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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. THOMAS COALT YOUNG, Defendant and Appellant.	2d Crim. No. B264175 (Super. Ct. No. 2012031959) (Ventura County)

Thomas Coalt Young appeals after a jury convicted him of first degree murder (Pen. Code, §§ 187, subd. (a), 189), and found true the special circumstance allegation that he committed the murder while engaged in the commission of rape (*id.*, § 190.2, subd. (a)(17)(C)). Appellant committed the crime almost 35 years before he was convicted. He was finally identified as the perpetrator through a "cold hit" DNA match obtained after he sexually assaulted his granddaughter. The trial court sentenced him to life without the possibility of parole. Appellant contends the court erred by (1) precluding him from introducing evidence under a theory of third party culpability; (2) excluding evidence offered to impeach a prosecution witness; and (3) admitting evidence of his prior uncharged sexual offenses. He also contends

that the jury was instructed with CALCRIM No. 1191 in violation of his due process rights, and that the cumulative effect of the alleged errors compels a reversal of his conviction. We affirm.

STATEMENT OF FACTS

The Murder of Stacy Knappenberger

On July 1980, Judy Linzey and her 15-year-old daughter Stacy Knappenberger moved into a duplex in Port Hueneme. They previously lived about two blocks away at the Villa Tropicana Apartments, where appellant also lived.

On the morning of July 30, 1980, Linzey left for work and locked the front and back doors. Before leaving, she opened Knappenberger's bedroom door and saw her asleep in bed. When Linzey returned home at about 4:20 p.m., she unlocked the front door and noticed a drop of blood on the porch. She went inside and saw that the back door was ajar. She then went into her own bedroom and saw Knappenberger lying face down on the floor and nude from the waist down. Linzey called 911 and the police and paramedics responded.

Knappenberger was pronounced dead at the scene. She had visible wounds on her head and neck and there were "[m]assive amounts of blood." A broken ceramic planter and a shattered glass ashtray were on the ground near her body. The police recovered a pair of blood-stained jeans, a pair of women's underwear, and bloody bed sheets. Neighbors reported hearing sounds of a struggle coming from the apartment that day at about 12:30 p.m.

At about 11:00 p.m. that night, Ventura County Assistant Medical Examiner Dr. C. Peter Speth examined Knappenberger's body at the scene and performed a rape examination. Knappenberger had 50 to 60 wounds on her body

and head, some of which were consistent with having been inflicted by the planter and ashtray found near her body. She also suffered bruising and abrasions to her vagina. Dr. Speth concluded Knappenberger had been dead for about 10 to 12 hours and had lived for about an hour after her wounds were inflicted.

Dr. Speth took swabs from five regions of Knappenberger's vagina. Live sperm cells were recovered from the fornix. In Dr. Speth's experience, sperm cells can only survive in that region of a dead body for about 12 hours after insemination. Another doctor who examined Knappenberger prior to the autopsy concluded that three injuries to the outside of her vagina were inflicted near the time of death and indicated she had been raped. The autopsy revealed that she also had several broken ribs and that her brain was severely swollen. Dr. Speth concluded that she died as a result of blunt force trauma.

Uncharged Sexual Assault of L.G.

On January 22, 1982, twenty-four-year-old L.G. and her two children lived in a two-story apartment complex in Port Hueneme. Appellant lived in the apartment below L.G. along with Kathleen Galvin and her children.[1] L.G. was awakened that night by a noise in the living room. She walked into the hallway and saw appellant's silhouette. She asked who he was and what he wanted. Appellant did not answer and walked

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[1] Kathleen Galvin's brother Brian met Knappenberger while he was living with Kathleen and her children at the Villa Tropicana Apartments. Appellant's wife often babysat Kathleen's children. A few months after Knappenberger's murder, appellant left his wife and moved into another apartment with Kathleen and her children. According to Brian, Kathleen and appellant were merely "roommates" but "a couple times it got more serious." Kathleen died prior to appellant's trial.

toward her with a knife in his hand. He grabbed her, covered her mouth, held the knife to her neck, and told her to be quiet.

