Filed 9/19/17 P. v. Dietz CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GUY ALLEN DIETZ, Defendant and Appellant.	B271892 (Los Angeles County Super. Ct. No. YA091064)

APPEAL from a judgment of the Superior Court of Los Angeles County. Steven R. Van Sicklen, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

Guy Allen Dietz (appellant) was charged with the following crimes against D.M.: forcible rape (count 1: Pen. Code, § 261, subd. (a)(2));[1] forcible oral copulation (count 2: § 288, subd. (c)(2)(A)); sexual penetration by a foreign object (count 3: § 289, subd. (a)(1)(A)); rape by threat to arrest or deport (count 4: § 261, subd. (a)(7)); oral copulation under color of authority (count 5: § 288a, subd. (k)); and sexual penetration by a foreign object by threat to arrest or deport (count 6: § 289, subd. (g)). It was further alleged as to all counts that: appellant was on bail in another case (§ 12022.1); appellant had a prior forcible rape conviction in violation of section 261, subdivision (a)(2), and that conviction subjected him to sentencing under section 667.61; the prior forcible rape conviction was a serious or violent felony that qualified appellant to be sentenced pursuant to the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12); and appellant had three prior convictions for which he served prison terms (§ 667.5, subd. (b)), namely, convictions for forcible rape (§ 261, subd. (a)(2)), possession of a controlled substance (Health & Saf. Code, § 11377), and transportation or sale of a controlled substance (Health & Saf. Code, § 11379.)

A jury convicted appellant on all counts. Appellant admitted the section 12022.1 on-bail allegation, and the trial court found the other special allegations true. The prosecutor and defense counsel stipulated that the sentences on counts 4, 5 and 6 would be stayed under section 654. The trial court considered appellant's Health and Safety Code section 11377 conviction a misdemeanor under Proposition 47.

---

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

As to count 1, the trial court sentenced appellant to a total term of 58 years to life, calculated as follows: 25 years to life, doubled pursuant to the Three Strikes law; two years for the on-bail enhancement; five years for the prior violent or serious felony conviction; and one year for a prior prison term regarding his conviction under Health and Safety Code section 11379. On count 2, appellant was sentenced to 25 years to life, doubled pursuant to the Three Strikes law. The trial court imposed the same sentence on count 3. The trial court ordered the three sentences for counts 1, 2 and 3 to be served concurrently.

On appeal, appellant argues: the trial court erred by not sua sponte instructing the jury under *People v. Mayberry* (1975) 15 Cal.3d 143 (*Mayberry*) that a reasonable and good faith mistake of fact regarding consent was a complete defense to the charges; it violated its pretrial ruling when it failed to instruct the jury that the uncharged forcible rape of N.C. admitted under Evidence Code section 1101, subdivision (b) could only be used to prove a common plan in the uncharged and current offenses; appellant's conviction under Health and Safety Code section 11379 should not have been used to enhance his sentence because it qualifies as a misdemeanor under Proposition 47; and the admission of propensity evidence under Evidence Code section 1108 was an abuse of discretion under Evidence Code section 352, and it violated appellant's right to due process and equal protection.

We find no error and affirm.

FACTS[2]

Appellant's Uncharged Forcible Rape of N.C.

Prior to trial, the prosecution moved to admit appellant's uncharged forcible rape of N.C. pursuant to Evidence Code section 1101, subdivision (b) to prove intent, common plan or scheme, lack of accident regarding injury to the victim in the charged offenses, and lack of mistake regarding consent. In addition, the prosecution sought to admit the prior offense pursuant to Evidence Code section 1108 to prove appellant's propensity to commit the charged offenses.

The motion summarized the facts supporting the uncharged forcible rape as well as the charged offenses against D.M.

In his written opposition, appellant stated: "For purposes of this motion, [appellant] agrees to the facts as stated in the prosecution's moving papers based upon police reports and preliminary hearing testimony."

