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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. QUINNO DEYZA ASSOON, Defendant and Appellant.	B280913 (Los Angeles County Super. Ct. No. TA137174)

APPEAL from judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, Blythe J. Leszkay, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Quinno Deyza Assoon guilty in counts 1 and 2 of committing lewd acts upon A.L., a child under the age of 14. (Pen. Code, §288, subd. (a).) The court sentenced defendant to the high term of eight years in count 1, plus a consecutive 2-year term (one-third the mid-term) in count 2.

Defendant contends that the trial court abused its discretion and violated his right to due process by admitting evidence of his prior sexual misconduct with T.H., and erred by instructing the jury that it could infer consciousness of guilt from his voluntary absence at trial. He contends that even if the individual errors do not warrant reversal, their aggregate effect was prejudicial.

We conclude defendant has failed to show error or prejudice, and affirm the judgment.

FACTS

Prosecution

Current Offenses

A.L. was born on January 19, 2002. From 2012 to 2014, she lived with defendant, her mother, her three sisters, and her disabled brother. Her mother, C.S., stayed at home and took care of her brother. Defendant worked. Defendant typically rode a bus part of the way to school with

the girls, and then they separated and took different buses. A.L. viewed defendant as her stepfather.

A.L. was 12 years old and in the sixth grade when the charged events took place. On the first occasion, defendant told A.L. to pretend she was sick so they would have a "daddy-daughter day." A.L. stayed home with defendant. They were alone while C.S. went to the DMV. A.L. was wearing a T-shirt and shorts. Defendant was wearing pants but no shirt. Defendant told A.L. to get on all fours in "the cat position" to do an exercise that helped ease the back pain she had from scoliosis. He positioned himself behind A.L., put his hands on her waist, and pushed her back toward the floor. He pressed his erect penis against her buttocks. The incident lasted less than five minutes. Defendant never helped A.L. with back exercises when her mother or siblings were present.

About two weeks later, defendant told A.L. to again pretend to be sick. He stayed home from work, and they were alone again while C.S. went to the store for about 35 to 40 minutes. Defendant had her get in the cat position again and pressed his penis against her buttocks.

Another day, on the bus to school, defendant told A.L. to pretend to throw up. When they stopped at a store, A.L. pretended to vomit so that her sisters would believe she was sick. A.L.'s sisters continued on to school, but defendant took A.L. home. Her mother was there when they arrived, but she left at some point. Defendant told A.L. to change into shorts. She said she felt uncomfortable. He said she

should not feel uncomfortable "since he was [her] daddy." A.L. changed into shorts. Defendant said they were going to play "a kissing game." He had her lie on the couch with her eyes blindfolded by a dark shirt. Defendant asked A.L. to guess where he was kissing her. He kissed her arms and legs. After about 15 to 20 seconds, she took the blindfold off and said she felt uncomfortable. He took her into her room, laid her on a bed, and put her ankle on his shoulder. He said he was going to shower and then they were going to "do leg-slapping." Leg-slapping was a term A.L. used to mean sex. She said, "no, because that's what grown-ups do."

In another incident, defendant asked A.L. to massage him. She thought he wanted his arms massaged, so she agreed to do it. Defendant got undressed and put a towel around his waist. He lay on his bed. He closed the bedroom door and locked it. A.L. started massaging defendant's arms. He said she could get on the bed. When she got on the bed, he told her it would be better if she straddled him. A.L. complied. Her thighs and vagina touched the middle of his body. Defendant held her waist while she massaged him in that position for about five minutes. She was uncomfortable during the massage.

Defendant warned A.L. not to tell her sisters she was pretending to be sick because they would be jealous. A.L. told L.L., her youngest sister, that defendant told her to lie. She asked L.L. not to say anything. A.L. asked L.L. to stay home with her. L.L. pretended she was sick, too, but their mother made her go to school.

A.L. told C.S. that defendant was making her pretend to be sick so that she could stay at home. Her mother responded, "I doubt it." She seemed mad at A.L., so A.L. avoided talking to her about it again. After C.S. learned what happened, A.L. felt like she could talk to her without her mother getting angry. At a prior hearing, A.L.'s mother raised her hand and interrupted A.L.'s testimony. She was removed from the courtroom. Afterwards, A.L.'s mother told her she wanted to leave the courtroom because it was "just too much." A.L. felt bad because she felt responsible for her mother and defendant breaking up. A.L. did not know whether defendant had touched anyone else inappropriately.