L.G. heard one of her children cry and moved toward the bedroom where he was sleeping. Appellant pulled her back, pushed her against the wall, and hit her head against the wall. He squeezed her neck, pushed her to the floor, and opened her legs. He put his mouth on her vagina and briefly penetrated her vagina with his penis. L.G. then heard appellant walk away from her, run downstairs, and slam the front door to his apartment.

L.G. locked the front door and took a shower before calling the police. The police took her to the hospital, where samples were taken from her vagina.

Uncharged Sexual Assault of T.Y.

T.Y. is appellant's granddaughter. In September 2008, T.Y. was 15 years old and lived with appellant in Illinois. She was asleep on the couch one night when she awakened to find appellant licking her vagina. She pulled away from appellant and let out a muffled scream. Appellant got up and walked away. T.Y. called the police and was taken to the hospital for a rape examination.

Appellant denied assaulting T.Y. when questioned by the police and agreed to provide a DNA sample. DNA analysis of amylase (a component of saliva) found on T.Y.'s shorts was consistent with appellant's DNA profile.

Subsequent Investigation

In March 2009, appellant's DNA profile was entered into the Combined DNA Index System (CODIS), a national database that allows users to match an unknown profile with the profile of individuals in the system. In 2010, DNA profiles were obtained from the sperm cells recovered from Knappenberger's

vagina. A profile was also obtained from the vaginal swabs taken from L.G. after she was assaulted. The profiles were submitted into CODIS, which found a match with appellant's DNA profile. DNA profiles obtained from semen found on Knappenberger's jeans, blood found on Linzey's sheets, and other blood found at the crime scene also matched appellant's DNA profile.

In September 2012, appellant was interviewed at his home in Alabama by an investigator from the Ventura County District Attorney's Office. During the interview, appellant admitted that he and his wife lived at the Villa Tropicana Apartments in 1980 and 1981. He also acknowledged that his wife babysat for Kathleen Galvin, yet denied that he knew Kathleen or ever lived with her. He also denied having any sexual contact with Knappenberger and L.G. When confronted with the DNA evidence indicating otherwise, he said it was "impossible."

Defense

In investigating Knappenberger's murder, the police found a bloody footprint on Linzey's bed that corresponded with a men's shoe size of 5½ or a women's size of 7½. Appellant wears a men's size 9 on his right foot and a size 10 on his left foot. His fingerprints did not match any of the prints recovered from the crime scene.

DISCUSSION

Third-Party Culpability

Appellant contends the trial court prejudicially erred in precluding him from presenting evidence that a third party, Rick Lacquement, had killed Knappenberger. We disagree.

"An accused may defend against criminal charges by showing that a third person, not the defendant, committed the

crime charged. He has a right to present evidence of third party culpability where such evidence is capable of raising a reasonable doubt as to his guilt of the charged crime. But evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice; there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime. [Citations.]" (*People v. Mackey* (2015) 233 Cal.App.4th 32, 110-111.)

In assessing an offer of proof relating to evidence of a third party's culpability, the court must decide whether the evidence could raise a reasonable doubt as to the defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352.[2] (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.) A trial court's ruling excluding third party culpability evidence is reviewed for abuse of discretion. (*People v. Brady* (2010) 50 Cal.4th 547, 558.)

Prior to trial, appellant moved in limine to present evidence that Lacquement was Knappenberger's killer. His proffered evidence consisted almost exclusively of follow-up reports prepared by the police from July 30, 1980 (the date of Knappenberger's murder) through December 1982. Lacquement, who was deceased at the time of trial, lived next door to Knappenberger in the Villa Tropicana Apartments. They dated for about two months and ended their relationship about three weeks prior to the murder. Neighbors told the police they heard Lacquement threaten to kill Knappenberger. Friends of Knappenberger reported that Lacquement sold drugs, physically abused Knappenberger, and told her "[p]ayback is a

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[2] All further statutory references are to the Evidence Code unless otherwise stated.

motherfucker" after she broke up with him. Other individuals reported seeing Lacquement in the vicinity of the Villa Tropicana Apartments on the day of Knappenberger's murder.

