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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. MANUEL VALLE, Defendant and Appellant.	2d Crim. No. B245014 (Super. Ct. No. 1363849) (Santa Barbara County)

Manuel Valle appeals the judgment entered after a jury convicted him of forcible rape (Pen. Code, § 261, subd. (a)(2)), forcible sexual penetration (Pen. Code, § 289, subd. (a)(1)), and false imprisonment by violence (Pen. Code, § 236). The trial court sentenced him to eight years in state prison. He contends the court erred in admitting evidence of two prior sexual offenses pursuant to Evidence Code[1] sections 1108, and 1101, subdivision (b). We affirm.

[1] All further undesignated statutory references are to the Evidence Code.

STATEMENT OF FACTS

Current Offenses

Tamara N.

In 2008, victim Tamara N. rented a bedroom in appellant's duplex on Walnut Avenue in Carpinteria. Appellant, who was 66 years old at the time, also lived at the duplex along with his 24-year-old son Joaquin. Although Tamara and appellant did not talk to each other much at first, over time they became friends.[2]

Tamara began dating Robert H. in 2009. When Robert was absent, appellant would occasionally come home after a night of drinking and "come on to" Tamara. Tamara always made it clear to appellant that she did not "feel that way" about him and reminded him she had a boyfriend.

After Robert was deported to Canada in 2010, appellant "started coming on to [Tamara] all the time." Tamara testified that appellant would "get me like up against the wall and be like rubbing on me . . . and trying to kiss me." Tamara pushed appellant away and told him she was still in a relationship with Robert. Appellant always left Tamara alone after she told him to do so, but she "started to feel not safe."

One night in early September of 2010, Tamara was eating dinner in her bedroom when appellant knocked on her door. Tamara asked who it was, and appellant identified himself. Appellant usually waited for Tamara to open the door, but this time he just came in. Appellant grabbed Tamara and began kissing her. Tamara pushed appellant away and told him to "stop it." While Tamara was struggling with appellant, she knocked over the "T.V. tray" that held her plate of dinner and the food "went flying." Appellant, who weighed about 250 pounds, laid on top of 106-pound Tamara. Tamara told appellant to "stop it" and "[g]et off of" her. Appellant, who was "obviously intoxicated," pulled down Tamara's pants and grabbed her breasts.

Tamara hit appellant a couple of times, but was afraid he would hit her back if she resisted too much. Appellant tried to put his penis in her vagina but was unable to

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[2] The record does not disclose Tamara's exact age, but she testified that her children were 25 and 31 years old.

get an erection. Appellant then held his penis in his hand and "shov[ed] his whole hand up inside of [her] with his penis." He repeatedly used his hand to push his penis in and out of her vagina in an attempt to get an erection. Appellant "was sticking his fist inside of" her and tore her vagina.

The incident, which lasted about 10 minutes, ended when appellant heard Joaquin coming home. Appellant jumped up, took his hand out of Tamara's vagina, and walked back to his bedroom with his pants halfway down. Tamara shut and locked her door and went to her bathroom. After Tamara "cleaned up the mess" caused during the assault, she "pretty much just kind of curled up in a ball and . . . just cried." She also started shaking and throwing up. Tamara suffered from painful bruised ribs that took over a month to heal.

Tamara did not go to the police right away because she was in shock and was scared and humiliated. Her family lived far away and she did not have a car. She was afraid she would not have a place to live if appellant were arrested. She also feared she might lose her job, which was two blocks away.

The next morning, Tamara asked appellant if he remembered what had happened. Appellant replied in the affirmative. She asked him why he had done what he did, and he replied, "Well, you know you wanted it." When she told him he had torn her vagina, he responded, "Ooh, I must be really big."

After the incident, appellant became very hostile toward Tamara. On one occasion, he put a refrigerator in her bedroom when she was not home. When she told him "[y]ou don't have any business being in my room," he replied, "Well, if you don't like it, you can just move out."

Robert noticed a change in Tamara's demeanor after the incident. Instead of being "her happy self" during their telephone calls, she was "tearful" and said "things are not good and will never be the same." On September 13, 2010, Tamara finally told Robert what had happened. He urged her to call the police, but she was afraid appellant might assault her again if she did. During their subsequent conversations, Tamara would

"speak in whispers." She told Robert that she needed to find another place to live first or would "lose everything."

