Filed 4/3/17 P. v. Wade CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RODERICK WADE,<br><br>Defendant and Appellant. | B272010<br><br>(Los Angeles County Super. Ct. No. NA090430) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard R. Romero, Judge. Affirmed, as modified.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Rene Judkiewicz, Deputy Attorney General, for Plaintiff and Respondent.

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Roderick Wade (defendant) appeals his convictions for committing various sex crimes against four different girls. He argues that the trial court erred (1) in not severing the counts involving one of his then-wife's sisters, and (2) in instructing the jury, under Evidence Code section 1108,[1] that it may consider each of the charged offenses as evidence of his propensity to commit the other charged offenses. There was no error. Accordingly, we affirm his 447 year and 4 month prison sentence, but do so with instructions to modify the abstract of judgment to impose the correct amount of fees.

## FACTS AND PROCEDURAL BACKGROUND

### I. Facts

Between 1999 and 2011, defendant, while in his late 30s and early 40s, sexually assaulted four different girls between the ages of 10 and 17—namely, his then-wife's two younger sisters, his stepdaughter, and his stepdaughter's best friend.

Between 1999 and 2001, he committed a number of sex acts against his then-wife's younger sister, D., who was 14 to 16 years old at the time. Specifically, defendant repeatedly slid his hands beneath her clothing to grope her breasts and buttocks, he once had vaginal and then anal sex with her, and he had vaginal sex with her on three more occasions. During one of those incidents, he impregnated her; her child's DNA confirms that defendant is the father.

Between 2006 and 2011, defendant committed a variety of sex acts against his stepdaughter K., who was 12 to 17 years old at the time. When she was 12 and 13 years old, defendant climbed into her bed, groped her breasts, and inserted his finger into her vagina; he did so at least 10 times. When K. was 14 and

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1 All further statutory references are to the Evidence Code unless otherwise indicated.

15 years old, he had vaginal sex with her in their garage, he inserted his finger into her vagina at least 10 times, he twice forced her mouth around his penis, and he licked and then inserted his tongue into her vagina. When she was 16, he had vaginal sex with her. The month of her 17th birthday, defendant placed his finger inside her vagina.

In May 2005, defendant sexually assaulted K.'s best friend, Amina, who was 10 years old at the time. When Amina was sleeping on the sofa in the living room of defendant's house one weekend, defendant inserted his fingers into her vagina. The pain woke her, but defendant continued for another 10 minutes and then started to lick her vagina for five more minutes.

Between 2007 and 2011, defendant committed several sex acts against another of his then-wife's sisters, Monique, who was 12 to 16 years old at the time. When she was 12 years old, defendant slipped his hands under her clothes to grope her breasts, buttocks and vagina at least 10 times, he inserted his finger into her vagina at least 10 times, and he had vaginal sex with her at least five times. Many of these incidents occurred when defendant crawled into Monique's bed, and K. saw several of these incidents because Monique and K. shared a bedroom. When Monique was 14 and 15 years old, defendant inserted his finger into her vagina at least five times and inserted his tongue into her vagina three times. When she was 15 years old, defendant had vaginal sex with her.

All of these events occurred when defendant's then-wife was not home or not in the same room. Each of the girls was much smaller than defendant in size and strength. Every girl told defendant to stop, but he ignored their pleas. And defendant threatened all three girls who lived with him—his stepdaughter, and his then-wife's two sisters—in order to keep them quiet.

## II. Procedural Background

In the operative first amended information, the People charged defendant with 13 different crimes.[2]

With respect to D., the People charged defendant with three counts of committing a lewd act upon a child who is 14 or 15 years old by a person who is at least 10 years older (Pen. Code, § 288, subd. (c)(1))—one count for groping D.'s breasts (count 1), one count for the incident in which defendant had vaginal and anal sex (count 2), and one count for the three subsequent incidents of vaginal sex (count 3).

With respect to K., the People charged defendant with (1) one count of continuous sexual abuse for committing three or more lewd acts against a child 14 years old or younger who resides in the defendant's home (Pen. Code, § 288.5, subd. (a)) for placing his finger inside her vagina at least 10 times when she was 12 or 13 years old (count 6); (2) three counts of committing a lewd act upon a child who is 14 or 15 years old by a person who is at least 10 years older (*id.*, § 288, subd. (c)(1)) for (a) having vaginal sex with her in the garage (count 7), (b) forcing K. to place his penis in her mouth (count 8), and (c) for placing his mouth on her vagina (count 9); (3) one count of unlawful sexual intercourse with a minor by someone at least three years older (*id.*, § 261.5, subd. (c)) for having vaginal sex with her when she was 16 (count 10); and (4) one count of sexual penetration by a foreign object on a minor (*id.*, § 289, subd. (h)) for placing his finger inside her vagina near her 17th birthday (count 11).