When Lacquement was initially questioned by the police, he said he was at his home in Ventura on the day of the murder. He later admitted that he went to several locations in Oxnard that day but denied killing Knappenberger. Several days after the murder, Dr. Speth observed abrasions on the back of Lacquement's hands and an incised wound on one of his fingers.

Several months after the murder, Lacquement' ex-girlfriend Valerie Trail told the police that appellant had admitted going to Knappenberger's apartment on the day of the murder but said he did not remember what had happened. In June 1982, a jail inmate (Mark McQuatters) told the police that Lacquement had recently told him he committed the murder. Lacquement was arrested for Knappenberger's murder in December 1982 but was never formally charged with the crime.

In objecting to appellant's motion, the prosecution argued that the offer of proof was based on inadmissible hearsay and that there was no direct or circumstantial evidence linking Lacquement to the crime. Appellant's attorney countered that the offer of proof was sufficient, but added "I'm prepared today to give live testimony from Valerie Trail and Mark McQuatters if the Court deems it necessary." Counsel also offered that any witnesses who might testify contrary to their prior statements could be impeached with those statements. The prosecutor replied that any statements attributed to Lacquement would still be inadmissible hearsay. The prosecutor also represented that McQuatters had recently admitted fabricating Lacquement's confession to obtain leniency in his own pending criminal case.

The trial court concluded "there's been enough of an offer of proof for the Court to listen to both of you today and to make the rulings on the motions that you made in these proceedings." The court found, however, that appellant's offer of proof failed to raise a reasonable doubt as to his guilt. The court concluded "there's been an insufficient amount of information presented that McQuatters would testify truthfully in these proceedings that Lacquement ever made any statements to him about Knappenberger's murder." The court also found "[t]here's no evidence, at least [that] the Court's aware of at this point considering the offers of proof made by both sides . . . , that Lacquement was ever present at the scene of this crime." The court further found that "[t]he probative value of any of the aforementioned information concerning Lacquement is more prejudicial than probative, and it will serve only to confuse the jury about relevant issues in the case concerning [appellant]."

The court did not abuse its discretion in excluding the proffered evidence of third party culpability. The offer of proof was insufficient to the extent it was based upon inadmissible hearsay. (See *People v. Hall* (1986) 41 Cal.3d 826, 833 [recognizing that third-party culpability evidence is subject to state evidentiary rules and cannot be premised upon inadmissible hearsay]; *People v. Frierson* (1991) 53 Cal.3d 730, 746 [same].) In any event, the court did not abuse its discretion in finding that the proffered evidence failed to create a reasonable doubt as to appellant's guilt. Appellant's live semen was found in Knappenberger's vagina and his blood was found at the scene.[3] Moreover, Knappenberger had injuries indicating

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[3] Appellant refers to Dr. Speth's testimony that sperm cells

that she was raped near the time of her death. By contrast, there was no physical evidence connecting Lacquement to the crime. The jury also heard evidence that appellant sexually assaulted another woman under similar circumstances. In light of this, it is not reasonably probable that the jury would have reached a different result had the court not excluded the proffered evidence of Lacquement's guilt. Accordingly, any error in excluding the evidence was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 837 (*Watson*); *People v. Hall*, *supra*, at p. 836 [exclusion of third party culpability evidence reviewed for harmless error under standard articulated in *Watson*].) We reject appellant's claim that his federal constitutional rights to present a defense were violated. (See *People v. Lawley* (2002) 27 Cal.4th 102, 155 [application of the ordinary rules of evidence does not impermissibly infringe upon an accused's federal constitutional rights]; *People v. Gonzales* (2012) 54 Cal.4th 1234, 1261.)