A.L. was friends with Cynthia and Paris in sixth grade. Cynthia began to notice that A.L. was sad, withdrawn, and eating less than usual. On March 26, 2014, A.L., Cynthia, and Paris were talking about their problems during P.E. class when A.L. began crying. She said her stepdad was touching her. Paris realized the problem was serious and told their teacher, who took them to the principal's office. That day, A.L. told the police about one incident involving defendant, and told DCFS about five incidents involving him.

Los Angeles Police Department Detective Elva Soriano interviewed A.L. on September 2, 2014. A.L. described five incidents in which defendant abused her. A.L. wrote that she recognized defendant on a photo of him that the detective showed her. She said "[h]e touched me inappropriately several times." After A.L. described the

incidents, Detective Soriano asked her to summarize what happened. A.L. did not know what to say, so Detective Soriano suggested what she should write. Detective Soriano testified that she did not tell A.L. what to write.

That spring, A.L.'s grades had fallen, so C.S. took her phone away. Defendant said he would move her to another school if her grades did not improve, which upset A.L. On one occasion, A.L. went to Starbucks with Cynthia and Paris, and Paris was caught stealing. A.L. got "whupped" with a belt afterwards. She was angry that her mother and defendant disciplined her that way.

A.L.'s younger sister D.L. testified that she and defendant wrestled alone in her room together once. Defendant put her face-down on the bed and lay on top of her. She felt his penis against her buttocks. She told her mother about the incident. She also relayed the incident to a social worker on March 26, 2014, when asked whether anyone had touched her inappropriately.

School, Work, and DMV Records

A.L.'s school records showed that A.L. had never been disciplined. The records reflected that A.L. left school early on October 8, 2013. Defendant's work records showed that he took two hours off that day. On October 15, 2013, and February 25, 2014, A.L. was absent from school and defendant missed work. DMV records showed that C.S. had her photo taken on February 25, 2014. C.S.'s application

with the DMV was processed the same day. On March 12, 2014, A.L. left school at around 12:10 p.m., and defendant missed about one and a half hours of work. On March 21, 2014, defendant signed A.L. out of school at 12:05 p.m. On January 17, 2014, A.L.'s sister D.L. was absent from school part of the day, and defendant missed work.

Prior Uncharged Sexual Abuse

T.H. was born on August 31, 2000. Her mother and defendant were in a relationship from the time T.H. was an infant until she was about eight years old. She had an older brother and a younger brother.

When T.H. was about four years old, defendant took her into his bedroom and closed the door. He blindfolded her and put his penis in her mouth. He put his hands on the back of her head and pulled her toward him. When he stopped, she took the blindfold off and saw his penis.

Defendant put his penis in T.H.'s mouth almost every day for years. When she was around seven years old, defendant tried to insert his penis in her vagina twice. He stopped after she said it hurt. He tried to insert his penis in her anus about three times. She told him it hurt and pushed him. He said, "Okay. Okay. We'll stop here." He sometimes kissed her mouth and licked her vagina.

When he put his penis in her mouth, he often ejaculated, either in her mouth or on his own chest. If he ejaculated in her mouth, she would spit it out in the

bathroom. Sometimes she almost threw up, and she spit up saliva. Defendant sometimes told her not to go to school so he could sexually abuse her.

T.H.'s brother tried to interfere, but the bedroom door was blocked. Defendant "whipped" T.H., and she believed he was abusive. T.H. was aware that another girl had accused defendant of abusive behavior. She was afraid to testify because she worried that people would not believe her.

T.H.'s older brother, Tyronn, testified that defendant regularly spent time alone with T.H. in his bedroom when their mother was working. Defendant usually closed the door. Tyronn would sometimes try to get in, but could never open the door. One night, Tyronn woke up and realized T.H. was not in bed. He saw the light on in defendant's bedroom and tried to open the door. Defendant opened the door and hit him across the face. Defendant was wearing underwear, and Tyronn saw T.H. sitting on the bed in her pajamas. Whenever T.H. came out of defendant's bedroom, she looked like she was sad or in pain, but acted like everything was normal.