Uncontested Facts

Prior Forcible Rape

"On April 9, 1998, [N.C.], age 16, attended a party at [an apartment in] Redondo Beach, the home of her best friend, [E.L.]. [Appellant] was [E.L.'s] stepfather and lived at the location. [Appellant] and [his wife, E.L.'s mother,] were present at the party. During the party minors played games such as truth or dare. [Appellant] joined in the game[] and engaged in sexually

---

[2] In this opinion, we conclude there was no error by the trial court. This means a harmless error analysis is unnecessary. As a result, the recitation of facts in this opinion has been streamlined. We have intentionally declined to recite facts pertaining to the investigation and arrest of appellant.

charged behavior with the minors. Late in the party[,] [appellant] grabbed [N.C.]'s arm and told her to come with him. He took her outside and across the street to the bleachers of [a high school] football stadium[.] There he pushed her down, slammed her head to the ground and got on top of her. He threatened to kill her and covered her mouth and nose. He then raped [N.C.] After being raped, [N.C.] begged to leave as [appellant] paced back and forth. [Appellant's wife] approached and screamed at [appellant]. Everyone returned to [the] home and shortly thereafter [N.C.] escaped with friends. On June 16, 1998, [appellant] pled no contest to the charge of forcible rape[.]"

Charged Offenses

On August 28, 2014, appellant committed multiple sex offenses against D.M., including forcible rape.[3]

Ruling

The trial court ruled that the prior forcible rape of N.C. was admissible under both Evidence Code sections 1101, subdivision (b) and 1108.

Also, the trial court ruled that the evidence was not inadmissible under Evidence Code section 352. In connection with its ruling, it commented that the prior forcible rape was relevant to appellant's predisposition to rape women by force. Because appellant admitted guilt in connection with the prior forcible rape, there was a high degree of certainty that it happened. The trial court expressed confidence that it could give

---

[3] Because we summarize D.M.'s trial testimony later in our statement of facts, and because D.M.'s trial testimony is materially similar to the alleged facts in the prosecution's motion regarding her, we opt to avoid redundancy by omitting the details of those particular alleged facts in the motion.

a limiting instruction that would mitigate any risk that the prior forcible rape would confuse or mislead the jury. Next, the trial court noted that the prior forcible rape was the same offense as alleged in count 1. As to the likelihood of prejudice, the trial court stated, "All evidence is prejudicial. The earlier case I don't believe is any more prejudicial than [the current case]." In the trial court's view, the relevance outweighed the prejudice.

At one point during the hearing, the trial court commented that, as to Evidence Code sections 1101, subdivision (b), "motive and common plan and scheme are appropriate considerations." Later, when the prosecutor asked if the motion was being granted with respect to Evidence Code section 1101, subdivision (b) in connection with the issues of "motive and common scheme or plan," the trial court stated, "Common plan." The minute order broadly encapsulated the ruling by stating, "The [trial court] has read and considered the moving papers . . . and opposition papers. The [trial court] gives a tentative ruling and hears the argument of counsel. The [trial court] will allow the evidence."

Trial

N.C. was called to testify regarding the 1998 forcible rape.[4]

The prosecutor presented evidence that on August 28, 2014, appellant committed multiple sex offenses against D.M.

She testified as follows:

Appellant responded to an advertisement offering D.M.'s services as an exotic dancer for $250. A driver took D.M. to appellant's address in Torrance on August 28, 2014, at around

---

[4] While the summary of N.C.'s proposed testimony in the prosecution's motion is relevant to the issues discussed in part I. of the Discussion, *ante*, the details of N.C.'s testimony are not relevant to this opinion.

3:00 p.m. The driver parked on the street and allowed D.M. to go to the house by herself.

D.M. knocked on the door. Appellant answered, she entered the house, and he closed and locked the door. Appellant was a very big and muscular man who towered over D.M. He was wearing cargo shorts, a T-shirt, and "flip flops." D.M. was wearing a black skirt, black tank top, and blue heels. D.M. had two cell phones with her but no purse.

D.M. asked how appellant's day was going. Appellant asked if she wanted to sit on the couch, and she sat down. He sat down next to her and they spoke for a while. Then he got up, went to a table behind D.M., and got his wallet, a badge, and a set of handcuffs. He sat back down next to D.M. and placed the wallet down on top of the badge and handcuffs.[5] The badge was a gold star with points and looked like a sheriff's badge. The handcuffs were silver. D.M. asked if he was a cop, and he said he was a special undercover officer for the Torrance Police Department. D.M. asked him if she was in trouble. Appellant said, "What? Cops can't have fun, too?" D.M. assumed fun meant sex. She said, "I don't have fun," and "You need to find someone else." Appellant did not respond. D.M. said she did not want to be there anymore and was uncomfortable.

