily suggestive and, if so, the resulting identification was also unreliable." (*People v. Yeoman* (2003) 31 Cal.4th 93, 123; see also *Manson v. Brathwaite* (1977) 432 U.S. 98, 106-114.) Accordingly, "'[t]he issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, . . . if, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.) Consequently, "[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends." (*United States v. Bagley* (9th Cir. 1985) 772 F.2d 482, 492.)

Appellant argues that the field show-up was unduly suggestive because T., Maribel V., and J.L. viewed him in custody, standing next to a police officer. He further complains he was shown dressed in clothing similar to that which Maribel V. and J.L. described as worn by the perpetrator.

Appellant has not demonstrated that the show-up was impermissibly suggestive. First, the record does not contain evidence that the officers told the witnesses before the show-up that they had apprehended the person who committed the crimes or said anything to suggest appellant's guilt. Police gave the witnesses the standard admonition that the person detained for viewing may or may not be the person who committed the crime and the fact that the person detained is handcuffed should not influence them. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 990 [the admonition re-enforces the reliability of the identification].) Second, other aspects of the show-up, including that appellant was in custody, standing with officers next to a patrol car, do not render the show-up suggestive. (*People v. Gomez* (1976) 63 Cal.App.3d 328, 335-337 [appellant was standing outside the patrol car, handcuffed, with two deputies standing near him]; see also *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 [the presence of handcuffs on a detained suspect is not so unduly suggestive as to taint the identification].) The circumstances of the show-up in this case are the trappings of police activity that are inherent in nearly all field show-ups and are not necessarily suggestive or unfair.

Regarding appellant's argument that the show-ups were unduly suggestive because of his clothing, we observe that appellant was shown in the clothing he wore when the police arrested him. Due process is not denied where a person participates in a field show-up wearing the clothing in which he was arrested. (See *People v. Floyd* (1970) 1 Cal.3d 694, 713.) Likewise, appellant's clothing was not so distinctive as to be suggestive of his guilt. (See *People v. DeSantis* (1992) 2 Cal.4th 1198, 1222 [upholding photo array where defendant was only suspect wearing red-colored jacket that a witness had identified as similar to that worn by perpetrator].)

In short, the field show-ups were not unduly suggestive, and thus, they did not violate appellant's right to due process. If appellant had filed a motion to suppress the identifications from the field show-ups, the trial court would have been properly required to deny the motion. As a result, appellant has not shown that counsel was deficient in failing to file a motion to suppress the field show-up.

II. *Assault With Intent To Commit A Felony Is A Lesser Included Offense Of Assault With Intent To Commit A Felony In The Commission Of A Burglary.*

Appellant properly contends, and the Attorney General agrees, that this court should reverse appellant's conviction for assault with intent to commit a felony (§ 220, subd. (a)(1); count 2) because it is a necessarily lesser included offense of his assault to commit a felony during a residential burglary conviction (§ 220, subd. (b); count 4). (See *People v. Dyser* (2012) 202 Cal.App.4th 1015, 1021.) Accordingly, appellant's conviction of assault with intent to commit a felony cannot stand. (*People v. Medina* (2007) 41 Cal.4th 685, 701-702 [multiple convictions cannot be based on necessarily included offenses].)

III. *The Record Contains Sufficient Evidence That Appellant Used Force Under Section 288, Subdivision (b)(1).*

Appellant's conviction under section 288, subdivision (b)(1) required proof that, in committing the proscribed acts, he used force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the victim. (§ 288, subd. (b)(1) [forcible lewd conduct].) Force, in this context, means physical force that is "'substantially different from or substantially greater than that necessary to accomplish'" an ordinary lewd act punishable under section 288, subdivision (a). (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13; *People v. Soto* (2011) 51 Cal.4th 229, 242.)

Appellant claims insufficient evidence supported his conviction under section 288, subdivision (b)(1) because the prosecution failed to prove that he used force above and beyond that which was necessary to perpetrate the offense. Appellant points out that a few courts have ruled that "[s]ince ordinary lewd touching often involves some additional physical contact, a modicum of holding and even restraining cannot be regarded as substantially different or excessive 'force.'" (*People v. Schulz* (1992) 2 Cal.App.4th 999, 1004; accord, *People v. Senior* (1992) 3 Cal.App.4th 765, 774.)

