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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. NEY ALBERTO PETTUS, Defendant and Appellant.	B260648 (Los Angeles County Super. Ct. No. GA090403)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jared Moses, Judge. Affirmed.

Philip Deitch, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Scott A. Taryle and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Ney Alberto Pettus appeals his judgment of conviction on multiple counts of spousal rape and other related offenses. Pettus contends that the trial court abused its discretion and violated his constitutional right to due process by admitting evidence of three prior instances of sexual misconduct allegedly committed by Pettus pursuant to Evidence Code sections 1101, subdivision (b) and 1108, subdivision (a). We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Charges

The Los Angeles County District Attorney charged Pettus with 14 felony counts arising out of his alleged physical and sexual abuse of his wife, R.H., between June 27, 2013 and July 10, 2013. Pettus specifically was charged with three counts of false imprisonment by violence (Pen. Code, § 236), three counts of assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)), two counts of corporal injury to a spouse (Pen. Code, § 273.5, subd. (a)), two counts of spousal rape (Pen. Code, § 262, subd. (a)(1)), two counts of sodomy by use of force (Pen. Code, § 286, subd. (c)(2)(a)), one count of forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)(a)), and one count of attempted criminal threats (Pen. Code, §§ 422, subd. (a), 664). Following Pettus's plea of not guilty to each count, his case was tried to a jury in April 2014.

II. Prosecution Evidence

A. Pettus's Physical and Sexual Abuse of R.H.

R.H. immigrated to the United States from China in August 2010. She originally resided in Illinois where she worked as an accountant pursuant to a work visa. In January 2013, after she was laid off from her employment, R.H. moved to California and began the process of applying for a student visa. In February 2013, R.H. met Pettus when she applied for a position as an accountant at Pettus's certified public accounting business in El Monte, California. During an interview at his office, Pettus asked R.H. to sit with him on the couch. He told R.H. that she was overqualified for the position and then invited her to lunch at a restaurant. R.H. accepted the invitation.

During lunch, Pettus inquired about R.H.'s immigration status and asked her why she did not find an American man to marry so that she could stay in the United States.

R.H. told Pettus that she recently had broken up with her boyfriend. Pettus and R.H. returned to his office after lunch. Pettus began removing R.H.'s clothes and told her that she had a beautiful body. He also said he wanted to marry her. R.H. felt uncomfortable and told Pettus that she wanted to go home. She then left his office.

Over the next week, however, R.H. spent a lot of time with Pettus and he repeatedly proposed marriage to her. About a week after she met Pettus, R.H. was informed by her immigration attorney that there was a problem with her visa application. R.H. discussed her immigration issues with Pettus and he reiterated that they should get married so that she could stay in the United States. R.H. initially refused the proposal and returned to her own home, but they continued to spend time together. R.H. later agreed to marry Pettus because she wanted to stay in the country and to develop an accounting business with him. She also felt some love for Pettus at the time. On February 20, 2013, Pettus and R.H. were married in a private ceremony at a notary office.

After Pettus and R.H. married, they lived together in his office for a few weeks. Pettus and R.H. later moved into a two-bedroom apartment and began a consensual sexual relationship. In May 2013, however, their marriage turned violent as Pettus became physically abusive toward R.H. On occasions when Pettus felt that R.H. had done something wrong in the office or their home, he would hit her in the head. Pettus's violence toward R.H. also extended to their sexual relationship. When R.H. did not want to have sex or Pettus was not satisfied with their sexual activity, Pettus would hit R.H. and choke her. Pettus told R.H. that all American husbands hit their wives and that it was not considered domestic violence in this country. Pettus also told R.H. that he was unhappy in their marriage and was planning to divorce her. Although R.H. called a domestic violence hotline for advice about her situation, she was reluctant to contact the police. R.H. also believed that, before she could report Pettus's abuse to the police, she would need to gather proof.

On June 27, 2013, R.H. was able to record one of Pettus's acts of domestic violence by concealing a recording device in her purse. During the incident, Pettus became angry because R.H. did not want to have sex with him. Pettus grabbed R.H. by

the neck, forced her into their bedroom, and pushed her onto the bed. He then hit R.H. with a closed fist twice on her head. R.H. cried and told Pettus that she needed to go to the hospital. Pettus became more upset and said, "Nobody hurt you that much." Pettus then choked R.H. and hit her on her legs. He also called her a "stupid monkey," a "piece of shit," and a "fucking bitch." Following the incident, Pettus refused to let R.H. leave the home and only later drove her to the store to get an ice pack.