When D.M. got up to leave and went to the front door, appellant came up from behind her, reached over her shoulder and put his finger on the door. D.M. put her hand on the

---

[5] The record is unclear regarding where appellant placed the wallet, badge and handcuffs. Presumably it was on the couch, an end table or a coffee table.

doorknob but did not open the door because appellant was "three times [her] size" and she was afraid.

Appellant said, "Show me." D.M. asked him what, and he told her to lift up her skirt. She told him no. Appellant said, "Well, I can make a report, whatever I want it to be. So do what I say." D.M. lifted her skirt up and showed him her buttocks because she did not think she had a choice, and that he would lift her skirt if she did not do it herself. She thought "he was a dirty cop and that he was going to do what he wanted to do." After he looked at her buttocks, she said, "Okay. Can I go now?" Appellant said no.

While D.M. was still facing the front door, appellant placed a handcuff on her right wrist. D.M. said, "What did I do? I didn't do anything." He replied, "Now you're gonna do what I want or things can get worse from here." Eventually, he took the handcuffs off her. He then told her to take off her clothes, put them on a chair and sit back down on the couch with him. On the couch, he molested her in various ways.

Subsequently, appellant told D.M. to lie on the couch. He started to put the handcuffs back on D.M., and she said, "Please don't do that. I'm very claustrophobic. If you don't want me to freak out, don't put them on me." Appellant responded by saying, "Then do what I tell you to do."

Once D.M. was reclining on the couch, appellant straddled her, pulled his shorts down and told her to feel his penis. She did. Repeatedly, she asked appellant to use a condom "if he was gonna to do this." Appellant said he had a condom but never retrieved it.

He told her to orally copulate him, and she complied. Then he placed her on her hands and knees, touched her vagina and

then put his penis inside. While he was doing this, D.M. kept pulling away. When she felt that appellant was going to ejaculate, she jumped up, and appellant fell forward. She tried to run out of the house, but he yanked her arm and threw her to the ground.

They wrestled on the floor, and D.M. screamed. Appellant twisted D.M.'s arm behind her back, put his arm around her neck, and said, "Are you done? Are you done? Are you going to behave now?" D.M. could not breathe. He told her to get up and get dressed, and she did. He told her to walk over to the entertainment center and put her hands on top of it. She complied with his command. Appellant then proceeded to search her again, after which he handcuffed both her hands behind her back. Appellant sat her back on the couch and told her, "Now, if you want to go home, you're going to take care of my boys, too."

Appellant told her to get up. He then took her to another room where Elias Ortiz (Ortiz) was waiting. Appellant took the handcuffs off of D.M. and closed the door, leaving her alone with Ortiz. D.M. asked what she had to do. Ortiz told her to leave, and that it was her lucky day.

D.M. walked out of the room and told appellant that Ortiz said she could leave. Appellant took her various cell phones, made her sit at a table, and then went to talk to Ortiz in the other room. Seconds later, appellant returned to where D.M. was sitting and said Ortiz did not want her, she could go. Appellant directed her out of the house through the back door.

Jury Instruction Regarding Evidence Code Section 1101, Subdivision (b)

After the presentation of evidence, the jury was instructed that it could consider the prior forcible rape only if the

prosecution proved appellant had committed that offense. The jury was then told that if the prosecution met its burden, the jury could consider the evidence for "the limited purpose of deciding whether or not [appellant] had a motive to commit the offense alleged in this case or [appellant's] actions were the result of mistake[,] or [appellant] had a plan or scheme to commit the offense alleged in this case[,] or whether [appellant] reasonably and in good faith believed that the victim consented."

DISCUSSION

I. No Duty to Give a Sua Sponte *Mayberry* Instruction.

Appellant contends the trial court erred by failing to give a sua sponte instruction pursuant to *Mayberry* that he had a defense to the charged offenses because there was sufficient evidence that he harbored a reasonable and good faith belief that D.M. consented to the sex acts. (*Mayberry, supra,* 13 Cal.3d at pp. 153–158.) We conclude that the evidence did not support the elements of a *Mayberry* defense.

