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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. WILLIAM LOUIS BELIVEAU, Defendant and Appellant.	2d Crim. No. B285718 (Super. Ct. No. 2016024232) (Ventura County)

William Louis Beliveau appeals after a jury convicted him of anal or genital penetration of an unconscious person by use of a foreign object (Pen. Code,[1] § 289, subd. (d)(1)), and anal or genital penetration of an intoxicated person by use of a foreign object (*id.*, subd. (e)). The trial court sentenced him to 10 years in state prison. Appellant contends the judgment must be reversed due to evidentiary and instructional error. We affirm.

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

STATEMENT OF FACTS

I,

Prosecution's Case-in-Chief

a. ***Victim H.S. (Count 1)***

H.S., who was 55 years old at the time of trial, has a history of drug and alcohol addiction. Around December 2015, H.S. met appellant at an Alcoholics Anonymous (AA) meeting she attended every Saturday in Malibu. Appellant, who had been sober for about 25 years, befriended H.S. and occasionally drove her to the meetings from her sober living facility. Appellant and H.S. also began communicating through Facebook and text messages. Although some of their communications were flirtatious, H.S. made clear to appellant that she merely considered him a friend and was not interested in a romantic relationship.

In early 2016, H.S. relapsed on alcohol while visiting her family in Chicago. Around May 2016, she returned to Southern California and entered another treatment facility. H.S. did not have the financial resources for a long-term stay at the facility, so she needed to find another place to live. Appellant, who was renting a motel room at the time, offered to let H.S. stay with him and she accepted. The room had only one bed, so H.S. and appellant had to sleep together. The first night, appellant tried to sleep in the nude. H.S. told appellant she would leave unless he wore underwear or clothes, and he complied.

At some point, appellant started coming to bed nude again and H.S. repeatedly told him not to do so. Appellant sometimes went to bed in the nude anyway and rubbed up against H.S. while she was next to him.

On June 10, 2016, appellant and H.S. moved into another room at a different motel. Appellant, who paid for the room because H.S. had no money, once again chose a room with only one bed. The next night, H.S. took her prescription medications for anxiety and

depression and went to bed wearing leggings, underwear, a bra, a tank top, and a hoodie. She fell asleep at about 1:30 a.m.

At about 5:30 or 6:30 a.m., H.S. woke up and discovered that her clothing had been removed. She screamed, waking appellant, and asked him what he had done to her. Appellant replied, "Relax, chill out. I tried to give you an orgasm and you just sat there. You just laid there. You did nothing." Appellant added, "You were so hot last night, I tried to give you an orgasm." H.S. asked appellant if he had raped her and he denied doing so. She asked him to leave and he did so after packing his belongings.

H.S. initially did nothing because she was traumatized. She suspected that appellant may have raped her because she felt pain in her ovaries and vaginal area.

H.S. eventually called a friend and told him what had happened. At her friend's urging, she took a cab to the hospital and reported the assault. She was subsequently taken to a safe house, where she was interviewed by a Ventura County Sheriff's deputy. After the interview, she was examined by a sexual assault nurse.

Three days later, H.S. made a supervised "cool call" to appellant. During the recorded call, H.S. told appellant she wanted to talk about what had happened. Appellant said, "what I attempted to do . . . was to give you . . . [the] pleasure of climaxing" by "playing with your clit." Appellant added, "I tried to get you to climax for a period of time and it didn't happen. And I know through experience that [if] you . . . play too long with a clit it gets sore, so I did not do it for a long extended period of time." Appellant admitted taking off H.S.'s clothing and using his finger "to get [her] off." He also admitted to H.S. that he "shouldn't have done that."

On June 25, 2016, appellant returned to the motel room and was arrested. He was interviewed by a sheriff's deputy after

waiving his *Miranda*[2] rights. He initially denied sexually assaulting H.S., but later admitted he had removed her clothes and rubbed her clitoris while she was asleep.

b. *Victim S.B. (Count 2)*

1. *S.B's Testimony*

S.B. was 54 years old at the time of trial and identified as a recovering alcoholic. She met appellant at an AA meeting. She had no romantic interest in him and never consented to engaging in intimate contact with him.

Around Christmas 2015, S.B. relapsed and asked appellant to give her a ride to an AA meeting. S.B. was drinking heavily during this time and appellant repeatedly provided her with alcohol.