This approach, however, "has been criticized for attempting 'to merge the lewd acts and the force by which they were accomplished as a matter of law' [citation]." (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1004, italics omitted.) The *Alvarez* court observed this analysis "fails to recognize a 'defendant may fondle a child's genitals without having to grab the child by the arm and hold the crying victim in order to accomplish the act. Likewise, an assailant may achieve oral copulation without having to grab the victim's head to prevent the victim from resisting.' [Citation.] Lewd conduct of this sort is punishable in and of itself. (§ 288, subd. (a).) Therefore, it stands to reason that the force requirement will be deemed satisfied when the defendant uses any force that is 'different from and in excess of the type of force which is used in accomplishing similar lewd acts with a victim's consent.' [Citation.]" (*People v. Alvarez, supra*, 178 Cal.App.4th at pp. 1004-1005.) Such force includes grabbing, holding and restraining in conjunction with the lewd acts themselves. (See, e.g., *People v. Gilbert*

(1992) 5 Cal.App.4th 1372, 1381 [defendant's placing his arm over the victim's mouth to prevent her from crying out and pushing the victim back when she tried to move found sufficient force under section 288, subdivision (b)(1)]; *People v. Bolander* (1994) 23 Cal.App.4th 155, 160-161 [defendant's acts of overcoming the victim's resistance to having his pants pulled down, bending the victim over, and pulling the victim's waist towards him constituted forcible lewd conduct]; *People v. Bergschneider* (1989) 211 Cal.App.3d 144, 153 [pushing the victim's hands away was sufficient force under section 288 subdivision (b)(1)].)

Alvarez outlines the correct approach to analyzing force in section 288, subdivision (b)(1) lewdness cases. In this case, the record contains sufficient evidence that a reasonable jury could find that appellant used more force than required to carry out the basic lewdness offense. T. testified that appellant pushed her down when she tried to get up from the couch; he pulled her pants down with both hands and covered her mouth when she tried to scream. Appellant's exercise of force restrained T. and overcame her resistance to appellant and thus, satisfied the standard discussed in *Alvarez*. Accordingly, sufficient evidence of force existed to support a charge under section 288, subdivision (b)(1).[2]

IV. *The Court Should Have Instructed The Jury On The Offense Of Attempted Forcible Lewd Act On A Minor.*

Appellant claims that the evidence warranted a *sua sponte* jury instruction on *attempted* forcible lewd act on a minor as a lesser included offense of forcible lewd act. He asserts that because a reasonable jury could have concluded that his conduct fell short of a completed forcible lewd act, his conviction cannot stand. As we shall explain, we agree.

An attempt to commit a lewd act upon a child requires both intent to commit the lewd act and a direct if possibly ineffectual step toward committing the act. (See *People v. Singh* (2011) 198 Cal.App.4th 364, 368 [describing attempt in the context of

[2] In view of our conclusion, we need not analyze whether the prosecutor also presented sufficient evidence of violence, duress, menace, or fear of bodily injury.

section 288, subdivision (a)].) Attempted forcible lewd act is a lesser included offense of the crime of a forcible lewd act on a minor because a perpetrator who completes a forcible lewd touching with the requisite specific intent also necessarily completes an *attempt* to commit the crime. (See *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1381.)

A trial court must instruct the jury, *sua sponte*, on lesser included offenses if substantial evidence supports such instructions. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.) "'"Substantial evidence" in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude'" that the lesser offense, but not the greater, was committed. [Citations.]'" (*Ibid.*; *People v. Parson* (2008) 44 Cal.4th 332, 348.) This court reviews a claim that the trial court erred in failing to instruct on a lesser included offense is *de novo.* (*People v. Avila* (2009) 46 Cal.4th 680, 704.)

Here, if properly instructed, the jury could have concluded that appellant's conduct only amounted to an attempt. Maribel V. and J.L. interrupted appellant when T.'s screams brought them into the living room, and therefore, it is not clear whether appellant's conduct constituted a complete lewd act or only preliminary steps in a lewd act. It was proper for the jury to evaluate the evidence and to decide the issue. Under the circumstances, the jury's evaluation should have been conducted with an appropriate instruction on the lesser included offense of attempted forcible lewd act.