A. Standard of Review; Governing Principles.

A claim of instructional error is a question of law subject to independent review. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569 (*Guiuan*).)

A trial court has a sua sponte duty to instruct on a particular defense if it appears, inter alia, there is substantial evidence to support such a defense and it is not inconsistent with the defendant's theory of the case. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1052.) The *Mayberry* defense has both subjective and objective aspects. The subjective aspect demands that the defendant honestly and in good faith believed the victim consented to a sex act. A defendant must "adduce evidence of the victim's equivocal conduct on the basis of which he erroneously

believed there was consent." (*People v. Williams* (1992) 4 Cal.4th 354, 361.) Regarding the objective aspect, the question is whether the defendant's mistake regarding consent was reasonable under the totality of the circumstances. (*Ibid.*)

B. Analysis.

There was nothing equivocal about D.M.'s actions. Appellant said he was a police officer. She said she did not have "fun" (meaning sex), and that appellant needed to find someone else. Also, she said she wanted to leave and was uncomfortable. When she tried to leave, appellant stopped her and told her to lift her skirt. She said no. She complied only after he threatened her by saying he could "make a report." After she lifted her skirt, she asked if she could leave. He told her no. Then he put handcuffs on one of her wrists and threatened her by saying "things can get worse from here" if she did not do what he said. He was much larger than her. Everything that happened after that point was under the duress of his threats. Therefore, there was no substantial evidence supporting appellant's contention that he harbored a reasonable and good faith believe that she had consented to sex acts.

Moreover, any mistake made by appellant regarding consent was unreasonable under the totality of the circumstances. He barred D.M. from leaving and then threatened her verbally and with handcuffs. No reasonable person could have believed that D.M. consented to anything that followed.[6]

---

[6] We need not determine whether a *Mayberry* defense was consistent with appellant's theory of the case.

II. No Instructional Error Under Evidence Code Section 1101, Subdivision (b) Regarding the Issues to which the Uncharged Forcible Rape was Relevant; No Ineffective Assistance of Counsel.

According to appellant, the trial court erred under Evidence Code section 1101, subdivision (b) when it violated its own pretrial ruling that the uncharged forcible rape was relevant only to the issue of common plan. As a result, appellant urges us to conclude that his trial was tainted with unfairness in violation of his right to due process, and that reversal is mandated. Even though appellant did not object, he contends no objection was required. If the objection was forfeited, appellant maintains that he received ineffective assistance of counsel.

As we discuss, appellant has not demonstrated that the trial court was bound by its pretrial ruling, or that the uncharged forcible rape was otherwise inadmissible on issues such as motive and mistake. Consequently, we find neither error nor ineffective assistance of counsel.

A. Standard of Review; Guiding Principles.

As we previously noted, the propriety of jury instructions is subject to de novo review. (*Guiuan*, *supra*, 18 Cal.4th at p. 569.)

Except as otherwise provided by statute, "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) In contrast, Evidence Code section 1101 does not prohibit "the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation,

plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented)[.]" (Evid. Code, § 1101, subd. (b).)

B. Forfeiture.

To preserve a challenge to a jury instruction, a defendant must object at trial. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260.) But there is an exception. (*People v. Romero* (2008) 44 Cal.4th 386, 411; § 1259.) Section 1259 provides, inter alia, that the "appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." As a consequence, "[a]scertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.)

Appellant did not object to the giving of the instruction concerning the Evidence Code section 1101, subdivision (b) evidence. Accordingly, the issue was forfeited. But based on the requirements of section 1259, we must examine the merits of the claim.

C. Analysis.

The trial court instructed the jury, inter alia, that it could consider the uncharged forcible rape with respect to the issues of motive and whether appellant's actions were the result of mistake. In appellant's view, this was error because admission of the uncharged forcible rape was limited to the issue of whether

there was a common plan employed in the prior offense and charged offense. He states: "The [trial court] was required to instruct the jury on exactly which issue the evidence had been admitted to prove and delete reference to all other potential [issues] when instructing the jury with CALCRIM No. 375." To backstop his argument, appellant cites two cases, *People v. Simon* (1986) 184 Cal.App.3d 125, 131 (*Simon*) and *People v. Swearington* (1977) 71 Cal.App.3d 935, 949 (*Swearington*).