Impeachment Evidence

Appellant contends the court erred in precluding him from impeaching Dr. Speth with evidence regarding an incident that occurred in 1993 while he was working as a private medical examiner in New Jersey. As a result of that incident, Dr. Speth was indicted on charges of third-degree tampering with a witness (N.J.S.A. § 2C:28-5), fourth degree tampering with physical evidence (N.J.S.A. § 2C:28-6), and fourth-degree false swearing (N.J.S.A. § 2C:28-2.). Dr. Speth was convicted on the witness tampering charge, but the conviction was expunged in 2011. The

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can live for up to 72 hours after insemination. The doctor also made clear, however, that the sperm cells at issue here—which were recovered from the fornix of a dead body—would have survived for about 12 hours.

jury deadlocked on the remaining charges and the charges were never retried.

The trial court in the instant case found that the conviction itself was inadmissible pursuant to section 788.[4] The court further found that evidence of the acts that prompted the charges was irrelevant to Dr. Speth's credibility in the instant matter and would be more prejudicial than probative. The court reasoned that evidence of the facts relating to the charges—which the New Jersey court described as "complicated and requir[ing] extensive exposition"—would consume too much time and "confuse the issues in this case."

Although appellant does not dispute that the conviction itself was inadmissible, he claims that evidence of the underlying acts was admissible pursuant to *People v. Wheeler*

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[4] Section 788, subdivision (d), provides in pertinent part that a prior felony conviction is inadmissible to impeach the credibility of a witness if "[t]he conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to" the procedure for expunging a felony conviction under California law. Under New Jersey law, crimes are classified as being of the first, second, third, or fourth degree. (N.J.S.A. §§ 2C:1-4, 2C:43-1, 2C:1-4, subd. d.) The crime of witness tampering is a third degree offense and is punishable by three to five years imprisonment. (*Id.*, § 2C:43-6, subd. a(3).) The trial court in this case concluded, and the parties did not claim otherwise, that (1) Dr. Speth's conviction for witness tampering was equivalent to a felony conviction under California law; and (2) the conviction was expunged pursuant to a procedure that is substantially equivalent to the procedure set forth in Penal Code section 1203.4.

(1992) 4 Cal.4th 284 (*Wheeler*), and that the court abused its discretion in excluding the evidence under section 352. We are not persuaded.

Evidence that a witness has committed acts involving moral turpitude is generally relevant and admissible to impeach his or her credibility. (*People v. Contreras* (2013) 58 Cal.4th 123, 157, fn. 24; *Wheeler*, *supra*, 4 Cal.4th at p. 295.) "Misconduct involving moral turpitude may suggest a willingness to lie [citations], and this inference is not limited to conduct which resulted in a felony conviction." (*Wheeler*, *supra*, at pp. 295-296; *People v. Rivera* (2003) 107 Cal.App.4th 1374, 1380.)

The admission of impeachment evidence is subject to exclusion under section 352. (*People v. Lucas* (2014) 60 Cal.4th 153, 240, disapproved on another point in *People v. Romero* (2015) 62 Cal.4th 1, 53, fn. 19; *Wheeler*, *supra*, 4 Cal.4th at pp. 295-296.) "[T]he latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues. . . . [¶] When exercising its discretion under . . . section 352, a court must always take into account, as applicable, those factors traditionally deemed pertinent in this area. [Citations.] But additional considerations may apply when evidence other than felony convictions is offered for impeachment. In general, a misdemeanor—or any other conduct not amounting to a felony—is a less forceful indicator of immoral character or dishonesty than is a felony. Moreover, impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence, courts may and should

consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value. [Fn. omitted.]" (*Wheeler*, *supra*, 4 Cal.4th at pp. 296-297.)