One night during S.B.'s relapse, appellant was visiting her at her home. Appellant said he was cold and S.B. gave him a blanket. After appellant began fondling himself under the blanket, S.B. said, "I'm going to bed. There's the door." S.B. went into her bedroom and passed out on the bed in her clothes. At some point during the night, she woke up to find herself unclothed and on her back with her legs spread open. Appellant was between her legs and penetrating her rectum with his hand as he played with his genitals. S.B. told appellant to "get off me and get the hell out of here."

S.B. fell back asleep. When she woke up the following morning, appellant was gone and she felt pain in her "rear end." At some point, S.B. told her AA sponsor A.D. what had happened. S.B. reported the incident to law enforcement approximately six months later.

2. *A.D.'s Testimony*

Sometime around the 2015 Christmas holidays, A.D. visited S.B. at her home. S.B. was heavily intoxicated and was lying on the

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

couch in her own urine. A.D. took S.B. to the hospital, where testing revealed she had a blood alcohol content of .60. While S.B. was in the hospital, she told A.D. that appellant had "finger-banged her" while he was masturbating himself. S.B. also told A.D. that when she woke up in the morning her rectum was bleeding and hurt very badly.

c. *Prior Offense Against J.*

J. met appellant at an AA meeting. J. did not have a driver's license and appellant offered to drive her to meetings. J. relapsed and appellant supplied her with alcohol. During J.'s relapse, appellant also occasionally stayed the night at her residence. J. slept in her bedroom and appellant slept on the living room couch. J. had no romantic interest in appellant and merely considered him as a friend.

One night while appellant was staying over, J. passed out on her bed while fully clothed. When she woke up the next morning, she was nude and felt sore in her vaginal and anal area. Appellant's clothes were in J.'s bathroom. She had a feeling that appellant may have done something to her, but she "brushed it off" because she "didn't have a lot of self-esteem." J. came forward after her discovering that appellant had been arrested for assaulting H.S.

II.

Defense

Appellant testified in his own defense. At the time of trial he was 64 years old and had been sober for more than 26 years. He was very involved in AA and had acted as a sponsor for six other AA members.

Appellant met J. at an AA meeting in 2009. They eventually developed a romantic relationship that lasted for six months. During that time, they often had consensual sex. The relationship ended in March 2011 after J. reconciled with a former boyfriend.

Appellant did not know why J. had denied that she and appellant had a consensual sexual relationship.

Appellant met S.B. at an AA meeting in 2009. On December 26, 2015, S.B. called appellant and asked him to bring her a bottle of alcohol. Instead, appellant went to her house and talked her into attending an AA meeting. S.B. was disruptive during the meeting and eventually left with her sponsor A.D. and three other women. One of the women took S.B. to the hospital, but S.B. left and took a cab home. Later that night, S.B. gave appellant money and he bought her a bottle of vodka. He did so because he feared she would die if she abruptly stopped drinking. He slept next to S.B. in her bed that night but did not touch her. Over the following three days, appellant bought S.B. alcohol and slept next to her in her bed. He wore clothes to bed each night and never touched S.B.

Appellant also met H.S. at an AA meeting. While H.S. was in Chicago, she and appellant communicated by text and Facebook. The content of these communications led appellant to believe they were moving toward a romantic relationship. When H.S. returned to California, she asked appellant to move her belongings into his storage unit. She also invited him to attend a family day at her sober living facility. At one point, H.S. asked appellant for a weekly allowance of $1,000 but he said no.

Sometime in May 2016, H.S. sent appellant a topless photograph of herself. Around May 15, H.S. began staying with appellant. Appellant believed they were in a relationship and might get married. They kissed each other on the lips and cuddled while sleeping in the same bed.

On the night of the alleged incident, appellant undressed H.S. while she was sleeping and touched her clitoris. He thought she would wake up and want to have sex with him. He acknowledged that H.S. had not consented to him touching her and that he had exercised poor judgment in doing so.

In addition to his own testimony, appellant called five witnesses who testified that he had a reputation for honesty and that they had never seen him act inappropriately with women.

III.

Rebuttal - L.T.'s Testimony

L.T. and appellant were in an intimate relationship from 2008 to 2010. When L.T. met appellant, she told him that she had problems with alcohol and methamphetamine. Appellant told L.T. she was not an alcoholic and often furnished her with alcohol. When L.T. attended AA meetings with appellant, he was very flirtatious with other women and picked them up off their feet while hugging them. During women-only AA meetings, other women asked her to talk to appellant about his behavior.