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2 This information charged a 14th crime as well (count 4), but the trial court dismissed it as beyond the statute of limitations.

With respect to Amina, the People charged defendant with committing a lewd act upon a child under the age of 14 (Pen. Code, § 288, subd. (a)) (count 5).

With respect to Monique, the People charged defendant with (1) one count of continuous sexual abuse (Pen. Code, § 288.5, subd. (a)) for groping her breasts and buttocks at least 10 times when she was 12 and 13 years old (count 12); (2) one count of committing a lewd act upon a child who is 14 or 15 years old by a person who is at least 10 years older (*id.*, § 288, subd. (c)(1)) for inserting his fingers and tongue in her vagina on numerous occasions (count 13); and (3) one count of forcible rape (*id.*, § 261, subd. (a)(2)) for having vaginal sex with Monique when she was 15 years old (count 14).

The People further alleged that defendant had committed these crimes against multiple victims within the meaning of our state's "One Strike" law. (Pen. Code, § 667.61, subds. (b) & (e).) The People additionally alleged that defendant's four robbery convictions in 1981, 1985, and 1990 qualified as prior "strikes" within the meaning of our state's Three Strikes law (*id.*, §§ 667, subds. (b)-(j) & 1170.12, subds. (a)-(d)), constituted prior "serious" felonies (*id.*, § 667, subd. (a)(1)), and constituted prior prison terms (*id.*, § 667.5, subd. (b)(1)).

Defendant moved to sever the counts involving D. from the counts involving the other three girls, arguing that the "strong" case involving the crimes against D. might spill over to the weaker cases involving the other girls. The trial court denied the motion, finding joinder appropriate because the evidence involving each victim was admissible against the others and noting the hardship upon D. if she had to testify in multiple trials.

The matter proceeded to a jury trial. Defendant took the stand, admitted that he had sex with D. twice and that he was the father of her child. He denied all of the other allegations.

The jury found defendant guilty of all charged crimes and found true the multiple victim allegation.

The trial court sentenced defendant to prison for 447 years and 4 months. More specifically, the court imposed a sentence of 25 years to life on counts 1, 2, 3, 7, 8, 9, 11, and 13; a sentence of 60 years to life on counts 5 and 14 (calculated as a base sentence of 15 years to life tripled under Penal Code section 667.61, plus three five-year sentences for the three prior serious felonies); a sentence of 63 years to life on counts 6 and 12 (calculated as a base sentence of 16 years to life tripled under Penal Code section 667.61, plus three five-year sentences for the three prior serious felonies); and a sentence of 16 months on count 10 (calculated as one-third the midterm sentence of 24 months, doubled as a second strike).

Defendant filed this timely appeal.

## DISCUSSION

Defendant argues that his convictions must be reversed because the trial court erred (1) in denying his motion to sever for trial the counts involving D. from the remaining counts, and (2) in instructing the jury that it could consider each of the counts as evidence of his propensity to commit the other counts. Because our resolution of the second issue impacts the first, we will begin with the second issue. Also, the People argue that the trial court erred in failing to impose two mandatory statutory fees.

### I. Charged Counts as Propensity Evidence

Although evidence that a criminal defendant has the propensity or disposition to engage in certain conduct is "generally inadmissible to prove" that he did so "on a specified occasion" (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1159 (*Villatoro*); § 1101, subd. (a)), section 1108 is an exception to this general rule because it allows "evidence of [a] defendant's commission of another sexual offense or offenses" to prove his disposition to commit a charged "sexual offense" (§ 1108, subd.

(a)). Our Legislature created this exception for a "practical" reason—namely, "sex crimes" are "[b]y their very nature" "usually committed in seclusion without third party witnesses or substantial corroborating evidence"; propensity evidence fills this evidentiary gap. (*People v. Falsetta* (1999) 21 Cal.4th 903, 915 (*Falsetta*).) Section 1108 authorizes the admission of "another sexual offense or offenses" whether or not those offense(s) are charged. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1013 [uncharged]; *Villatoro*, at pp. 1160-1169 [charged].) In all cases, however, the trial court must decide under section 352 whether the probative value of the other sexual offense(s) is "substantially outweighed" by a "substantial danger of undue prejudice, of confusing the issues, or of misleading the jury" or may "necessitate undue consumption of time." (§§ 352 & 1108, subd. (a).) Although we review jury instructions de novo (*People v. Manriquez* (2005) 37 Cal.4th 547, 581), the propriety of the instructions in this case turns on the trial court's evidentiary ruling, which we review for an abuse of discretion (*People v. Clark* (2016) 63 Cal.4th 522, 597).