Later that evening, R.H.'s recorder captured another incident of domestic violence.[1] Pettus again placed his hands around R.H.'s neck and forced her into their bedroom. R.H. screamed and cried as Pettus choked her with his hands. During the incident, Pettus told R.H., "I'm going to end up [w]ringing your neck" and "I'm going to end up fucking killing you." He also told her, "[T]he only thing you understand is being hit." Pettus repeatedly called R.H. a "fucking stupid bitch" and eventually forced her to stand in the corner "like a 3-year-old" until she could explain to him why he was so angry. Despite R.H.'s repeated pleas, Pettus still would not let her leave the home. Pettus told R.H., "I want you here. I'm not trying to control you. It's just a thing with me. I've always been like this."

On July 3, 2013, Pettus had another violent outburst after discovering that R.H. had not bought soy milk for him. Pettus began yelling at R.H. and calling her a stupid monkey or bitch. He then grabbed her, pushed her into their bedroom, and hit her on the head one to two times with a closed fist. Two days later, on July 5, 2013, Pettus again became violent after R.H. told him that she was going to attend a church function. Pettus dragged R.H. into their bedroom by placing his hands around her neck. He then struck her on the head with his fist. R.H. asked Pettus for an ice pack for her head, but he refused and told her to go to sleep.

On July 10, 2013, R.H. was asleep in the bedroom when Pettus walked in and told her that he wanted to have sex. R.H. refused because she was sick. Pettus became angry

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[1] During the trial, the two audio recordings that R.H. made on June 27, 2013 were played for the jury.

and again insisted that they have sex. When R.H. repeated that she did not want to, Pettus yelled at her, showed her his fist, and ordered her to remove her clothes. Because R.H. was afraid of Pettus, she complied. Pettus first penetrated her vagina with his penis and choked her with his hands as she cried and screamed. He threatened to kill her if she did not cooperate. Pettus next demanded that R.H. perform oral sex on him and threatened to hit her when she refused. He grabbed R.H.'s head and forced her to orally copulate him until he ejaculated. He then forcibly sodomized her multiple times. R.H. repeatedly told Pettus that he was hurting her and begged him to stop, but he did not. Pettus then forcibly penetrated her vagina again until he ejaculated a second time. After the assault finally ended, Pettus got ready for work and left the apartment.

Once Pettus left for work, R.H. went to the police station to file a report against him. In describing Pettus's sexual assault to the interviewing officer, R.H. did not mention that Pettus had forced her to have anal sex or that he had threatened to kill her. That same day, after talking to the police, R.H. also applied for a restraining order against Pettus and made arrangements to stay at a motel. R.H. later consulted with an attorney, who informed that her she could be eligible for immigration relief as a victim of domestic violence.

On the evening of July 10, 2013, after R.H. failed to return home, Pettus spoke with X. Shin, a young woman who had been renting a room in the apartment from Pettus and R.H. Pettus was very upset during the conversation and called R.H. a "fucking bitch." During the time Shin lived in the apartment, she never saw Pettus hit R.H. However, Shin previously had witnessed Pettus drag R.H. into their bedroom by her arm and heard noises from the bedroom that sounded like someone being hit. At times, Shin also heard R.H. scream and repeatedly cry out "no." Shin also once heard R.H. tell Pettus, "No, I don't want to do this." In Shin's presence, Pettus often called R.H. derogatory names such as "stupid" and "monkey." Pettus also told Shin that he believed women were of lower intelligence than men and that they needed to be led.

On July 16, 2013, R.H. met with San Gabriel Police Detective Ray Lara and provided him with the audio recordings she had made during the June 27, 2013 incidents.

She also gave a detailed account of Pettus's acts of physical and sexual abuse, including the July 10, 2013 sexual assault. In describing the sexual assault to Detective Lara, R.H. initially indicated that the order of penetration was vaginal, anal, and then oral. She later told the detective that she was not sure about the order, but she knew that Pettus had penetrated both her vagina and anus. R.H. never mentioned to Detective Lara that Pettus had ejaculated twice during the assault.