During the course of the relationship, L.T. sometimes awakened in the morning to find her nightgown pulled up. One morning, she woke up and appellant was hunched over her staring at her vagina. When she asked appellant what he was doing, he had a blank look on his face and walked away.

In the summer of 2016, S.B. told L.T. during an AA meeting that appellant had been coming to her house and bringing her alcohol and that after a night of drinking she woke up to find him "finger-fucking her."

DISCUSSION

J.'s Testimony

Appellant contends the trial court erred in admitting J.'s testimony. The court admitted the testimony under Evidence Code section 1101, subdivision (b) (1101(b)), to prove appellant's knowledge and intent and that he committed the charged offenses pursuant to a common design or plan. The evidence was also admitted under Evidence Code sections 1108 and 352 as proof of appellant's disposition to commit sex offenses.

Appellant argues that J.'s testimony should have been excluded as irrelevant because it was insufficient to prove the preliminary fact for which it was offered, i.e., that appellant committed a sexual offense against her. We disagree.

"Subject to the trial court's discretion under Evidence Code section 352, evidence of a defendant's uncharged acts may be admitted into evidence under Evidence Code section 1101(b) when relevant to prove some fact, such as motive, intent, preparation, or plan, other than his disposition to commit such an act." (*People v. Garelick* (2008) 161 Cal.App.4th 1107, 1115.) When the uncharged act constitutes an enumerated sex offense, the evidence may also be admissible under Evidence Code section 1108 to prove the defendant's disposition to commit sex offenses. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1095.)

Prior to admitting evidence for any of these purposes, the trial court must make a preliminary determination whether the proffered evidence is sufficient for the jury to find, by a preponderance of the evidence, that the defendant committed the uncharged acts or offenses. (*People v. Garelick*, *supra*, 161 Cal.App.4th at p. 1115; *People v. McCurdy*, *supra*, 59 Cal.4th at p. 1095.) "'The court should exclude the proffered evidence only if the "showing of preliminary facts is too weak to support a favorable determination by the jury."' [Citation.] 'The decision whether the foundational evidence is sufficiently substantial is a matter within the court's discretion.' [Citation.]" (*People v. Jandres* (2014) 226 Cal.App.4th 340, 353.)

Prior to trial, the prosecution made an offer of proof that J. would testify, inter alia, that (1) she met appellant in AA; (2) she repeatedly conveyed to appellant that she had no romantic interest in him and rebuffed his sexual advances, which included him "rubbing his body along her breasts" and attempting to kiss her; (3) appellant repeatedly furnished her with alcohol during a period of

relapse; (4) appellant occasionally stayed the night on her couch while she was drinking; (5) during these nights she often passed out on her bed while fully clothed; and (6) at least one morning after such a night she woke up nude, felt vaginal pain, and found appellant's clothing in her bathroom.

In concluding the evidence was admissible under Evidence Code section 1101(b), the trial court reasoned that "the similarities between what [J.] said happened and what the charged crimes are [are] significant and relevant. The same manner of selection of the victim, a similarly situated victim, the use of alcohol and the nature of all the allegations are very similar."

In determining that the proffered evidence was also admissible under Evidence Code sections 1108 and 352, the court implicitly concluded that a reasonable trier of fact could find by a preponderance of the evidence that appellant had sexually penetrated J. in violation of section 289 and reasoned: "[Section] 289 is one of the specified crimes under [Evidence Code section] 1108. So subject to additional [Evidence Code section] 352 objections if you think that it's taking too much time or creating more confusion than it is helping, then I think it's admissible. I have done [an Evidence Code section] 352 weighing, but it is highly probative. I don't think it is unduly time consuming given the nature of the charges. And its prejudicial effect is outweighed by its probative value."

The court did not abuse its discretion in admitting J.'s testimony. Appellant's arguments to the contrary erroneously focus on the prosecution's trial brief, which merely referred to appellant touching J.'s breasts without her consent. In a written offer of proof filed the following day, the prosecution further proffered that on several evenings during the period in question J. "recalls going to her master bedroom heavily intoxicated and clothed, while leaving [appellant] on the couch. When she awakened the next morning,

she would be nude in her bed, and the defendant's clothing would be on the floor of the master bedroom bathroom. She recalls feeling vaginal pain on some mornings and would notice that [appellant] was laying [*sic*] naked on the couch." Moreover, J. went on to testify at trial regarding one such incident.