This argument is unavailing.

At issue in *Simon* was whether Evidence Code section 403[7] applied to prior bad act evidence and therefore required the trial court to instruct the jury that it had to find a preliminary fact true before it could consider the prior bad act under Evidence Code section 1101. The *Simon* court said yes. The defendant's

---

[7] Evidence Code section 400 et seq. establish procedures for "proffered evidence," which means evidence that is admissible or inadmissible depending on "the existence or nonexistence of a preliminary fact." (Evid. Code, § 401.) Under Evidence Code section 403, "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: [¶] (1) The relevance of the proffered evidence depends on the existence of the preliminary fact[.]" (Evid. Code, § 403, subd. (a).) If proffered evidence is admitted under Evidence Code section 403, the trial court "[m]ay, and on request shall, instruct the jury to determine whether the preliminary facts exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist," and it "[s]hall instruct the jury to disregard the proffered evidence if the [trial court] subsequently determines that a jury could not reasonably find that the preliminary fact exists." (Evid. Code, § 403, subd. (c).)

motive in assaulting a victim was a critical preliminary fact that had to be resolved before that prior bad act was admissible. There were two possible motives. The first possible motive rendered the prior bad act irrelevant to any issue in the case. The second possible motive, however, was relevant to a self-defense claim. (*Simon*, *supra*, 184 Cal.App.3d at p. 131.) Because the trial court did not instruct the jury to disregard the proffered evidence unless it found that the defendant harbored the second of the two possible motives in the prior bad act, the reviewing court reversed. (*Id*. at pp. 131–132.)

The defendant in *Swearington* was charged with felony indecent exposure. The trial court allowed evidence of uncharged incidents in which defendant was nude on a college campus. (*Swearington*, *supra*, 71 Cal.App.3d at pp. 942, 946.) Before the jury deliberated, the trial court instructed pursuant to CALJIC No. 2.50 as follows: "Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show: [¶] 1. The identity of the person who committed the crime, if any, of which the defendant is accused; [¶] 2. A motive for the commission of the crime charged; [¶] 3. The existence of the intent which is a necessary element of the crime charged; [¶] 4. A characteristic method, plan or scheme in the commission of acts similar to the method, plan or scheme used in the commission of the offenses in this case." (*Swearington, supra*, at p. 947.) As a general rule, the court stated that it is error for a judge to "give CALJIC instruction No 2.50 and list *four separate issues* upon which the evidence is being received and which the jury may consider unless the evidence is relevant and admissible with respect to *each* of such four issues." (*Swearington, supra*, at p. 947.) The court concluded that the evidence was relevant to

the issue of the intent element of the charged crime, i.e., intent to direct public attention to the defendant's genitals. (*Id.* at p. 949.) According to *Swearington*, however, the trial court erred because the evidence was irrelevant to the issues of identity, motive, and common plan or scheme. *Swearington* advised that trial courts should "be careful to limit the issues upon which such evidence is relevant and admissible by striking from the instruction those issues upon which the evidence is not admissible." (*Id.* at p. 949.)

Neither *Simon* nor *Swearington* are on point because they did not consider the procedural issue presented by appellant, i.e., they did not decide whether a trial court is forever bound by a pretrial ruling regarding how evidence can be used by a jury. Thus, we have no cause to consider these cases. (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1160 [cases are not authority for propositions not considered].) Notably, these cases would be relevant only if appellant argued that the uncharged forcible rape was irrelevant to the issues of motive and mistake. But appellant does not advance any such relevancy argument.

If the evidence was relevant to those issues—which we presume absent a contrary showing by appellant—then the pretrial ruling could not force a reversal because it is the admissibility of the evidence on a particular issue that is paramount. (*People v. Brown* (2004) 33 Cal.4th 892, 901 ["If a judgment rests on admissible evidence[,] it will not be reversed because the trial court admitted that evidence upon a different theory, a mistaken theory, or one not raised below"].) Consequently, we conclude the trial court did not err when it instructed the jury.