On August 12, 2013, R.H. spoke with a probation officer regarding the pending charges against Pettus. R.H. told the officer that her immigration visa depended upon her marital status, and that she would divorce Pettus once her legal status in the United States was secure. On August 15, 2013, R.H. applied for legal status in the United Status as a victim of domestic violence. She then filed for divorce from Pettus in December 2013. At the time of trial, R.H. was still in the process of seeking permanent residency through her status as a domestic violence victim.

B. Pettus's Prior Acts of Sexual Misconduct Against Other Women

1. Mary B.

On August 7, 2011, Mary B., who was originally from Indonesia, went to Pettus's office in El Monte to interview for a bookkeeping position. He invited her inside, closed the door, and asked her to sit on the sofa. Pettus then sat next to Mary, and as he began interviewing her, he held her hand. He also told her that he liked her and thought that she was cute. Mary initially ignored Pettus's advances and asked him questions about the job position. After answering a few questions, Pettus again took her hand and told her that she was cute. He also said that he wanted to make love to her. Mary pulled her hand away because she felt that Pettus was "not right." When Pettus asked her how long she had been in the United States, Mary answered six years and made a point of mentioning that she had married her husband the year before. Pettus told Mary that if he hired her, he wanted to see her smiling and having fun with him. Mary felt uncomfortable and left the office. She then reported the incident to the police.

2. Tami D.

On December 11, 2010, Tami D. went to Pettus's office in El Monte to interview for a bookkeeping position. After Tami entered the office, Pettus closed the door. He briefly asked her about her background, but spent most of the interview talking about himself. At the end of the interview, Tami stood up and attempted to shake Pettus's hand. Pettus suddenly pulled her toward him and kissed her deeply on her mouth. He then placed his hands on her cheeks and told her that she was cute. Tami was shocked. She also was fearful that Pettus was going to rape her and backed away from him. Pettus seemed surprised and said to her, "Okay, well, I'll just look at your resume and I'll give you a call." Tami ran from the office to her boyfriend, who was waiting outside. After she told her boyfriend what had occurred, they confronted Pettus in his office. Pettus repeatedly apologized and acknowledged that he had acted inappropriately. He also said he had "never done anything like this before." Pettus followed Tami and her boyfriend to their car and offered to help her find another job. Tami told Pettus that she was going to report the incident to the police. She then contacted the police and waited for them to arrive at the office. By that time, however, Pettus had left.

3. W.K.

On December 25, 2001, W.K., who was originally from Burma, reported to the police that Pettus had sexually assaulted her. According to the statement that W.K. made the police, she was walking to a club where she worked as an exotic dancer when Pettus drove up and parked his car. He talked to W.K. about her living situation and asked if she was interested in renting a room at his house. W.K. agreed to accompany Pettus to his house, but they first went to her hotel room where she performed a nude lap dance for him in exchange for money. Afterward, they drove to Pettus's house together. Pettus brought W.K. into his bedroom, pushed her onto the bed, and removed their clothing. He penetrated her vagina with his penis two times as W.K. tried to push him off and told him to stop. He next orally copulated her while she continued to tell him to stop, and then penetrated her anus with his penis one time. At that point, W.K. was able to break free and she struck Pettus in his face. She then called 911. W.K. told the police that she

never consented to having sex with Pettus. Following an investigation, the case was submitted to the Los Angeles County District Attorney for filing consideration, but no charges were filed against Pettus in connection with the incident.

At trial, W.K. testified that Pettus approached her as she was walking on the street and offered to drive her to work, but he instead took her to his house. Once they were in his bedroom, Pettus got on top of W.K. and tried to penetrate her vagina with his penis and to orally copulate her. W.K. did not agree to have sex with Pettus and she wrestled with him. At some point, Pettus hit W.K. on her head. W.K. fought back again and tried to hit Pettus with a hammer she had found in his room. She then called 911 and reported the assault to the police. After the police arrived, W.K. was taken to the hospital for a sexual assault exam. During her testimony, W.K. could not recall whether she had performed a lap dance for Pettus before he took her to his house, and admitted that Pettus was the third man who had visited her hotel room that day. She denied that she was working as a prostitute at the time of the assault. W.K. stated that she only agreed to testify in the current case because she wanted "the truth to come out."