The court did not abuse its discretion in excluding the proffered evidence. None of that evidence establishes that Dr. Speth acted with moral turpitude. He was charged with tampering with evidence, filing a false certification about it, and arranging to have a friend contact the medical examiner in an effort to resolve the dispute without litigation.[5] But the jury was only able to agree on the third charge. Moreover, the incident took place 13 years after Dr. Speth examined Knappenberger's body, and 20 years before he testified at appellant's trial. The

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[5] In 1993, Dr. Speth was retained by the family of a man who died in jail. The medical examiner, Geetha Natarajan, ruled the death a suicide and concluded that the decedent's hyoid bone (a horseshoe-shaped bone in the neck) was not fractured. When Dr. Speth subsequently inspected the body, he concluded the bone was fractured. Dr. Natarajan reexamined the bone, saw the fracture, and concluded it had been inflicted post-mortem. After further investigation, the matter was reported to the state Attorney General's office. In a civil action brought by the decedent's family, Dr. Speth submitted a certification stating his opinion that the fracture of the decedent's hyoid bone "must have occurred while [the decedent] was still alive." Dr. Speth subsequently called Dr. Michael Baden, a medical examiner whom he had known for several years. Dr. Speth told Dr. Baden about the dispute and asked if he would arrange to have the two of them meet with Dr. Natarajan "and look at the specimen together" so they "could see that what he was saying was truthful and accurate and that it would resolve the matter without any further litigation."

court did not err in concluding that evidence of the prior incident would result in an undue consumption of time, and confuse the issues to be decided by the jury. Given the overwhelming evidence of appellant's guilt, any error in excluding the evidence was also harmless under any standard of review.

Evidence of Uncharged Offenses

Appellant asserts that the court erred in admitting evidence of his 1982 sexual assault of L.G. and his 2008 sexual assault of T.Y. We conclude the evidence was properly admitted under sections 1108 and 352. Accordingly, we need not decide whether the evidence was also admissible under section 1101, subdivision (b). (*People v. Soto* (1998) 64 Cal.App.4th 966, 992.)

"[E]vidence of uncharged sex crimes admitted under . . . section 1108 may be used in a sex offense prosecution to demonstrate the defendant's disposition to commit such crimes. [Citation.]" (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1095.) "Admissibility under . . . section 1108 does not require that the sex offenses be similar; it is enough the charged offense and the prior crimes are sex offenses as defined by the statute. [Citation.]" (*People v. Jones* (2012) 54 Cal.4th 1, 50.)

Such evidence is, however, subject to exclusion under section 352. "In deciding whether to exclude evidence of another sexual offense under section 1108, '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.' [Citation.] Like any ruling under section 352, the trial court's ruling admitting evidence under section 1108 is subject to review for abuse of discretion. [Citations.]" (*People v. Story* (2009) 45 Cal.4th 1282, 1295 (*Story*).)

In concluding that the 1982 rape of L.G. was admissible under sections 1108 and 352, the trial court reasoned that the crime was committed close in time to the charged offense and in the same city near appellant's residence. The court further reasoned that in both crimes appellant entered the residence and used a sharp weapon to commit the crime. Although 2008 assault of T.Y. was remote in time from the instant offense, both crimes involved teenage girls of the same age. The court could thus reasonably find that the 2008 assault demonstrated appellant had a propensity to commit sexual assaults against teenage girls. (See *People v. McCurdy*, *supra*, 59 Cal.4th at p. 1099 ["No specific time limit exists as to when an uncharged crime is so remote as to be excludable"].)