In this case, the trial court did not abuse its discretion in concluding that each of the charged sex crimes was admissible under section 1108 as evidence of defendant's propensity to commit the other charged sex crimes. Each of the charged sex crimes qualified as a "sexual offense" within the meaning of section 1108. (§ 1108, subd. (d)(1)(A) [covered offenses include violations of Pen. Code, §§ 261, 261.5, 288, 288.5 & 289].) Moreover, the trial court, in deciding whether to instruct the jury that it could consider the charged offenses as evidence of defendant's propensity, expressly cited section 352 and found that the jury's use of the charged offenses to prove propensity did not cause any "undue prejudice," would not "confus[e] . . . issues" and would not result in the "undue consumption of time." Further, the court was careful to instruct the jury that it could,

"but [was] not required to," infer defendant's propensity to commit sex acts from his commission of a charged offense; that it could only do so if it first found beyond a reasonable doubt that defendant committed that offense; that propensity was "only one factor to consider" and was not "sufficient by itself to prove" defendant's guilt of the other charged offenses; and that the jury was to "consider each count separately."[3] Under our Supreme Court's decision in *Villatoro*, the trial court's evidentiary ruling and jury instructions were proper.

Defendant levels four arguments at this conclusion. First, he argues that *Villatoro* was wrongly decided because a viable section 352 analysis is critical to the constitutionality of section 1108 (*Falsetta*, *supra*, 21 Cal.4th at pp. 917-918), and because the three concurring and dissenting justices in *Villatoro* expressed their view that it is impossible to conduct a viable section 352 analysis with respect to a *charged* offense. (*Villatoro*, *supra*, 54 Cal.4th at pp. 1176-1178 (conc. & dis. opn. of Corrigan, J.); *id.*

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3 In full, the court instructed the jury using CALCRIM Nos. 1191 and 3515 as follows: "If you decide that the defendant committed one of these charged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit the other charged crimes, and based on that decision also conclude that the defendant was likely to and did commit the other offenses charged. [¶] If you conclude that the defendant committed a charged offense, that conclusion is only one factor to consider along with all the other evidence. [¶] It is not sufficient by itself to prove the defendant is guilty of another charged offense. [¶] The People must still prove each element of every charge beyond a reasonable doubt and prove it beyond a reasonable doubt before you may consider one charge as proof of another charge." (CALCRIM No. 1191.) "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one." (CALCRIM No. 3515.)

at pp. 1183-1185 (conc. & dis. opn. of Liu, J.).) The majority opinion disagreed, reasoning that a trial court may consider "section 352 factors when deciding whether to permit the jury to infer a defendant's propensity." (*Id.* at p. 1163.) We are bound to follow the majority's opinion because it is the law. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.) Defendant relatedly asserts that *Villatoro* contradicts federal law interpreting the federal analogue to section 1108 (see *U.S. v. Castillo* (10th Cir. 1998) 140 F.3d 874, 884), but we are, again, required to follow the law set down by our Supreme Court.

Second, defendant contends that *Villatoro* has been displaced by *People v. Cottone* (2013) 57 Cal.4th 269, and that *Villatoro* does not apply when all of the victims know each other. He is wrong on both counts. *Cottone* held that a trial court may admit, under section 1108, an uncharged sexual offense committed by the defendant when he was a minor only if the court first determines, by clear and convincing evidence, that the defendant had the capacity at the time of the prior offense to understand that his conduct was wrongful. (*Cottone*, at pp. 286-287.) Nothing in *Cottone* casts any doubt upon *Villatoro's* continued vitality. In a similar vein, defendant's further argument that *Villatoro* is unconstitutional whenever the victims know each other and thus could engage in a global conspiracy to lie finds no support in *Villatoro*. Defendant cites *People v. Harris* (1998) 60 Cal.App.4th 727, 738-740, but that case simply held it was error to admit evidence of an uncharged, 23-year-old violent rape of a stranger to prove the defendant's propensity to commit sex acts against "two emotionally and physically vulnerable women" who were not strangers to the defendant. What is more, defendant's concern about a global conspiracy to implicate him in sex crimes he did not commit is substantially undermined by his own admission that he committed sex crimes against one of the victims (namely, D.).

Third, defendant asserts it is improper to prove propensity with a charged offense because the People only need probable cause to charge an offense—not proof beyond a reasonable doubt. This argument overlooks that the trial court here specifically instructed the jury that it could only infer propensity from a charged offense if it first found beyond a reasonable doubt that defendant committed that offense.