I. Defense Evidence

Cari Caruso, a sexual assault nurse examiner, testified as an expert witness for the defense. She described the process of a sexual assault exam and the types of physical evidence that could be recovered from an exam. According to Caruso, the exam could be performed any time within 120 hours of an alleged sexual assault. Caruso admitted that the exam would not show whether any sexual activity was consensual or non-consensual, and that it was possible for a victim of a sexual assault to not have any visible physical injuries.

San Gabriel Police Officer James Just was called as a witness by the defense. He interviewed R.H. on July 10, 2013 when she came to the police station to make a report about Pettus. Officer Just testified that he did not observe any physical injuries on R.H. He also testified that R.H. never mentioned during the interview that Pettus had forced her to have anal sex. Instead, she told the officer that the assault had ended with forcible oral copulation. Following the interview, Officer Just offered R.H. information about a

domestic violence shelter and emergency protective order. R.H. indicated that she was not interested in those services, but she would be seeking a restraining order against Pettus in the future. Officer Just never referred R.H. for a sexual assault exam.

II. Verdict and Sentencing

At the conclusion of the trial, the jury found Pettus guilty of each of the 14 counts. Following the jury's verdict and the denial of a motion for a new trial, the trial court sentenced Pettus to an aggregate term of 30 years in state prison. Pettus thereafter filed a timely notice of appeal.

DISCUSSION

On appeal, Pettus argues that the trial court abused its discretion in allowing the prosecution to present evidence of the three prior acts of misconduct related to Mary B., Tami D., and W.K. pursuant to Evidence Code sections 1101, subdivision (b) and 1108, subdivision (a).[2] Pettus also asserts that the admission of the evidence resulted in a violation of his constitutional right to due process.

I. Relevant Proceedings

Prior to the start of trial, the trial court was asked to rule on the admissibility of evidence concerning Pettus's alleged acts of misconduct toward Mary B. in 2011 and Tami D. in 2010. The court ruled that the evidence was admissible under section 1101, subdivision (b) and was more probative than prejudicial under section 352. The court noted that while neither incident involved physical violence, each concerned an act of inappropriate sexual conduct by Pettus. The court also noted that each incident was far less inflammatory than the charged offenses, thus minimizing the risk of undue prejudice. As the court explained, "[T]he conduct in those two incidents certainly pales in comparison to what was alleged by the complaining witness in this case. . . . Because it was of a much milder variety -- and, again, I'm not excusing it, I'm not suggesting that

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[2] Unless otherwise stated, all further statutory references are to the Evidence Code.

any kind of sexual misconduct is appropriate -- I think that the potential for misuse of that evidence or unfair prejudice arising because of that evidence is greatly, greatly reduced."

The trial court further found that the evidence was relevant on the issues of intent, knowledge of the lack of consent, and existence of a common plan or scheme. The court stated: "In our case now, we have three separate women in the span of, basically, about three years. All are younger Asian women. All coming in seeking a job. There's certainly a significant power differential between the defendant and these women. It's apparent, at least arguably . . . that the defendant uses his professional position to gain access to these women and then he uses that position to make unwanted sexual advances. So I certainly see this as a case in which one would argue intent, one could argue knowledge, and one can argue common plan or scheme. I see all three as being legitimately in play. And, even notwithstanding [section] 352 considerations, I believe these are admissible."

II. Relevant Law

A. Section 1101, Subdivision (b)

The rules governing the admissibility of evidence of uncharged crimes or other acts of misconduct are well-established. "'Subdivision (a) of . . . section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition,' such as identity, common plan, or intent. [Citation.]" (*People v. Edwards* (2013) 57 Cal.4th 658, 711; see § 1101, subd. (b) ["Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact . . . other than his or her disposition to commit such an act."].) Ultimately, the admissibility of evidence under section 1101, subdivision (b) "'depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes

[or conduct] to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.'" (*People v. Lindberg* (2008) 45 Cal.4th 1, 22.)