When T.H. was eight years old and Tyronn was nine or ten years old, T.H. told her aunt what happened. A few days later, the police spoke with T.H. and she was examined by a nurse. The nurse took swabs as part of a rape kit, which was booked into evidence. Criminalists searched the bedroom and bathroom for seminal fluid and collected 10 sample cuttings from a 6-inch by 6-inch area of carpet at the foot of the bed, where the last incident took place.

Defendant's sperm cells were identified in all 10 samples. Two cuttings also showed strong indicators of saliva, which contains a mixture of several types of cells. A mixture of defendant's and T.H.'s DNA was present in epithelial cells on one of the samples that had strong indicators for saliva.

Defense

C.S. testified that she and defendant broke up in March 2014. They had been in a relationship for almost four years at that time. A.L. called C.S. from school claiming to be sick several times. Defendant brought A.L. home from school early on the bus once or twice. C.S. went to the DMV to apply for a driver's license on February 25, 2014. She did not remember A.L. being home that day. She did remember defendant bringing A.L. home early on March 12 and March 21, 2014. On March 12, 2014, C.S. went to the market for about 10 minutes after they got home. Previously, she testified she was gone for 20 minutes. C.S. asked A.L. to go with her to the market, but A.L. did not want to. That was the only time C.S. ever left defendant home alone with one of the girls. She remembered that defendant stayed home from work on a day when one of the girls stayed home from school about three or four times.

A.L. was lactose intolerant and had scoliosis. The doctor recommended "the cat position" to alleviate her back pain. Defendant sometimes got behind A.L. and applied

pressure to her back as she moved it up and down. C.S. did not view his behavior as sexually suggestive.

A.L. had "an ongoing problem with her grades." C.S. and defendant told A.L. that she would get a "whupping," and that they would take her out of her school if she did not improve in school. C.S. was concerned about A.L.'s friends, including Paris and Cynthia. About a week before March 26, 2014, C.S. whipped A.L. with a belt because she and her friends had been leaving a designated area after school to go to Starbucks and McDonald's.

C.S. was A.L.'s support person at the preliminary hearing. A.L. became upset when she was asked the same question repeatedly. C.S. raised her hand and shook her head at the judge. The judge had her ejected from the courtroom. A.L. did not tell her that defendant had her pretend to be sick, and she did not respond, "I doubt it."

DISCUSSION

Prior Acts of Sexual Abuse

Defendant contends the trial court abused its discretion under Evidence Code section 352 by admitting evidence of his prior acts of sexual abuse against T.H.[1] He argues the prior conduct was dissimilar to the charged offenses and highly inflammatory, and that the prosecution's

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

use of the evidence as its "centerpiece" at trial dwarfed the evidence of the charged crimes and confused and misled the jury.[2] Defendant fails to establish error.

Proceedings

Prior to trial, the prosecution sought to introduce evidence of defendant's prior sexual abuse of T.H. under sections 1101, subdivision (b), and 1108, which the defense opposed. The trial court ruled the evidence admissible under both sections, finding that it was highly relevant to defendant's intent and his propensity to commit the type of offenses charged. The court found the evidence was not inadmissible pursuant to section 352, because the probative value of the evidence was not substantially outweighed by the possibility that it would consume an undue amount of time, create a substantial danger of undue prejudice, confuse the issues, or mislead the jury.

The court explained that the conduct with T.H. was "more overt certainly," but not unduly prejudicial. When defendant directed A.L. to put on a top and "get down on all fours," and then "got behind her and placed his penis against her," it was arguably for sexual gratification. The court reasoned that there were many similarities shared by the

[2] Defendant does not argue that the prior acts of sexual abuse were irrelevant to the issue of intent under section 1101, subdivision (b), or that the evidence failed to meet the threshold requirements for admission under section 1108.

conduct with T.H. and the conduct in the charged offenses: both victims were female children of women with whom defendant had a dating relationship; he lived with the victims, isolated them, used a blindfold in both instances, and he had both victims positioned on their hands and knees.[3] The fact that the victims did not know each other further strengthened the relevance of the prior acts. The court found it unlikely that the jury would be confused or misled in light of the limiting instructions that would be given. It found the five-year gap between the prior acts and the current offenses was not "substantial."