Appellant nevertheless contends that J.'s testimony should have been excluded because "the only thing that [J.] knew had happened between her and appellant was a suspicion that something had happened between her and appellant." But the issue is whether her testimony as a whole provides sufficient circumstantial evidence to prove by a preponderance of the evidence that appellant penetrated her vagina while she was unconscious. The court did not abuse its discretion in answering this question in the affirmative.

At the conclusion of his argument that J.'s testimony should have been excluded as irrelevant, appellant briefly adds that "whatever residual probity [the evidence] had was moreover marginal, including the fact there was no independent corroboration of [J.'s] allegation that 'something' had happened, and that [J.] complained to police only *after* being contacted by [H.S.] and after seeing newspaper accounts of the prosecution."

To the extent appellant argues that J.'s testimony should have been excluded as more prejudicial than probative under Evidence Code section 352, the claim is forfeited because it is not properly briefed. In any event, in assessing whether Evidence Code section 352 compels the exclusion of evidence of an uncharged sex offense that otherwise meets the requirements of Evidence Code section 1108, the degree of certainty that the offense was committed is only one factor to be considered. "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.)

Appellant fails to demonstrate that the court abused its discretion in declining to exclude J.'s testimony under Evidence Code section 352. Moreover, he fails to allege, much less establish, that any error in admitting the evidence would compel a reversal of his convictions. Even if J.'s testimony should have been excluded, appellant essentially confessed to one of the charged crimes and the evidence he committed the other charged crime was substantial. Accordingly, it is not reasonably probable that the jury would have reached a different result had the evidence of appellant's prior offense against J. 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"].)

L.T.'s Testimony

Appellant also contends the court erred in allowing L.T. to testify. L.T.'s testimony was presented on rebuttal to bolster S.B.'s credibility, which was placed at issue by appellant's testimony. In its offer of proof, the prosecution stated that "[L.T.] was the recipient of a complaint of abuse from [S.B.] This was at an AA meeting. And given the fact that [appellant] has placed [S.B.'s]

credibility at issue and has specifically denied ever penetrating her . . . , it is the People's position that I should be able to elicit from this witness that statement." The prosecution added that S.B. told L.T. about the incident "sometime in [the] winter, spring of 2016" and said that appellant "had finger-fucked her."

After the court indicated it would allow L.T. to testify, defense counsel stated "the defense . . . has some concerns of [L.T.] bringing in evidence that isn't even relevant under 1101(b) or 1108 in terms of domestic violence, threats, things that are not charged here and, therefore, not relevant." The prosecutor said, "I'll talk to her, your Honor" and the court replied, "We'll keep a tight reign [*sic*] on her."

During her testimony, L.T. recounted S.B. telling her she had awoken one night to find appellant "finger-fucking her." L.T. also testified that (1) appellant had frequently furnished her with alcohol even though she told him she was an alcoholic; (2) during AA meetings appellant flirted with other women and hugged them; and (3) during their relationship, she sometimes woke up in the morning to find her nightgown pulled up and appellant hunched over her and looking at her vagina. Appellant interposed no objections to this testimony or the questions that elicited it.

On appeal, appellant asserts that he "objected to the rebuttal evidence as irrelevant under [Evidence Code] sections 1101[(b)] and 1108." He goes on to claim that L.T.'s testimony was erroneously admitted under those sections and complains that "[L.T.'s] testimony regarding her then-partner looking at her vagina described no crime or bad act which could have been properly used by the jury."

But appellant did not object to L.T.'s testimony on the asserted grounds. Prior to the testimony, defense counsel merely expressed a concern that L.T. would "bring[] in evidence that isn't even relevant under 1101(b) or 1108 in terms of domestic

violence[and] threats." During L.T.'s testimony, defense counsel did not interpose any objection.

In any event, none of L.T.'s testimony was admitted under Evidence Code sections 1101(b) and 1108. The prosecutor never urged the jury to consider the testimony for those purposes, nor was the jury instructed that it could. Moreover, appellant makes no effort to demonstrate a reasonable likelihood that he would have achieved a more favorable result had L.T.'s testimony been excluded. (*People v. Mullens*, *supra*, 119 Cal.App.4th at p. 659.) Appellant's claim of error thus fails.