Lastly, defendant contends that section 1108 should be valid only if the trial court expressly places its section 352 analysis on the record. This contention is not only inconsistent with binding law directly on point (*Villatoro*, *supra*, 54 Cal.4th at p. 1168 [upholding use of charged offenses to prove propensity even though trial court did not expressly weigh § 352 factors]; *People v. Taylor* (2001) 26 Cal.4th 1155, 1169 ["a [trial] court need not expressly weigh prejudice against probative value or even expressly state that it has done so"]), but also ignores that the court in this case *did* engage in a section 352 analysis on the record.

In sum, the trial court properly instructed the jury that it could infer from defendant's guilt of a charged sex offense his propensity to commit the other charged sex offenses.

**II. Severance**

A trial court may join for trial "two or more different offenses connected together in their commission" or "two or more different offenses of the same class of crimes or offenses" unless the court "in its discretion" finds, on the basis of "good cause shown," that severance of the offenses is nevertheless "in the interests of justice." (Pen. Code, § 954.) Two offenses are "connected together in their commission" if they are "'linked by a "'common element of substantial importance.'" [Citations.]'" (*People v. Landry* (2016) 2 Cal.5th 52, 76 (*Landry*).) Two offenses are "of the same class" if they "'possess common characteristics or attributes.' [Citations.]" (*Ibid.*) If crimes are eligible to be joined

for trial, the good cause requirement obligates a defendant to "make a '"clear showing of prejudice"'" arising from the joinder. (*People v. Armstrong* (2016) 1 Cal.5th 432, 456 (*Armstrong*), quoting *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220 (*Alcala*).) This allocation of proof reflects the "legislative preference for consolidation." (*Landry*, at p. 75.) We engage in a two-step analysis of a trial court's severance decision, first examining "whether, in light of the information available at the time [of the decision], the trial court abused its discretion in denying the . . . motion" and next examining "'whether events *after* the court's ruling demonstrate that joinder actually resulted in "gross unfairness" amounting to a denial of defendant's constitutional right to fair trial or due process of law.'" (*People v. Simon* (2016) 1 Cal.5th 98, 122, 129 (*Simon*), quoting *People v. Merriman* (2014) 60 Cal.4th 1, 46 (*Merriman*).)

The trial court did not abuse its discretion in denying defendant's motion to sever the charges involving D. from the charges involving his three other victims based on the information the court had at the time of the denial. All of the charged crimes were eligible for joinder: Not only were they of the "same class" (*Merriman*, *supra*, 60 Cal.4th at pp. 36-37 [sex crimes are of the same class]; *People v. Ochoa* (1998) 19 Cal.4th 353, 409 [same]), but they also shared many '"'"common element[s] of substantial importance"'"' (*Landry*, *supra*, 2 Cal.5th at p. 76). Namely, the offenses were all committed against young, smaller girls to whom defendant had access when those girls were alone and over their repeated objections, and defendant used threats to keep all but one of his victims quiet.

Defendant also did not make a "clear showing of prejudice" that would have rebutted the statutory presumption that the eligible offenses should be joined. (*Armstrong*, *supra*, 1 Cal.5th at p. 456.) The threshold consideration is whether the evidence used to prove one offense is admissible to prove the others, and

vice versa. (*Ibid.*; *People v. Soper* (2009) 45 Cal.4th 759, 774-775 (*Soper*).) As our Supreme Court put it, the "[c]ross-admissibility of evidence is sufficient but not necessary to deny severance." (*People v. Ochoa* (2001) 26 Cal.4th 398, 423; cf. Pen. Code, § 954.1 [absence of cross-admissibility does not preclude joinder]; *Frank v. Superior Court* (1989) 48 Cal.3d 632, 641 ["cross-admissibility is not the sine qua non of joint trials"].) Cross-admissibility "is sufficient, standing alone, to dispel any prejudice" because "there can be no spillover effect"—and hence no prejudice—arising from the joinder of multiple charges "unless some of the evidence to be heard by the jury is inadmissible as to at least one of the charges." (*Alcala*, *supra*, 43 Cal.4th at p. 1221; *People v. Earle* (2009) 172 Cal.App.4th 372, 387-388 (*Earle*).) For the reasons described above, the evidence regarding the offenses involving K., Monique, and Amina was cross-admissible as propensity evidence under section 1108 to prove the offenses involving D., and vice versa. By itself, this requires us to reject defendant's argument.