Law

Evidence of a person's character or predisposition to act in a certain way—including evidence of uncharged crimes—is generally inadmissible to prove that the person acted in conformance with that character trait on a given occasion. (§ 1101, subd. (a); *People v. Villatoro* (2012) 54 Cal.4th 1152, 1159.) "'Such evidence "is [deemed] objectionable, not because it has no appreciable probative value, *but because it has too much*." . . . [Citations.]' [Citations.]" (*People v. Falsetta* (1999) 21 Cal.4th 903, 915 (*Falsetta*).)

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[3] In our review of the record, we were unable to locate evidence demonstrating that defendant positioned T.H. on her hands and knees.

Evidence of an uncharged criminal act is admissible to prove facts other than disposition to commit a crime, including, but not limited to "motive, opportunity, intent, preparation, plan, knowledge, identity, [and] absence of mistake or accident" under section 1101, subdivision (b). "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. (See *People v. Robbins* [(1988)] 45 Cal.3d 867, 880.) '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish . . . the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' (2 Wigmore, [Evidence] (Chadbourn rev. ed. 1979) § 302, p. 241.) In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]' (*People v. Robbins*, *supra*, 45 Cal.3d 867, 879.)" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) The court may exclude evidence that is otherwise admissible under section 1101, subdivision (b), under section 352 "if its probative value is substantially outweighed by the probability that its admission will . . . necessitate undue consumption of time[,] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.)

Section 1108 provides for admission of evidence of a defendant's commission of another sex offense to prove

propensity in a prosecution for certain enumerated offenses, including lewd act upon a child under the age of 14, as charged in this case. (§ 1108, subds. (a) & (d)(1)(A).) "[B]y enacting section[] 1108 . . . the obvious intention of the Legislature was to provide a mechanism for allowing evidence of past sexual offenses or acts of domestic violence to be used by a jury to prove that the defendant committed the charged offense of the same type; recidivist conduct the Legislature has determined is probative because of its repetitive nature. . . . [I]t is apparent that the Legislature considered the difficulties of proof unique to the prosecution of these crimes when compared with other crimes where propensity evidence may be probative but has been historically prohibited." (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333–1334, fn. omitted (*Brown*).) "The charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under Evidence Code section 1101, otherwise Evidence Code section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in section 1108." (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40–41, fn. omitted (*Frazier*).) Evidence offered pursuant to section 1108 is subject to exclusion under section 352. (§ 1108, subd. (a).) "In *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*), th[e] court identified five factors relevant to the trial court's consideration of whether the probative value of prior sexual misconduct evidence is substantially outweighed by its prejudicial effect under

[Evidence Code] section 1108: (1) the inflammatory nature of the prior offense evidence; (2) the probability that admission of the evidence will confuse the jury; (3) the remoteness of the prior offense; (4) the consumption of time necessitated by introduction of the evidence; and (5) the probative value of the evidence. (*Id.*, at pp. 737–740.)" (*People v. Shorts* (2017) 9 Cal.App.5th 350, 356.)

The court's decision to admit evidence of uncharged crimes is reviewed for abuse of discretion, and may be reversed when the ruling "'falls outside the bounds of reason.'" (*People v. Kipp* (1998) 18 Cal.4th 349, 371, quoting *People v. De Santis* (1992) 2 Cal.4th 1198, 1226 [§ 1108]; see also *People v. Davis* (2009) 46 Cal.4th 539, 602 [§§ 1101, 352].) "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*Falsetta*, *supra*, 21 Cal.4th at p. 913.)

Analysis

To support his contention that the prior offenses would impermissibly inflame the jury, defendant attempts to analogize this case to *Harris*, *supra*, 60 Cal.App.4th 727. The *Harris* court reversed the trial court's ruling admitting evidence of a prior offense on the basis that the defendant's prior crimes were "inflammatory *in the extreme*." In the charged incidents in *Harris*, "at worst defendant licked and fondled an incapacitated woman and a former sexual

partner, both of whom were thereafter on speaking terms with him." (*Id.* at p. 738.) In the uncharged incident in *Harris*, "[the defendant] entered [the victim's apartment] at night while she was sleeping, beat her unconscious and used a sharp instrument to rip through the muscles from her vagina to her rectum, then stabbed her in the chest with an ice pick, leaving a portion of the pick inside her. Police found her beaten unconscious on the floor, bleeding heavily from the vaginal area and bleeding from the mouth and nose." (*Id.* at p. 733.)