Tamara subsequently told several friends about the incident. Tamara moved out of the duplex in early October 2010. Shortly thereafter, she sought medical attention because her vagina was still torn and was bleeding. Tamara told the nurse practitioner who examined her that she had been "raped by her roommate." She diagnosed her with vaginal and urinary tract infections, the former of which is usually caused by sexual intercourse. She also exhibited symptoms of extreme anxiety and was diagnosed with post-traumatic stress disorder (PTSD). For an entire month after the incident, Tamara woke up shaking and throwing up and was unable to work. Tamara also exhibited PTSD symptoms when Robert came to visit her in October 2010. A psychiatric social worker offered testimony indicating that Tamara's anxiety and failure to immediately report the assault were consistent with an individual suffering from rape trauma syndrome.

Several weeks after the incident, Tamara's friend Annie H. disclosed that she had also been sexually assaulted by appellant. Tamara realized she needed to tell the police what had happened to prevent appellant from victimizing anyone else. Tamara reported the incident to the police on October 12, 2010.

Tamara's friend Kelly D. told the police he had heard appellant make graphic sexual remarks about Tamara. On one occasion, appellant said "[Tamara's] got a nice butt and [I] wouldn't mind tapping it." On another occasion, Kelly asked appellant to leave his house because appellant was using offensive language in front of Kelly's wife, Cathy F. When Tamara first moved into appellant's duplex, Cathy heard appellant say, "I think I'm going to go home and try to get some head from Tamara." Cathy also heard appellant say that Tamara was thin and pretty and had beautiful hair.

Annie H.

Tamara and Annie were close friends who socialized a few times a week.[3] Annie stayed the night with Tamara a couple of times a month, but only felt comfortable being there when Tamara's bedroom door was locked. Annie became "very scared" of appellant after meeting him for the second time. The first time, Annie came to the duplex to see if she could borrow $20 from Tamara. Appellant, who was home alone, seemed liked "a really nice guy" and agreed to lend Annie the money. Several months later, Annie went to borrow money from Tamara again and discovered she was not home. This time, appellant told Annie he did not have $20 but could get it from Joaquin if Annie would "give him a blow job" or "have sex with [him]." Annie told appellant "to F-off," called him "a creep," and left. Appellant subsequently told Tamara that Annie was no longer allowed to come to the duplex.

Sometime later, Annie went to the duplex looking for Tamara. Appellant, who was wearing only a robe, told Annie that Tamara was not there and asked if she wanted to come inside and see Joaquin's artwork. Annie agreed to do so because she had seen Joaquin's artwork before and liked it. As she was bending down to look at a sculpture in appellant's bedroom, appellant opened his robe, pressed her face into his penis, and said, "suck my dick." He then threw her on the bed and jumped on top of her. As Annie was pinned under appellant, he grabbed her breasts under her clothing and put his hand down her pants. Annie managed to push appellant off her and ran away.

Annie told her niece about the incident. There were also a couple of times when she tried to tell Tamara, but Tamara "said she didn't want to listen" because "she thought that [appellant] was a very nice man" and did not want Annie to "get involved in [Tamara's] relationship" with him. Annie finally told Tamara and reported the incident to the police. Appellant was charged with sexually assaulting Annie H., but was not convicted.

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[3] Although Annie's exact age is not revealed in the record, she testified that she had a 24-year-old son.

Prior Sexual Offenses

Bailee M.

In 2005, Bailee M. was 13 years old and lived in Carpinteria. Two days a week, she walked down Walnut Avenue to get to a babysitting job. When she passed a garage two blocks from her residence, appellant would be inside waving at her. One day, appellant approached Bailee on the sidewalk and stepped in front of her to prevent her from walking away. Appellant introduced himself as "Manny" and shook her hand. Bailee also introduced herself, but "felt very uncomfortable" and "got a very bad feeling from him right away."

The next time Bailee saw appellant, he came out of the garage and gave her a ring he said he had found. He told her "not to tell anyone he was giving it to [her] and [said] it was a friendship ring." Bailee went home and told her mother about it. Later, around Valentine's Day, appellant approached Bailee and said he wanted to give her a box of chocolates and did not know whether her boyfriend had already done so. Bailee once again felt very uncomfortable. A couple of weeks later, appellant approached Bailee yet again and said he was having dreams about her and wanted to be with her. He said he knew it was wrong and that he would ask her out in the future when she was older. On another occasion, appellant showed Bailee his car and house and invited her inside the latter. Bailee went home and told her mother, who immediately called the police.