Furthermore, the error was not harmless. "Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to [the] defendant under other properly given instructions." (*People v. Lewis* (2001) 25 Cal.4th 610, 646.) No other jury finding resolved that issue—whether appellant's acts were complete or an attempt—adversely to appellant. Moreover, appellant's identity defense did not concede any aspect of his conduct; thus, the prosecution was required to prove all of the elements of the charge, including that appellant completed the lewd act. When, however, the evidence could support two conclusions, the court was required to instruct on both. Where, as here, the jury may be convinced a defendant did something for which he ought to be punished, without a third choice between conviction of the greater offense and acquittal,

a substantial risk exists of an unwarranted conviction that "diminishes the reliability of both the factfinding and the sentencing determination." (*People v. Geiger* (1984) 35 Cal.3d 510, 519, overruled on other grounds in *People v. Birks* (1998) 19 Cal.4th 108, 136.)

"When a greater offense must be reversed, but a lesser included offense could be affirmed, we give the prosecutor the option of retrying the greater offense, or accepting a reduction to the lesser offense." (*People v. Kelly* (1992) 1 Cal.4th 495, 528.) The People are entitled to try to obtain another conviction for forcible lewd act upon a child. On the other hand, the prosecution may decide that it is satisfied with the attempted forcible lewd act conviction. Our disposition preserves these two options. (See *People v. Edwards, supra,* 39 Cal.3d at p. 118.)

V. *The Court Did Not Err In Admitting Evidence Of Appellant's Prior Misconduct Under Evidence Code Section 1108 and Section 352.*

Appellant contends the trial court improperly admitted evidence of his uncharged sexual misconduct because those acts were dissimilar to the charged offenses. He also argues the prior act evidence should have been excluded under Evidence Code section 352 because it created an undue risk that the jury would punish him for the uncharged crimes regardless of whether sufficient evidence existed as to the charged offenses. Finally, he claims that Evidence Code section 1108, on its face, violates his federal constitutional rights to due process and equal protection. We disagree.

A. *Factual Background*

Before trial, the prosecutor filed a motion in limine to introduce evidence of uncharged instances of sexual misconduct appellant committed involving Priscilla S. and Patricia E.[3] In 2008, appellant, Anguiano (appellant's son), and Priscilla S., Anguiano's former girlfriend, lived together. In September 2008, while Priscilla S. (then between

[3] The prosecutor also sought to introduce evidence of a third instance of sexual misconduct involving allegations that in 2009, appellant forcibly raped and kidnapped a 16-year-old female. Although the court ruled that the evidence involving the 16-year-old was admissible under Evidence Code section 1108, the prosecution did not present evidence of that incident in the trial.

17 and 18 years old) slept in her bedroom, she woke up to find appellant grabbing her vagina. At Anguiano's request, Priscilla S. did not report the incident to police.

Approximately a year later in 2009, Patricia E. (then age 20) stayed with Priscilla S., Anguiano, and appellant. On the night of July 31, 2009, appellant, Anguiano and Patricia E. drank beer. Later in the evening, Patricia E. fell asleep on the living room floor. During the early morning hours, Patricia E. awoke to find appellant kissing her and touching her vagina. Patricia E. then called the police. Police subsequently arrested appellant, but no charges were filed.

The trial court ruled that the prosecutor could present evidence involving appellant's prior acts of sexual misconduct to the jury, concluding that the conduct involving the other young women was "so similar" to this case that it suggested a "pattern and practice." The court subsequently instructed the jury, under CALJIC No. 2.50.01, that it could not convict appellant of the charged offenses based solely on the prior uncharged crimes.

B. *Analysis*

When a defendant is charged with a sex offense, Evidence Code section 1108 allows admission of evidence of other sex offenses to prove the defendant's disposition to commit sex offenses, subject to the trial court's discretion to exclude the evidence under Evidence Code section 352. (Evid. Code, § 1108, subd. (a); *People v. Lewis* (2009) 46 Cal.4th 1255, 1286.) "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 section 1108." (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41; *People v. Loy* (2011) 52 Cal.4th 46, 63.)