While the crimes in *Harris* were markedly dissimilar, here the charged and uncharged conduct exist on a continuum. Although the past conduct is more severe, the trial court could reasonably conclude that this is the type of disposition evidence our Legislature deemed highly relevant when it enacted section 1108. (See *Brown*, *supra*, 77 Cal.App.4th at pp. 1333–1334 [propensity evidence of crimes enumerated in section 1108 is admissible due to their repetitive nature and the unique difficulties in proof].) There is no doubt that the evidence had the power to influence the jury, but its power is derived from its relevance. (See *Falsetta*, *supra*, 21 Cal.4th at p. 915 [propensity evidence usually inadmissible because it is "too" relevant].) Defendant's intent and his propensity to commit the crimes were central issues in this case. As the trial court stated in its ruling, there were many similarities between the charged and uncharged crimes, which increased the probative value of the uncharged offenses. T.H. and A.L.

were both female children under the age of 14. The defendant had relationships and lived with both of their mothers. He isolated the girls and used blindfolds in both cases. The difference in the conduct is not one of nature but of the degree of severity, which alone does not substantially outweigh their considerable probative value. (See *Frazier*, *supra*, 89 Cal.App.4th at pp. 33, 40–41 [prior offense evidence of forcible oral copulation and sodomy permitted where defendant was charged with fondling bare buttocks].) The trial court reasonably found the evidence was highly probative to combat defendant's assertion that there were innocent explanations for his behavior. Moreover, the jury was instructed under CALCRIM No. 375 to evaluate the similarity of the incidents and independently determine their significance, which provided another safeguard against the use of evidence of dissimilar incidents.

Defendant's claim that the jury was likely confused by the prosecution's presentation of the evidence—the order of witnesses and the emphasis on the uncharged acts in argument—was not raised with the trial court. Defendant did not seek to have the prosecution's use of the evidence restricted when he opposed its admission, and did not object to the manner in which the case was presented at trial. We agree with the People that the issues were forfeited. (*People v. Nelson* (2012) 209 Cal.App.4th 698, 711 [objection must be timely and specific to preserve issue on appeal].) Regardless, we are unconvinced of the likelihood for confusion. The jury was instructed on the proper use of evidence of prior

offenses. It was instructed on reasonable doubt (CALCRIM No. 220), evidence of an uncharged offense to prove intent and lack of mistake (CALCRIM No. 375), and evidence of an uncharged sex offense (Former CALCRIM No. 1191). The jury was also admonished that the prosecution was required to prove each element of the charged offenses. (CALCRIM No. 1110.) These instructions minimize the risk defendant would be convicted based on his conduct in the prior offenses by properly focusing the jury on the requirement that each element of the charged offense must be proven beyond a reasonable doubt. (See *Frazier*, *supra*, 89 Cal.App.4th at p. 42.) As the Attorney General notes, this jury's questions related only to the charged conduct, which indicated that it was not confused by the uncharged acts evidence.

The offenses, which occurred five years before the current offenses, were not remote in time, which also weighs in favor of admission. (See *People v. Regaldo* (2000) 78 Cal.App.4th 1056, 1059 [prior offense that occurred five years prior to charged offense not remote in time].)