Allison F.

In 2007, Allison F. was 16 years old and lived with her family on Walnut Avenue. Appellant was her neighbor. When Allison walked by appellant's duplex, he would call out, "Hey, cutie" or "Hey, beautiful." On October 8, 2007, Allison was leaving a mosh pit at the avocado festival when appellant approached and asked if she would hug him because it was his birthday. Allison gave appellant a hug. Sometime the following month, Allison was walking to the drug store when appellant approached her on a bicycle. Appellant wanted to give her a ride, but she said no and continued walking. Appellant followed Allison to the drugstore and playfully tried to take one of the items

she had placed in her basket. Allison and her father subsequently went to the police and reported appellant's behavior.

Defense

Appellant did not testify in his defense. His son, daughter, and son-in-law testified to their opinions that he had never been inappropriate with Tamara or other women and never showed any sexual interest in children. Appellant's friends Daniel Arredondo and Joesph Costa offered the same opinions. Arredondo also recounted visiting appellant during the 2010 Labor Day weekend. According to Arredondo, Tamara was "under the influence of alcohol" and did not appear to be angry or upset with anyone.

DISCUSSION

Appellant contends the court erred in admitting evidence of his prior sexual offenses against Bailee M. and Allison F. pursuant to sections 1108 and 1101, subdivision (b). We conclude otherwise.[4]

"'Evidence Code section 1108 authorizes the admission of evidence of a prior sexual offense to establish the defendant's propensity to commit a sexual offense, subject to exclusion under Evidence Code section 352.' [Citations.] 'By removing the restriction on character evidence in section 1101, section 1108 now "permit[s] the jury in sex offense . . . cases to consider evidence of prior offenses *for any relevant purpose*" [citation], subject only to the prejudicial effect versus probative value weighing process required by section 352.' [Citation.]" (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1273-1274 (*Hollie*).)

Pursuant to section 352, in order to be admissible under section 1108 "'the probative value of the evidence of uncharged crimes "must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of

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[4] Appellant has also filed an in propria persona supplemental brief in which he claims (1) newly discovered evidence compels a new trial; (2) the verdict is contrary to the evidence, which is insufficient to support his convictions; (3) the trial judge was biased against him; and (4) trial counsel provided ineffective assistance. Because appellant is represented by counsel, we need not consider briefs filed in propria persona. (*People v. Clark* (1992) 3 Cal.4th 41, 173, overruled on another point as stated in *People v. Pearson* (2013) 56 Cal.4th 393, 462.) In any event, appellant's claims lack merit.

undue prejudice, of confusing the issues, or of misleading the jury." [Citations.]' [Citation.] 'The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense. Other factors affecting the probative value include the extent to which the source of the evidence is independent of the charged offense, and the amount of time between the uncharged acts and the charged offense. The factors affecting the prejudicial effect of uncharged acts include whether the uncharged acts resulted in criminal convictions and whether the evidence of uncharged acts is stronger or more inflammatory than the evidence of the charged offenses.' [Citation.] 'The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules.' [Citation.]" (*Hollie, supra*, 180 Cal.App.4th at p. 1274.) We review a challenge to the admission of prior bad acts under section 352 for abuse of discretion and will reverse only if the trial court's ruling was "'arbitrary, whimsical, or capricious as a matter of law. [Citation.]'" (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

Appellant's prior sexual offenses led to misdemeanor charges of annoying or molesting a child in violation of Penal Code section 647.6. Although the conduct proscribed by Penal Code section 647.6 expressly falls under section 1108's definition of a "sexual offense" (§ 1108, subd. (d)(1)(A)), appellant maintains that the evidence of this conduct was nevertheless inadmissible because it has no logical tendency to prove he has a propensity to engage in the type of conduct underlying the charged offenses. He offers that "[w]hile his [prior] conduct might have been annoying, offensive, or even frightening to the girls, it did not demonstrate a propensity to commit violent and forcible rape and digital penetration against a mature woman in an isolated location."