Under Evidence Code section 1108, a defendant's fair trial rights are protected by the safeguard of Evidence Code section 352. (See *People v. Loy*, *supra*, 52 Cal.4th at p. 62; *People v. Falsetta* (1999) 21 Cal.4th 903, 916-917.) When evaluating the other sex offense evidence under section 352, relevant factors include "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." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.) On appeal, we review the admission of Evidence Code section 1108 evidence, including the court's Evidence Code section 352 weighing process, for abuse of discretion. (*People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1104-1105.)

1. *Application of Evidence Code Section 1108 and Section 352*

The trial court's decision to admit the uncharged crimes testimony was not error. The charged crimes and the uncharged acts are defined as sex crimes under Evidence Code section 1108, subdivision (d). We concur with the trial court that similarities existed between the charged offenses in this case and the uncharged conduct. In all three instances, appellant attacked young females who were asleep and vulnerable. Moreover, the current offense and the uncharged conduct with Patricia E. involved appellant's consumption of alcohol. Any dissimilarities, including that Patricia E. and Priscilla S. were adults, go to the weight of the evidence. (See *People v. Hernandez* (2011) 200 Cal.App.4th 953, 967 ["any dissimilarities in the alleged incidents relate only to the weight of the evidence, not its admissibility"].)

In addition, the court did not err in weighing this evidence under Evidence Code section 352. The uncharged crimes were not remote; they occurred only a couple of years before the charged incident. Also, the uncharged crimes are not more egregious than the charged crime, and thus, the admission of the uncharged conduct would not inflame the jury's emotions against appellant. The evidence of appellant's prior misconduct was not uncertain, confusing, or distracting. Its presentation did not place an undue burden on the defense. Contrary to appellant's claim, his situation is not analogous to *People v. Harris* (1998) 60 Cal.App.4th 727, 733, 738-739, where the prior offense occurred 23 years before the charged offense and the prior offense involved a violent sexual assault that was significantly more serious and inflammatory than the

charged offense. Finally, the court admonished the jury here on the limited use of this evidence, and we have no reason to believe that the jury failed to heed that instruction. (See *People v. Chism* (2014) 58 Cal.4th 1266, 1299 [reviewing court presumes the jury followed the trial court's instructions].)

2. *Constitutionality of Evidence Code Section 1108*

Appellant also raises a facial challenge to the constitutionality of Evidence Code section 1108, which he claims violates due process and equal protection. Appellant recognizes, however, that the California Supreme Court has rejected his due process contention in *People v. Falsetta*, *supra*, 21 Cal.4th at p. 917, and that we are obligated to follow it under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.[4]

Appellant's additional contention that Evidence Code section 1108 deprived him of equal protection is unavailing. Although the California Supreme Court has not expressly ruled on the equal protection argument, the *Falsetta* Court cited with approval the intermediate appellate court's rejection of an equal protection challenge in *People v. Fitch* (1997) 55 Cal.App.4th 172, 182–184. As our Supreme Court explained: "*Fitch* . . . rejected the defendant's equal protection challenge, concluding that the Legislature reasonably could create an exception to the propensity rule for sex offenses, because of their serious nature, and because they are usually committed secretly and result in trials that are largely credibility contests." (*People v. Falsetta*, *supra*, 21 Ca1.4th at p. 918.)

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[4] Appellant raises the due process claim both to preserve it for federal review and to argue that *Falsetta* should be reconsidered in light of *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769,775, which held that the trial court erred in reading an instruction that invited the jury to draw the additional inference of criminal propensity from other crimes evidence. *Garceau* does not bind this court, and is irrelevant, in any event. *Garceau* did not concern the admissibility of prior sexual misconduct in a sex offense case, but rather, the introduction of drug and homicide evidence under Evidence Code section 1101. (*Id.* at p. 773.) Furthermore, in *U.S. v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1031, the Ninth Circuit held that Federal Rules of Evidence, rule 414, which concerns admission of evidence of prior child molestation evidence, is constitutional in light of Federal Rules of Evidence, rule 403, which like California Evidence Code section 1108, provides that relevant evidence may be admitted unless its probative value is substantially outweighed by the danger of unfair prejudice. (*U.S. v. LeMay*, *supra*, 260 F.3d at p. 1031.)

For the reasons expressed in *Fitch*, effectively endorsed in *Falsetta*, we reject appellant's equal protection challenge. (Accord, *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [rejecting equal protection attack on Evidence Code section 1108].)