"Evidence of uncharged crimes is admissible to prove identity, common plan, and intent 'only if the charged and uncharged crimes are sufficiently similar to support a rational inference' on these issues. [Citation.]" (*People v. Edwards, supra*, 57 Cal.4th at p. 711.) "'"The least degree of similarity … is required in order to prove intent. [Citation.] … In order to be admissible to prove intent, the uncharged conduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" [Citation.] "A greater degree of similarity is required in order to prove the existence of a common design or plan. … [E]vidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations.'" [Citation.] "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. … [T]he uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. … [Citation.]" [Citation.]'" (*People v. Rogers* (2013) 57 Cal.4th 296, 326.)

"If evidence of prior conduct is sufficiently similar to the charged crimes to be relevant to prove the defendant's intent, common plan, or identity, the trial court then must consider whether the probative value of the evidence 'is "substantially outweighed by the probability that its admission [would] … create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." [Citation.]' [Citation.]" (*People v. Foster* (2010) 50 Cal.4th 1301, 1328.) "'Evidence is prejudicial within the meaning of . . . section 352 if it "'uniquely tends to evoke an emotional bias against a party as an individual'" [citation] or if it would cause the jury to '"prejudg[e]" a person or cause on the basis of extraneous factors'" [citation].' [Citation.]" (*Id.* at p. 1331.) We review the trial court's ruling on the admissibility of other crimes evidence under

section 1101, subdivision (b) for an abuse of discretion. (*People v. Leon* (2015) 61 Cal.4th 569, 597; *People v. Edwards*, *supra*, 57 Cal.4th at p. 711.)

B. Section 1108, Subdivision (a)

Notwithstanding the general rule prohibiting the use of character evidence to prove a person's conduct on a specified occasion, section 1108 permits the admission of evidence of a defendant's uncharged sexual offenses to prove his or her propensity to commit a charged sexual offense, subject to the trial court's discretion to exclude such evidence under section 352. Section 1108 specifically provides that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (§ 1108, subd. (a).)

Accordingly, "[u]nlike evidence admitted under . . . section 1101, subdivision (b), evidence of uncharged sex crimes admitted under . . . section 1108 may be used in a sex offense prosecution to demonstrate the defendant's disposition to commit such crimes. [Citation.]" (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1095; see also *People v. Jones* (2012) 54 Cal.4th 1, 49 ["'[s]ection 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes'"].) Moreover, "[a]dmissibility under . . . section 1108 does not require that the sex offenses be similar; it is enough the charged offense and the prior crimes are sex offenses as defined by the statute." (*People v. Jones*, *supra*, at p. 50; see also *People v. Cordova* (2015) 62 Cal.4th 104, 133 ["'"[T]he charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under . . . section 1101, otherwise . . . section 1108 would serve no purpose."'"].)

Even where a prior sexual offense is admissible, "'section 1108 preserves the trial court's discretion to exclude evidence under . . . section 352 if its prejudicial effect substantially outweighs its probative value. [Citations.] 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.]" (*People v. Avila* (2014) 59 Cal.4th 496, 515.) The trial court's ruling admitting evidence of other sexual offenses under section 1108, subdivision (a) is also reviewed for an abuse of discretion. (*People v. Cordova*, 62 Cal.4th at p. 132; *People v. Avila*, *supra*, at p. 515.)

III. Evidence of Prior Sexual Offenses Against W.K.

Pettus contends the trial court abused its discretion and denied him due process by admitting evidence of his alleged prior sexual assault of W.K. under section 1108. He specifically claims that the evidence should have been excluded because the uncharged sexual offenses against W.K. were dissimilar from the charged crimes, were remote in time, and were unduly prejudicial. We conclude that the trial court did not err in admitting the challenged evidence.