We are not persuaded. "'[T]he 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.' [Citation.]" (*People v. Loy* (2011) 52 Cal.4th 46, 63, quoting *People v. Frazier* (2001) 89 Cal.App.4th 30, 40–41.) Evidence of prior sex offenses has been admitted under section

1108 despite an age difference in the victims. (*People v. Escudero* (2010) 183 Cal.App.4th 302, 306, 311 [evidence of prior sexual assaults against adult women admitted to prove propensity to commit lewd and lascivious acts against young girl].) The disparity between the ages of appellant's prior and current victims, although relevant to the court's exercise of its discretion under section 352, is not dispositive of the issue whether the evidence meets the threshold requirements for admissibility under section 1108. (*Loy, supra*, at p. 63; *Escudero, supra*, at p. 306.) For purposes of section 1108, "such evidence is presumed to be admissible to assist the trier of fact 'in evaluating the victim's and the defendant's credibility.'" (*Escudero*, at p. 306, quoting *People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*).)

Moreover, the charged and uncharged offenses share similarities. All of the offenses began with innocent and friendly encounters that subsequently led to unwelcome remarks and inappropriate contact in which appellant isolated his victims and asserted his physical dominance. In all four instances, appellant also exhibited sexually predatory behavior and sought to "groom" vulnerable females. Although the prior offenses were relatively innocuous, it is only due to the fact that appellant was deprived of the opportunity to take any further action because his victims sought the aid of the police. Contrary to appellant's claim, the evidence that appellant had previously engaged in sexually inappropriate behavior served to aid the jury in evaluating the veracity and accuracy of Tamara and Annie's testimony. (See *Falsetta, supra*, 21 Cal.4th at p. 912; *Hollie, supra*, 180 Cal.App.4th at pp. 1275-1276.) The fact that the crimes involved different types of behavior directed at women of different ages merely goes to the weight to be given to the evidence, rather than its admissibility. (*People v. Soto* (1998) 64 Cal.App.4th 966, 984 (*Soto*) [noting that "[m]any sex offenders are not 'specialists', and commit a variety of offenses which differ in specific character"].)

The court also properly exercised its discretion in determining that the evidence of the prior offenses was admissible under section 352. In light of section 1108, the admission of evidence of other sexual offenses to show character or disposition is no longer treated as intrinsically prejudicial or impermissible. (*Soto, supra*, 64 Cal.App.4th

at p. 984.) The Legislature has determined that this type of evidence is particularly and uniquely probative in cases involving sexual offenses. (*People v. Loy, supra*, 52 Cal.4th at pp. 61, 64.) The presumption is strongly in favor of admission. The evidence can only be excluded under section 352 if its probative value concerning the defendant's disposition to commit the charged sexual offense is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice. (*Id.* at p. 62.)

Here, the balance of the relevant factors demonstrates that the evidence was properly admitted under section 352. Evidence of the uncharged offenses was probative of whether appellant had a disposition to commit the charged offenses. As the trial court found, any lack of similarity decreased the risk of undue prejudice. Moreover, the source of the evidence of the uncharged offenses was entirely independent of the charged offenses, the uncharged offenses are relatively recent, and the evidence offered to prove those offenses did not result in an undue consumption of time. Further undermining the potential for prejudice is the fact that the uncharged offenses are substantially less inflammatory than the charged offenses. Contrary to appellant's claim, the evidence of the uncharged offenses did not have a "tendency to paint appellant as a pervert, or worse a child molester . . . ." As the People note, the lack of such prejudice is reflected in the fact that the jury acquitted appellant on one charge involving victim Annie H., and deadlocked on the other. Because it cannot be said that the probative value of the evidence was substantially outweighed by the probability it would cause undue prejudice, the court properly admitted the evidence under section 352.[5]

Having concluded the court properly admitted evidence of appellant's prior sexual offenses under sections 1108 and 352, we need not address his claim that the

[5] In light of our conclusion that the evidence of appellant's prior sexual offenses was relevant and that its admission did not violate the state rules of evidence, we also reject appellant's claim that the evidence had the additional consequence of violating his federal due process rights. (See *People v. Fitch* (1997) 55 Cal.App.4th 172, 178-184.)

evidence was inadmissible under section 1101. (*Soto*, *supra*, 64 Cal.App.4th at p. 992.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Jean M. Dandona, Judge

Superior Court County of Santa Barbara

Gilbert W. Lentz, under appointment by the Court of Appeal, for Defendant and Appellant.

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