We reject defendant's argument that the evidence regarding his prior sexual misconduct dwarfed the evidence relating to his offenses against A.L. Defendant specifically objects to the "parade of five additional witnesses to testify about the DNA evidence that [defendant's] sperm was found in the bedroom carpet." The five witnesses who testified regarding the DNA evidence were restricted to essential persons in the chain of custody of the samples and the criminalists who performed the DNA analyses. Although

defendant attempts to minimize the importance of the DNA evidence, we point out that the testimony was not merely proof of the presence of defendant's sperm on his own bedroom carpet. The evidence tended to show that both defendant's sperm and T.H.'s saliva were present on the same small area of carpeting cut from the location where the last incident of the sexual abuse against T.H. took place. The totality of this evidence was highly probative, given T.H.'s testimony that defendant forced her to orally copulate him in his bedroom and ejaculated in her mouth. Of the 10 cuttings taken from a 6-inch by 6-inch piece of carpet in defendant's bedroom, all 10 contained sperm consistent with defendant's DNA profile. Two of the cuttings contained a mixture of sperm consistent with defendant's DNA and epithelial cells consistent with T.H.'s DNA. Two cuttings had strong indicatives of saliva, which contains different types of cells. The veracity of T.H.'s testimony was a material issue at trial, and the DNA evidence strongly supported her credibility. The time and number of witnesses devoted to the evidence of defendant's prior uncharged acts was not unreasonable.

The probative value of the evidence is further strengthened by the fact that the victims were unknown to one another. T.H. filed a report regarding the crimes against her with the police five years prior to the commission of the crimes in the instant case. The many similarities that the trial court relied on in admitting the evidence were

documented before either trial took place or before the victims were aware of one another.[4]

The trial court carefully considered the evidence, was familiar with the applicable legal principles, and made a reasoned decision. Defendant has failed to establish that the court acted arbitrarily or beyond the bounds of reason. Nor was defendant's trial rendered fundamentally unfair by the trial court's application of the rules of evidence. (*People v. Abilez* (2007) 41 Cal.4th 472, 503 [in general application of ordinary rules of evidence under state law does not violate a criminal defendant's federal constitutional rights].)

Consciousness of Guilt Instruction

Defendant contends the trial court's instruction to the jury that it was permitted to consider his absence from trial or "flight" as evidence of consciousness of guilt and the prosecutor's comments regarding defendant's absence denied him the constitutional right to a fair trial. We disagree.

Proceedings

On what was to be the second day of the trial, defense counsel informed the court that defendant had texted him:

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[4] To the extent that T.H. testified to facts not elicited in earlier testimony (which the trial court did not rely on in its ruling), the defense impeached her with her prior testimony and elicited that she learned of A.L.'s allegations before trial.

"Been in a car accident, at the E.R." at approximately 8:30 a.m. The investigating officer and district attorney contacted local emergency rooms but could not confirm defendant's whereabouts. Defendant had been ordered back to court at 9:30 a.m. At 11:15 a.m., he remained absent and had not communicated his whereabouts. The court issued a no-bail bench warrant and ordered bail forfeited. The court acknowledged there could be an innocent explanation for defendant's failure to appear, but advised counsel that if defendant returned he would need documentation to verify the reason for his absence. The court advised counsel it would dismiss the jury for the day, and would proceed with the trial the following day regardless of whether defendant was present.[5]

The following morning the court met with counsel concerning defendant's absence. Defense counsel stated that defendant had not communicated with him since the initial text. The prosecutor stated that he had been following defendant's Facebook page and that defendant's profile picture had been updated at 6:00 p.m. the night before with a photo of his mother and grandmother. The court inquired if the clerk or bailiff had been contacted by defendant or by

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[5] Defendant asserts that the court told the jury, "We have a defendant that's M.I.A., for lack of a better term, and we're trying to determine his whereabouts," and "there's word that he might have been in an accident." As the Attorney General correctly notes, the trial court made these remarks to a few witnesses outside the presence of the jury.

anyone on defendant's behalf about his absence. No contacts had been made. Defense counsel stated that defendant's cousin told him defendant was with his grandmother when he left, and that he had not seen defendant since then. Defendant's grandmother, who regularly drove him to court, also had not seen him. It was defense counsel's understanding that defendant's family had been "trying to reach out [to him in] any way they can."

The court observed that defendant was aware he needed to be in trial every day—as evidenced by his attendance on every day of his prior trial and at the numerous pretrial hearings—and yet had failed to appear. It found defendant voluntarily absented himself pursuant to Penal Code section 1043, subdivision (b)(2),[6] and determined to proceed with the trial in his absence. The prosecution inquired whether the court intended to instruct the jury on the issue. The court responded that it believed the "flight" instruction on consciousness of guilt was appropriate, given that defendant chose not to return to court following his victims' testimony.[7]

Defense counsel requested permission to call in backup counsel so he could testify concerning defendant's text message. He proposed that his testimony be admitted to

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[6] The court mistakenly cited Penal Code section 1043, subdivision (a)(2).