As a preliminary matter, it appears that Pettus forfeited his right to challenge the admission of evidence concerning his alleged sexual assault of W.K. because he failed to raise a timely objection in the trial court. The record reflects that, at the hearing on the parties' motions in limine, the trial court ruled on the admissibility of evidence concerning Pettus's prior acts of misconduct toward Mary B. and Tami D. However, there is no indication in the record that Pettus ever objected to the admission of evidence concerning the prior incident involving W.K. on any ground until he filed a motion for a new trial following the jury's verdict. There is also no indication that the trial court ever expressly ruled on the admissibility of the evidence related to W.K. under sections 1108, 1101, or 352 at any time prior to or during the trial. In order to preserve evidentiary issues for appeal, the objecting party must make a timely objection stating the specific ground on which it is made. (§ 353, subd. (a); *People v. Williams* (2008) 43 Cal.4th 584, 620.) "'Although no "particular form of objection" is required, the objection must "fairly inform the trial court, as well as the party offering the evidence, of the specific reason

or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling." [Citation.]' [Citation.]" (*People v. Valdez* (2012) 55 Cal.4th 82, 130.) In the absence of a timely objection in the trial court, "'"questions relating to the admissibility of evidence will not be reviewed on appeal."'" (*People v. Williams, supra,* at p. 620.)

Even assuming that Pettus's claim of error had been preserved for appeal, it would fail on the merits. Although Pettus was never charged with any crimes in connection with the incident involving W.K., his alleged forcible rape, sodomy, and oral copulation of W.K. clearly constituted a "sexual offense" within the meaning of section 1108. (See § 1108, subd. (d) [defining a sexual offense as including any conduct proscribed by Penal Code sections 261, 286, and 288a]; *People v. Villatoro* (2012) 54 Cal.4th 1152, 1161 [provisions of section 1108 "extend to evidence of both uncharged and charged sexual offenses"].) In exercising its discretion to admit evidence of these uncharged sexual offenses, the trial court also reasonably could have concluded that the probative value of the evidence substantially outweighed the risk of undue prejudice under section 352.

Pettus claims that the evidence of the alleged sexual offenses against W.K. should have been excluded under section 1108 because they were not sufficiently similar to the charged crimes. Although similarity between the uncharged and charged sexual offenses is not required under section 1108, it can be a relevant factor for the trial court to consider under section 352. In this case, the alleged sexual offenses against W.K. bore sufficient similarities to the charged sexual offenses against R.H. to support the trial court's exercise of discretion in admitting the evidence. With respect to W.K., the evidence showed that Pettus pushed her onto his bed, forcibly removed her clothing, and then committed acts of vaginal penetration, anal penetration, and oral copulation without her consent. Pettus also continued to engage in these sexual acts after W.K. repeatedly told him to stop and became physically violent when she attempted to fight back. With respect to R.H., the evidence showed that, on July 10, 2013, Pettus committed similar acts of forcible rape, sodomy, and oral copulation after R.H. made clear that she did not want to engage in any sexual activity. Pettus also ignored R.H.'s repeated pleas to stop,

was physically violent when she tried to resist him, and threatened to kill her. Pettus nevertheless contends that the uncharged sexual offenses against W.K. were too dissimilar from the charged offenses to be admissible because W.K. was a prostitute who willingly performed a lap dance for Pettus in exchange for money before the alleged assault. However, absent consent, an act of vaginal or anal penetration or oral copulation by means of force or violence constitutes a criminal offense regardless of whether the victim is a paid prostitute or the defendant's spouse. While there certainly were differences regarding the nature of Pettus's relationship with each victim and the circumstances giving rise to each sexual assault, such differences ultimately went to the weight of the evidence rather than its admissibility. (*People v. McCurdy*, *supra*, 59 Cal.4th at p. 1098.)

Pettus also argues that the alleged sexual assault of W.K., which occurred about 12 years before the charged crimes, was too remote in time to be admissible. While a time gap between the charged and uncharged offenses is a relevant factor for the trial court to consider, "no specific time limit exists as to when an uncharged crime is so remote as to be excludable." (*People v. McCurdy*, *supra*, 59 Cal.4th at p. 1099.) The California Supreme Court accordingly has upheld the admission of evidence of uncharged sexual offenses that were separated in time from the charged crimes by a number of years. (See, e.g., *People v. Cordova*, *supra*, 62 Cal.4th at p. 133 [time gap of 13 to 18 years between charged and uncharged offenses]; *People v. McCurdy*, *supra*, at p. 1099 [time gap of 17 years between charged and uncharged offenses]; *People v. Loy* (2011) 52 Cal.4th 46, 62 [time gap of 15 to 21 years between charged and uncharged offenses].) Given the probative value of the prior sexual offenses allegedly committed against W.K., the trial court reasonably could have concluded that the 12-year time gap between the charged and uncharged crimes did not compel the exclusion of the evidence in this case.