Instructional Error

Appellant also contends the court erred in instructing the jury on how to evaluate J.'s testimony pursuant to Evidence Code sections 1101(b) and 1108. Instead of giving the separate pattern jury instructions on Evidence Code sections 1101(b) (CALCRIM No. 375) and 1108 (CALCRIM No. 1191A), the court gave a modified version of CALCRIM No. 375 that purported to incorporate the essential elements set forth in CALCRIM No. 1191A.

The court instructed the jury as follows: "The People presented evidence of other behavior of the defendant that was not charged in this case. Specifically, the testimony of [J.] concerning her experiences with the defendant. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the acts. Proof by a preponderance of the evidence is a different burden of proof than 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, you must disregard this evidence entirely. If you decide that the defendant committed the acts, you may but are not required to consider the evidence for the limited purpose of deciding whether the defendant acted for the purpose of sexual abuse,

arousal or gratification in this case; . . . and/or 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 sexual penetration of a person who was unconscious of the nature of the act, Count 1, and/or sexual penetration of a person while that person was intoxicated, Count 2, as charged here. In evaluating this evidence consider the similarity or lack of similarity between the uncharged acts and the charged offenses. Do not consider this evidence for any other purposes except for the limited purposes specified above and for the purpose of determining the defendant's credibility. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit a crime. If you conclude that the defendant committed the acts, the 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 sexual penetration of a person who was unconscious of the nature of the act, Count 1, and/or sexual penetration of a person while that person was intoxicated, Count 2. The People must still prove each charge beyond a reasonable doubt."

Appellant contends the instruction was erroneous because (1) it refers to evidence of appellant's uncharged "behavior" or "acts" rather than an uncharged sexual offense; and (2) omits any reference to the uncharged sexual offense he was alleged to have committed against J., i.e., a violation of section 289. He argues that in light of these errors "the standard of proof could not help but be reduced in this case, given that there was *no* requirement that the jury find that appellant had committed any sexual or other kind of criminal or 'bad' offense against [J.], just that he had done an 'act' testified to by her." He goes on to assert that "once this presumptively non-criminal 'act' had been found by a preponderance of the evidence, the jury could use this non-criminal 'act' in its determination of the charged offenses, to be proved

beyond a reasonable doubt." The People concede the error but contend the error is harmless.

The incorrectness of the instruction was plainly erroneous. Evidence of a defendant's uncharged "behavior" or "act" is admissible to prove his propensity to commit charged sexual offenses only if the uncharged behavior or act constitutes an enumerated sexual offense. (Evid. Code, § 1108.) Moreover, in order to find the defendant committed an uncharged sexual offense the jury must be instructed on the elements of the offense. (See CALCRIM No. 1191A.)

The jury would have been so instructed had the court simply given both CALCRIM No. 375 and CALCRIM No. 1191A. Instead, the court unsuccessfully attempted to combine the instructions into one. As a result, the jury was not expressly instructed that appellant's uncharged acts as testified to by J. had to amount to a sexual offense in order to be considered as evidence of his propensity to commit the charged offenses. The court only exacerbated its error by vaguely identifying the subject uncharged "behavior" as "the testimony of [J.] concerning her experiences with the defendant."[3]

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[3] The court undertook to combine the instructions after defense counsel objected to the giving of CALCRIM No. 1191A. It also appears that the court eliminated any reference to a sexual offense to accommodate defense counsel's objection.

During the discussion on jury instructions, the court asked the parties if it was necessary to give CALCRIM No. 375 "because to me based on the testimony of what [J.] said, it is 1108, which can be used for propensity specifically. And I thought about it because she didn't testify to any particular sexual act, but the reasonable inference from her testimony that one could make is that otherwise she wouldn't be here if she felt she hadn't been molested in some way. And if she was, it would be for one of the qualifying crimes

Although the instruction was erroneous, reversal is not required. "'A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant. [Citations.]' [Citation.] '"[T]he correctness of jury instructions is to be determined from the entire

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under 1108. It would either be rape, digital penetration, or anal penetration." The prosecutor responded, "I'm fine with that approach . . . . [If] [y]ou want to jettison 375 and in its place put the 1108 [*sic*]." The court replied, "Well, if we give one, I think we have to give the other."