VI. *Appellant's Challenge to CALJIC No. 2.50.01 Fails.*

Appellant next contends the trial court's instructing the jury with CALJIC No. 2.50.01 violated his constitutional right to due process. He argues that by allowing the jury to infer propensity under Evidence Code section 1108 by a preponderance of the evidence, the instruction undermined the presumption of innocence and interfered with the requirement that the jury determine his guilt beyond a reasonable doubt.

The California Supreme Court and the California Courts of Appeal have repeatedly rejected appellant's specific challenge to CALJIC No. 2.50.01. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1013-1014; *People v. Lewis* (2009) 46 Cal.4th 1255, 1297-1298 [affirming rationale of *Reliford*]; see also *Schultz v. Tilton* (9th Cir. 2011) 659 F.3d 941, 945 [holding that *Reliford's* interpretation of CALJIC No. 2.50.01 is not contrary to federal law].) We are bound to follow *Reliford*, and, therefore, decline appellant's invitation to revisit this issue.

VII. *The Jury Instructions Defining Lewd Acts Are Not Impermissibly Argumentative.*

CALJIC No. 10.41 and No. 10.42 are the pattern instructions that explain the elements of lewd conduct (section 288, subd. (a); CALJIC No. 10.41) and forcible lewd conduct (section 288, subd. (b)(1); CALJIC No. 10.42) with a child under the age of 14. Appellant argues these instructions are argumentative. He complains the instructions favor the prosecution because they inject specific evidentiary matters that are not elements of the offense, namely, that consent is not a defense to the crime of lewdness and that the law does not require the actual arousal of lust, passions, or sexual desires. In addition, appellant maintains that this language improperly diminished the weight the jury would afford to certain evidence, causing the jury to minimize or to disregard it. We disagree.

An argumentative instruction is one that highlights specific evidence and invites the jury to draw inferences favorable to one of the parties from the specified items of evidence. (*People v. Earp* (1999) 20 Cal.4th 826, 886.) CALJIC No. 10.41 and No. 10.42 are not argumentative. They do not specify items of evidence, identify witnesses, or in any way favor the prosecution over the defense. Instead, these instructions accurately set out the elements in easily understood language and do not improperly diminish the weight to be given to any evidence. The language is also neutral in tone and does not discourage the jury from considering evidence on either sexual arousal or lack thereof. (See, e.g., *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1195-1196 [the pattern jury instruction on stalking did not improperly diminish the weight to be given evidence when it set out that the prosecutor did not need to prove that a person who makes a threat actually intends to carry it out; the instruction merely assisted jurors to understand the nature of the crime].)

Finally, charging the jury with CALJIC No. 10.41 and No. 10.42 did not constitute constitutional error. The instructions did not impede the jury in determining appellant's guilt of every element of the charge beyond a reasonable doubt. Nor did they bias the jury so that it determined guilt in a way that violated the Constitution. (See *U.S. v. Fuller* (4th Cir. 1998) 162 F.3d 256, 259, citing *United States v. Gaudin* (1995) 515 U.S. 506, 522-523.)

VIII. *Instructing The Jury With CALJIC No. 2.62 Did Not Constitute Reversible Error.*

Appellant contends the trial court erred in instructing the jury using CALJIC No. 2.62, that it could draw an adverse inference from his failure, during his testimony, to explain or deny evidence against him. Appellant asserts that the court should not have given the instruction because he denied the allegations and explained his behavior.

The trial court properly instructs with CALJIC No. 2.62 where the prosecution presents facts or evidence "within [the defendant's] knowledge which he did not explain or deny." (See *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469.) A contradiction between the defendant's testimony and other witnesses' testimony does not, however,

constitute a failure to deny which justifies giving the instruction. (See *People v. Kondor* (1988) 200 Cal.App.3d 52, 57 [the test for giving the instruction is not whether the defendant's testimony is believable].) The court may, nonetheless, give the instruction when the defendant's testimony, while accounting for his or her conduct, appears bizarre or implausible. (See *People v. Vega* (2015) 236 Cal.App.4th 484, 500; *People v. Sanchez* (1994) 24 Cal.App.4th 1012, 1029-1030.)