Pettus further asserts that the evidence of his alleged sexual assault of W.K. should have been excluded because it was unduly prejudicial. We disagree. As our Supreme Court has observed, "[e]vidence of previous criminal history inevitably has some prejudicial effect. But under section 1108, this circumstance alone is no reason to

exclude it." (*People v. Loy*, *supra*, 52 Cal.4th at p. 62.) In this case, W.K.'s testimony at trial was relatively brief. In addition, a concise, straightforward description of the assault was provided to the jury by way of a stipulation, which set forth the pertinent facts of W.K.'s statement to the police following the incident. As a result, the evidence did not consume an undue amount of time at trial nor did its admission create a risk of confusing the issues or misleading the jury. Although the alleged sexual assault of W.K. was disturbing in nature, it was no more inflammatory than the charge that Pettus committed multiple acts of forcible rape and sodomy against his wife while threatening to kill her. Under these circumstances, the trial court did not abuse its discretion in admitting the evidence of Pettus's uncharged sexual offenses against W.K. under section 1108.

We likewise reject Pettus's claim that the admission of the evidence violated his constitutional right to due process. It has long been recognized that "'[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a defendant's constitutional rights." (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 26.) "To prove a deprivation of federal due process rights, [the defendant] must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229.) Hence, "[t]he admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair. [Citations.]" (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) For the reasons discussed, the evidence of Pettus's sexual assault of W.K. was probative of his propensity to commit the charged sexual offenses under section 1108 and was not unduly prejudicial under section 352. The admission of the evidence therefore did not result in any due process violation.

IV. Evidence of Prior Acts of Sexual Misconduct Against Mary B. and Tami D.

Pettus also challenges the trial court's ruling allowing evidence of the two prior incidents of misconduct involving Mary B. and Tami D. under section 1101, subdivision (b). Pettus contends that these uncharged acts were not sufficiently similar to the charged offenses to be probative on the issues of knowledge, intent, or a common plan or scheme.

The admissibility of evidence concerning Pettus's prior acts of misconduct toward Mary B. and Tami D. is a closer question. However, we need not decide whether the trial court abused its discretion in admitting the evidence of these two incidents under section 1101, subdivision (b) because even assuming that there was error, it was harmless. "Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional . . . test [set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836]: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. [Citations.]" (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Here, Pettus cannot show that it is reasonably probable the jury would have reached a different verdict had the court excluded the challenged evidence. The testimony provided by Mary and Tami was brief in nature and totaled approximately 10 pages of transcript. Moreover, their respective accounts of Pettus's unwanted sexual advances during a job interview did not involve the serious verbal, physical, and sexual abuse that R.H. detailed in her testimony. Each women simply testified that Pettus made an unwelcome advance and did not object when she rebuffed him and then left his office. The evidence of Pettus's isolated acts of misconduct toward these women was therefore far less inflammatory than the evidence of his charged offenses and was unlikely to elicit a negative emotional response from the jurors.

Furthermore, even if the testimony of Mary and Tami had been excluded, the jury still would have heard overwhelming evidence of Pettus's guilt. R.H.'s audio recordings, in particular, showed that Pettus was physically and verbally abusive toward her during their marriage and made threats to beat and kill her when she did not submit to his will. The recordings thus buttressed R.H.'s testimony that her previously consensual sexual relationship with Pettus had become violent and abusive in nature. R.H.'s testimony was further corroborated by her former roommate, X. Shin, who confirmed that Pettus had a history of being verbally abusive toward R.H. Shin also recounted that she would hear R.H. scream and cry out "no" from the bedroom, in addition to noises that sounded like someone being hit. In light of such evidence, it is not reasonably probable that the verdict would have been more favorable to Pettus had the evidence of his misconduct

toward Mary and Tami been excluded. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) For these same reasons, any alleged constitutional error in admitting the evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

DISPOSITION

The judgment is affirmed.

ZELON, Acting P. J.

We concur:

SEGAL, J.

BLUMENFELD, J.*

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