The significant time gap between the 2008 offense and the instant offense was a relevant fact for the court to consider, but "the time gap alone does not compel exclusion of the evidence. Neither section 352 nor section 1108 contains rigid requirements. [Citation.]" (*People v. Cordova* (2015) 62 Cal.4th 104, 133.) Appellant "does not point to any evidence that his character changed over the relevant time period or offer any reason that such a change might have occurred. Moreover, evidence of subsequent crimes may bear on a defendant's character at the time of the charged offense. [Citations.]" (*Ibid.*) The evidence that appellant committed sex offenses against two

young women after the instant offense was committed allowed the jury to infer he had a propensity to commit sex offenses against young women earlier in his life, notwithstanding that the crimes were committed over the course of many years. (*Ibid.*; see also *People v. Callahan* (1999) 74 Cal.App.4th 356, 367 [evidence of a prior offense involving a victim of the same or similar age is highly probative].)

The court also acted within its discretion in concluding that the evidence of the prior offenses was more prejudicial than probative. In arguing otherwise, appellant relies on *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*), and *Story*, *supra*, 25 Cal.4th 1282. Neither case is persuasive. In *Harris*, the prior crime was a violent physical attack on a stranger, while the charged offenses involved the use of trust and dependence to obtain sexual gratification. (*Harris*, *supra*, at pp. 735-736.) Moreover, the evidence of the prior crimes was highly inflammatory and its admission resulted in an undue consumption of time. (*Id.*, at pp. 737-738.) Here, evidence of the prior offenses was relatively brief and was less inflammatory than the evidence of Knappenberger's rape and murder.

Appellant's citation to *Story* at most demonstrates that the uncharged offenses in that case were more similar to the charged offense than was so here. *Story*, however, does not purport to establish a benchmark for the admission of evidence under section 1108. Our task is to determine whether the trial court could reasonably conclude that the evidence at issue here was admissible. We conclude that it could.

Even if the evidence of appellant's prior offenses should have been excluded, the other evidence of appellant's guilt was overwhelming. Accordingly, it is not reasonably probable

that the jury would have reached a different result had the evidence of appellant's prior offenses been excluded. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 659 ["Error in the admission or exclusion of evidence [under section 1108] following an exercise of discretion under section 352 is tested for prejudice under the *Watson* harmless error test"].)

CALCRIM No. 1191

Appellant claims the court prejudicially erred in giving CALCRIM No. 1191, the pattern jury instruction on the application of section 1108.[6] He argues that the instruction

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[6] The jury was instructed as follows: "The People presented evidence that the defendant committed the crimes of 1982 Rape of [L.]G. and 2008 oral copulation of [T.]Y. that were not charged in this case. These crimes are 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 offenses. 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 the 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 offenses, 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 rape [*sic*] of Stacy Knappenberger, as charged here. If you conclude that the defendant committed the uncharged offenses, 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 rape [*sic*] of Stacy Knappenberger. The People must still prove the charge beyond a reasonable doubt." (*Ibid.*)

violated his due process rights by allowing the jury to convict him by a preponderance of the evidence, rather than by proof beyond a reasonable doubt. Our Supreme Court has rejected this claim. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1016 [addressing CALCRIM No. 1191's predecessor, CALJIC No. 2.50.01]; see *People v. Villatoro* (2012) 54 Cal.4th 1152, 1160 [recognizing "that section 1108 satisfies the requirements of due process" and "that CALJIC No. 2.50.01, the predecessor to CALCRIM No. 1191, is a correct statement of the law"].) We are bound to follow this precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *People v. Cromp* (2007) 53 Cal.App.4th 476, 480 [following *Reliford* in concluding that CALCRIM No. 1191 comports with due process].)[7]

Cumulative Error

Appellant finally contends that the cumulative effect of the claimed errors resulted in the denial of a fair trial. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488; *People v. Hill* (1998) 17 Cal.4th 800, 844-848.) We reject this contention because, for the reasons already stated, we have no prejudicial error to cumulate. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1094.)

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[7] We reject the People's assertion that appellant forfeited the claim by failing to raise it below. (*People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1574 ["[T]here is no forfeiture of an instructional issue on appeal where, as here, the issue raised asserts a violation of substantial constitutional rights"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Jeffrey G. Bennett, Judge
Superior Court County of Ventura

Chris R. Redburn, 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, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.