Defendant further fails to make a "clear showing of prejudice" because, even if the cross-admissibility of the evidence were not enough, the other factors counseling against joinder are not present. When evidence is not cross-admissible, courts also examine "(1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense." (*Soper*, *supra*, 45 Cal.4th at p. 775.)

Although sex offenses involving children are "quite inflammatory" (*Simon*, *supra*, 1 Cal.5th at p. 124; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 452 [terming them "highly inflammatory"]), superseded on other grounds by Pen. Code, § 954.1), the danger that the jury will transfer its outrage arising from a highly inflammatory charge to a less inflammatory

one is not present when all charges are equally inflammatory (*People v. Marshall* (1997) 15 Cal.4th 1, 28). All of the charges here are sex crimes against children; none is demonstrably more inflammatory than the others.

This is also not a case where "'"strong evidence of a lesser but inflammatory crime might be used to bolster a weak prosecution case" on another crime.' [Citation.]" (*People v. Capistrano* (2014) 59 Cal.4th 830, 850.) The evidence of defendant's guilt as to each victim rests on the direct evidence of the victim identifying defendant as the perpetrator after knowing him for years and, except for Amina, after he sexually assaulted them over and over. Such direct evidence is "strong" evidence. (*Earle*, *supra*, 172 Cal.App.4th at p. 401 [a case based on a "positive[] identifi[cation]" is "extremely strong"].) To be sure, the evidence that defendant committed crimes against D. was even stronger in light of the DNA evidence identifying defendant as the father of D.'s child, which no doubt prompted defendant to admit that the child was his. But this is an instance of a strong case against defendant involving K., Monique, and Amina paired with an even stronger case involving D.; it is *not* an instance of a strong case being paired with a weak case. Because "it always is possible to point to individual aspects of one case and argue that one is stronger than the other," the "mere imbalance in the evidence" does "not indicate a risk of prejudicial 'spillover effect.'" (*Soper*, *supra*, 45 Cal.4th at p. 781.)

The final factor is irrelevant because none of the charged crimes is a capital offense.

Defendant has also not demonstrated that the trial that followed the trial court's denial of severance "'resulted in "gross unfairness"'" rising to the level of a denial of due process. (*Simon*, *supra*, 1 Cal.5th at p. 129.) As noted above, the evidence of the sex crimes against each victim was cross-admissible; the trial court carefully circumscribed the conditions under which the

jury could infer propensity from the commission of each offense; and the direct evidence of defendant's guilt as to each offense was overwhelming. There was no denial of due process.

Defendant raises three further arguments in response. First, he likens his case to *Earle*, *supra*, 172 Cal.App.4th 372. In *Earle*, the court held it was error not to sever an indecent exposure count from an assault count where the evidence as to one count was *not* cross-admissible to the other, where the indecent exposure count "had the potential to inflame the jury" into believing the defendant was "a kind of freak, a pariah, [and] a 'pervert,'" and where the evidence of the defendant's guilt as to the indecent exposure count was strong but the evidence of his guilt as to the assault was weak. (*Id.* at pp. 400-407.) For the reasons described above, none of these rationales is present in this case, let alone all three.

Second, defendant asserts that the trial court was wrong, when denying the motion to sever, in placing any weight on the hardship to D. in having to testifying in multiple trials; according to defendant, the only hardship that matters is the hardship to him. We disagree. The hardship on D. is an aspect of the judicial economy arising from joinder, which is to be weighed against the prejudice to defendant; the hardship on D. is not irrelevant. More to the point, we are reviewing the trial court's result, not its reasoning (e.g., *Cruz v. Sun World Internat., LLC* (2015) 243 Cal.App.4th 367, 373); its result is correct for the reasons we set forth above.

Lastly, defendant notes that the charged crimes took place over a large span of years. This is true, but does not affect any of the analysis set forth above.

## III. Fees

The People argue the trial court orally imposed a $30 criminal conviction assessment (Gov. Code, § 70373) and a $40

court security fee (Pen. Code, § 1465.8) for each of the 13 counts, but that the abstracts of judgment reflect the imposition of those fees for three counts. The People are correct, and we may correct a trial court's failure to impose a mandatory fee on appeal. (*People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1530.) Because the assessment and fee were due on each count of conviction, we order the clerk of the superior court to prepare amended abstracts of judgment that reflect a total of $390 in criminal conviction assessments and $520 in court security fees. (*People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

**DISPOSITION**

The abstracts of judgment are modified as follows: a $30 criminal conviction assessment pursuant to Government Code section 70373, subdivision (a) should be imposed for each count, for a total of $390; and a $40 court security fee pursuant to Penal Code section 1465.8 should be imposed for each count, for a total of $520. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.*
GOODMAN

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* Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.