In any case, we need not determine the merits of appellant's claim because, even assuming error, he has failed to demonstrate prejudice. (See *People v. Lamer*, *supra*, 110 Cal.App.4th at p. 1469 [error in giving an instruction is only prejudicial if it is reasonably probable a more favorable verdict would have resulted had it not been given].) The evidence against appellant was strong. Appellant admitted he drank beer outside Maribel V.'s apartment shortly before the crime. T. identified appellant as her attacker and Maribel V., and J.L. identified appellant as the man they saw fleeing the apartment after the attack. Saliva found on the palms of appellant's hands contained the highly likely presence of T.'s DNA. Given this evidence, absent the alleged error it is not reasonably probable that appellant would have received a more favorable result. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

IX. *The Court Did Not Err In Denying Appellant's Motion For A New Trial Based On Juror Misconduct.*

During the trial, the prosecution presented evidence from a DNA expert who testified that evidence from saliva found on the palms of appellant's hands indicated the possible presence of T.'s DNA. The expert concluded that for someone other than T. to have contributed all of the DNA on appellant's left palm, such a person would be about one in 1.4 million of the general population.

According to appellant's trial counsel, after the verdict, Juror No. 7, who worked as a criminalist in Orange County, told the lawyers that she "had to 'break down' what one in 1.4 million meant for the rest of the jury." After that, appellant filed a motion for a new trial, arguing that Juror No. 7's comment reflected that she had committed jury misconduct. The trial court denied the motion, concluding that appellant did not meet his

burden to prove that Juror No. 7 improperly relied on external evidence, rather than interpreting the evidence and explaining it to her fellow jurors.

Appellant claims that the trial court erred in denying his motion for a new trial based on jury misconduct because Juror No. 7 brought extrinsic evidence into the jury deliberations. Even assuming that the statement attributed to Juror No. 7 is admissible, appellant has not carried his burden to prove it constitutes misconduct. (*People v. Marshall* (1990) 50 Cal.3d 907, 949 [defendant must affirmatively demonstrate juror misconduct].) The jury must base its verdict on the evidence presented at trial, not on extrinsic matters. (*People v. Wilson* (2008) 44 Cal.4th 758, 829; *People v. Leonard* (2007) 40 Cal.4th 1370, 1414.) Jurors commit misconduct if they express an opinion explicitly based on specialized information obtained from outside sources, that is different from (or contrary to) the evidence admitted in the trial. (*People v. Steele* (2002) 27 Cal.4th 1230, 1266.) Not every consideration of extraneous information, however, is misconduct. Jurors bring to their deliberations knowledge and beliefs about law and fact that find their source in everyday life and experience. (*People v. Danks* (2004) 32 Cal.4th 269, 302.) Moreover, a juror, regardless of his or her educational or employment background, may express an opinion on a technical subject, so long as the opinion is based on the evidence. Cases have found no misconduct "where the jurors employed their own reasoning skills in a demonstrative manner or performed tests in the jury room that were confined to the evidence admitted at trial. [Citations.]" (*People v. Vigil* (2011) 191 Cal.App.4th 1474, 1485.)

Juror No. 7's statement is ambiguous. Appellant did not establish that whatever Juror No. 7 did to "break down" the DNA evidence for her fellow jurors involved the use of extrinsic information or evidence that differed from that presented in the trial. As a result, Juror No. 7's statement does not support a finding of juror misconduct. (See, e.g., *English v. Lin* (1994) 26 Cal.App.4th 1358, 1363-1365 [lack of specificity defeats efforts to show misconduct].) Further, because we cannot delve into the jurors' mental processes in reaching their verdicts, we are not permitted to consider how Juror No. 7's explanation affected other jurors. (Evid. Code, § 1150.)

DISPOSITION

The judgment on appellant's conviction of assault with intent to commit a felony (count 2) is reversed. Appellant's conviction of forcible lewd act upon a child under the age of 14 years (count 3) is reversed with the following directions: If the People do not retry appellant for forcible lewd act upon a child, within 60 days after the remittitur is filed or if the People file a written election not to retry appellant, the trial court shall proceed as if the remittitur modified the judgment to reflect a conviction of attempted lewd act upon a child under the age of 14 years and resentence appellant accordingly. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.