[7] Both A.L. and T.H. testified on the first day of trial while defendant was present.

show "state of mind." The prosecutor objected on hearsay grounds, and the court sustained the objection. The court emphasized that, given defendant's choice to absent himself from trial, an instruction to the jury not to take his choice into account would be inappropriate. The court would research the issue further, however, and invited the parties to do the same.

The next day, the court stated it would give the flight instruction, citing *People v. Snyder* (1976) 56 Cal.App.3d 195 (*Snyder*). The court ordered defense counsel not to speak about the reasons for defendant's absence in closing argument without presenting some evidence of the reasons for his absence. The court restricted the prosecution to arguing that "[defendant] is not here and [the jury] can consider it" in accordance with the flight instruction and *Snyder*.

The trial court instructed the jury under CALCRIM No. 372:

"If the defendant fled after he was accused of committing the crime, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself."

The court invited defense counsel to present any admissible evidence to explain defendant's absence, but counsel did not do so. Defendant remained absent throughout trial.

In closing argument, the prosecutor referred to defendant's absence at trial and argued that it demonstrated consciousness of guilt. As relevant here, the prosecutor stated: "[Defense counsel has] done a fantastic job, with a lot of the evidence stacked against him, and the added thing of his client not choosing to join us for this week." "[Y]ou got a guy who sits there next to [defense counsel] and listens to the evidence in opening statement and listens to the victims testify on Friday, and then he says, 'Wow, that's a lot of evidence,' and he takes off--"[8] "Mr. Assoon is confident in what your decision is going to be, and that's why he hit the road." "[Defense counsel] says 'Where is [T.H.'s mother]?' Which is also kind of funny -- right? -- for a guy who's sitting next to an empty chair, to say, 'Where is [T.H.'s mother]?'" and, "But, I mean, for a guy who is bold enough to not even show up for his own trial -- okay?"

Defense counsel objected to the prosecutor's final statement and moved for mistrial. The court held a sidebar and admonished the prosecutor not to go beyond her ruling on the issue. She reiterated that the prosecution was allowed to point out defendant's absence and could argue that the jury could infer consciousness of guilt, but nothing more. She noted that the prosecutor "ha[d] not crossed that line, because it does show consciousness of guilt." The trial court overruled the objection and denied the motion.

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[8] Defense counsel objected to this statement. The trial court overruled the objection.

Defendant was absent for the remainder of the trial. After trial, defendant was arrested in Tennessee on the court's warrant. He did not offer an explanation for his absence at the sentencing hearing.

Law

"In general, a flight instruction 'is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.' (*People v. Ray* [(1996)] 13 Cal.4th [313,] 345; [Pen. Code,]§ 1127c.) "'[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested.'" (*People v. Visciotti* (1992) 2 Cal.4th 1, 60, quoting *People v. Crandell* (1988) 46 Cal.3d 833, 869.) '*Mere* return to familiar environs from the scene of an alleged crime does not warrant an inference of consciousness of guilt [citations], but the *circumstances* of departure from the crime scene may sometimes do so.' (*People v. Turner* (1990) 50 Cal.3d 668, 695, original italics.)" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) "[I]n the absence of any explanation [for defendant's failure to attend trial after the jury has been impaneled] it [is] reasonable to infer that defendant's absence [is] voluntary and [is] a fact relevant to the determination [of] his guilt or innocence. (*People v. Kessler* (1968) 257 Cal.App.2d 812, 814–816.) 'It [is] for the jury to

determine whether [the defendant's] conduct amounted to flight and the significance and weight to be attached to such circumstance.' (*People v. Olea* (1971) 15 Cal.App.3d 508, 516.)" (*Snyder*, *supra*, 56 Cal.App.3d at 199.)