The prosecutor went on to state that "[u]sually in the 1108 they ask for you to specify in that first paragraph the charge from the prior conduct." Defense then asked to court not to give CALCRIM 1191A "because I don't think we have specifics about what happened." The court responded that it would "work on a combination instruction" that would "include parts of 1191[A] and 375 in separate places. And then we'll discuss it because I do think that they have to find that the conduct has been proved by a preponderance and I need to instruct them on that . . . ." The prosecutor interjected that "in order to find the preponderance language they need to know the elements of the offense that we're citing in that first sentence" of CALCRIM No. 1191A. The court responded, "I'm going to take out that first sentence and say 'The People have presented evidence that the defendant committed other conduct of a sexual nature that was not charged in this case.' [¶] . . . [¶] So I'll make it more generic, the testimony of [J.]."

The instruction the court ultimately gave to the jury, however, omitted any reference to "conduct of a sexual nature." When the court presented counsel with its proposed instruction, counsel replied, "That's fine." After presenting the parties with the proposed instruction, the trial judge also asked the parties to let her know "if there is anything that you would like me to change." Neither party responded.

charge of the court, not from a consideration of parts of an instruction or from a particular instruction." [Citations.]' [Citation.]" (*People v. Solomon* (2010) 49 Cal.4th 792, 822.) From the totality of the instructions, a reasonable jury would have understood that J.'s testimony was relevant to the determination of appellant's guilt of the charged crimes only if the jury found by a preponderance of the evidence that appellant had done the same thing to J. he was charged with doing to H.S. and S.B., i.e., sexually penetrated her while she was unconscious and/or intoxicated in violation of section 289. Moreover, the jury received separate instructions on the elements of that offense.

The potential prejudicial effect of the aforementioned errors in the instruction is also undermined by other errors in the same instruction. First, the jury was told that in evaluating the evidence testified to by J. it should "consider the similarity or lack of similarity between the uncharged acts and the charged offenses." Although this statement is correct with regard to the admissibility and relevance of J.'s testimony under Evidence Code section 1101(b), "[a]dmissibility under Evidence Code 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.)

Second, the instruction contains directly conflicting statements regarding the relevance of J.'s testimony under Evidence Code section 1108. The instruction first states that "[i]f you decide that the defendant committed the acts, you may but are not required to consider the evidence for the limited purpose of deciding whether . . . 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" the charged offenses. Later, however, the jury was instructed "[d]o *no*t conclude from this evidence that the defendant . . . is disposed to

commit a crime." (Italics added.) As the bench notes on CALCRIM No. 375 make clear, the latter statement—which is included as a bracketed sentence in the pattern instruction—should be given "on request if the evidence is admitted only under Evidence Code section 1101(b). *Do not give this sentence if the court is also instructing under Evidence Code section 1108 or 1109.*" (Italics added.)

Even assuming that the jury could have misconstrued the instruction in the manner urged by appellant, the error would be harmless. Contrary to appellant's claim, the instruction did not lessen the prosecution's burden of proof. The instruction made clear that the uncharged "behavior" or "acts" testified to by J. could not be considered for any purpose unless they had been proven by a preponderance of the evidence. The instruction also made clear that proof by a preponderance of the evidence of the uncharged offense was insufficient by itself to prove appellant committed the charged offenses, which had to be proven beyond a reasonable doubt. Accordingly, the error must be deemed harmless unless it is reasonably probable that it contributed to the verdict. (*People v. Falsetta* (1999) 21 Cal.4th 903, 924-925; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

No such reasonable probability exists here. As we have noted, other errors in the instruction actually inured to appellant's benefit. Moreover, appellant essentially confessed to the sexual offense he was charged with committing against H.S. Although the challenged instruction on Evidence Code section 1108 was erroneous, J.'s testimony was properly admitted pursuant to that section. Given the many similarities between the charged and uncharged offenses, and the fact that appellant confessed to one of the charged offenses—which was itself admissible to prove his propensity to commit the other charged offense (see *People v. Villatoro* (2012) 54 Cal.4th 1152, 1167)—it is not reasonably probable appellant would

have achieved a more favorable result had the jury been properly instructed pursuant to Evidence Code section 1108. The error is thus harmless. (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 924-925; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Nancy L. Ayers, Judge
Superior Court County of Ventura

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

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