Analysis

We agree with the trial court that the reasoning in *Snyder* is applicable here. The facts of *Snyder* closely parallel those of the present case. Snyder was released on bail and was present when the jury was impaneled. (*Snyder*, *supra*, 56 Cal.App.3d at p. 197.) He failed to appear before any evidence was presented or witnesses testified. After having the courthouse searched, the trial court issued a bench warrant and Snyder's bail was forfeited. The court continued the trial until the following day. Defense counsel notified the court that defendant had telephoned him and stated he had been arrested for a traffic warrant and was being held in Alhambra city jail, but that he would arrive in court by 11:00 a.m. Snyder failed to appear. The county jail system was checked and Alhambra city jail was contacted, but there was no record that Snyder had been apprehended. Defense counsel moved for mistrial, and the prosecution moved to proceed in Snyder's absence. The trial court denied the motion for mistrial, and granted the prosecution's motion to proceed with trial. Snyder did not appear for the duration of the trial. (*Id.* at p. 198.) Over defense counsel's objection, the court instructed the jury under CALJIC No. 2.52: "'The

flight of a person after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.'" (*Ibid.*) No evidence regarding Snyder's absence was formally offered, but he was "noticeably absent" during trial. (*Ibid.*) The jury found Snyder guilty. When he returned for sentencing several months later, Snyder did not explain his absence. (*Ibid.*)

On appeal, Snyder argued that the trial court prejudicially erred by instructing the jury on flight and violated his right to due process by proceeding with the trial in his absence. The Court of Appeal affirmed. The court held the trial court properly instructed the jury it could consider Snyder's flight as a fact relevant to the determination of his guilt or innocence. (*Snyder*, *supra*, 56 Cal.App.3d at p. 199.) It reasoned that "in the absence of any explanation it would be reasonable to infer that [Snyder's] absence was voluntary and it was a fact relevant to the determination as to his guilt or innocence," and that the jury could decide whether Snyder's voluntary absence amounted to flight, and if it did, what weight to give that fact. (*Ibid.*)

This case presents an identical circumstance. Defendant's argument that he was prohibited from offering evidence to explain his absence is belied by the record. To

the contrary, the court invited the defense to offer admissible evidence to explain defendant's absence. Defense counsel only offered his own testimony regarding defendant's text message—hearsay for which he offered no viable exception.

On appeal, defendant does not argue that the text message was admissible, only that he should have been permitted to present it to the jury. Defendant offers no precedent to support the admission of inadmissible evidence to explain his absence. He relies on *People v. Burres* (1980) 101 Cal.App.3d 341, 355 (*Burres*), to argue that he was prejudiced by the exclusion of the evidence, but in *Burres*, the Court of Appeal held the trial court erred when it prevented the defendant from testifying regarding his prior experiences with an officer to explain his flight—i.e., the court erred because the defendant offered non-hearsay evidence not otherwise excluded by the Evidence Code. The situation is not analogous.

We likewise reject the argument that *People v. Pigage* (2003) 112 Cal.App.4th 1359 (*Pigage*), stands for the proposition that it is improper to instruct the jury regarding consciousness of guilt when a defendant voluntarily absents himself from court. As defendant acknowledges, *Pigage* concerned the very different issue of whether the prosecutor's comments during closing argument regarding Pigage's flight—made in violation of the court's direct order—prejudiced him. The *Pigage* court stated in dicta that the trial court's decision to instruct the jury not to consider Pigage's absence was within its discretion. (*Id.* at p. 1374,

fn. 5.) Its statement that the court did not err in refusing to give a flight instruction in that case—where evidence was presented that Pigage's life was in danger and that he had suffered threats and vandalism—does not compel the conclusion that the trial court abused its discretion by giving the instruction in this case, where there was no explanation for defendant's absence.

Finally, defendant argues that the prosecutor's comments amplified the instructional error by drawing even greater attention to the bare fact of his absence. As there was no instructional error and defendant did not object that the prosecutor's statements went beyond the court's ruling at trial or argue that the prosecutor exceeded the bounds of the ruling on appeal, the argument necessarily fails.

Cumulative Error

Defendant contends the cumulative errors at trial deprived him of due process. As we have concluded that the trial court did not err, his contention fails. (See *People v. Hines* (1997) 15 Cal.4th 997, 106.)

DISPOSITION

The judgment is affirmed.

KRIEGLER, Acting P.J.

We concur:

BAKER J.

DUNNING, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.