Because appellant did not establish instructional error, he cannot establish that defense counsel's failure to object to the jury instructions was prejudicial. As a result, appellant cannot establish an ineffective assistance of counsel claim. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

III. No Violation of Evidence Code Section 352, Due Process or Equal Protection Resulted from the Trial Court's Decision to Admit Evidence that Appellant Committed the Uncharged Forcible Rape.

Appellant maintains that the admission of the uncharged forcible rape as propensity evidence under Evidence Code section 1108 was a violation of Evidence Code section 352, due process and equal protection. As we discuss below, admission of the evidence was permissible under both state and federal law.

A. Standard of Review; Guiding Principles.

A trial court's determination that evidence is admissible will not be disturbed on appeal absent an abuse of discretion. (*People v. Leon* (2015) 61 Cal.4th 569, 597.)

"In 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 [Evidence Code section] 1101, if the evidence is not inadmissible pursuant to [Evidence Code section] 352." (Evid. Code, § 1108, subd. (a).) In relevant part, Evidence Code section 352 provides that a trial court, in its discretion, "may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The prejudicial evidence targeted by the statute is ""evidence which uniquely tends to evoke an emotional bias against the defendant

as an individual and which has very little effect on the issues. In applying [Evidence Code] section 352, 'prejudicial' is not synonymous with 'damaging.'" [Citation.]" (*People v. Coddington* (2000) 23 Cal.4th 529, 588.)

Our Supreme Court has determined that Evidence Code section 1108 does not violate either due process or the equal protection clause. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911, 918 (*Falsetta*).) Nonetheless, the admission of evidence can be so unfair as to violate due process.

State courts have an obligation under the Due Process Clause of the Fourteenth Amendment "to ensure 'that "justice shall be done"' in all criminal prosecutions. [Citation.]" (*Cone v. Bell* (2009) 556 U.S. 449, 451.) Only "when evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice,' [citation], [has the Supreme Court] imposed a constraint tied to the Due Process Clause." (*Perry v. New Hampshire* (2012) 132 S.Ct. 716, 723.) The Ninth Circuit utilizes this analytic approach: "Evidence introduced by the prosecution will often raise more than one inference, some permissible, some not; we must rely on the jury to sort them out in light of the court's instructions. Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.' [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose." (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920, fn. omitted (*Jammal*).) California courts have utilized the *Jammal* court's view of how to identify when a trial is unfair.

(*People v. Hunt* (2011) 196 Cal.App.4th 811, 817; *People v. Albarran* (2007) 149 Cal.App.4th 214, 229.)

B. Analysis.

Appellant acknowledges that we are bound by *Falsetta* with respect to whether Evidence Code section 1108 violates federal due process and equal protection. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction].) He raises those claims to preserve them for postconviction federal review. Having no power to depart from *Falsetta*, we reject appellant's federal challenge to the constitutionality of Evidence Code section 1108.

We turn, now, to appellant's claim that the trial court abused its discretion under Evidence Code section 352 and violated due process by arbitrarily and capriciously admitting evidence of the prior forcible rape.

Appellant contends that *People v. Harris* (1998) 60 Cal.App.4th 727, 738–740 (*Harris*) compels reversal. The *Harris* court explained that Evidence Code section 1108 passes constitutional muster only if Evidence Code section 352 preserves the accused's right to be tried for the current offense. (*Harris, supra,* at p. 737.) When evaluating whether evidence should be disallowed under Evidence Code section 352, *Harris* set forth a series of factors to consider. (*Harris, supra,* at p. 737.)

The first factor considered under *Harris* was whether the testimony describing the prior uncharged offense was no stronger and no more inflammatory than the testimony concerning the charged offense. (*Harris*, *supra*, 60 Cal.App.4th at pp. 737–738, citing *People v. Ewoldt* (1994) 7 Cal.4th 380.)

Appellant suggests that N.C.'s proposed testimony was stronger and more inflammatory that D.M.'s testimony on the sole theory that N.C. was a more sympathetic and credible witness. To establish the premise, he states that N.C. was the best friend of appellant's stepdaughter and attended the stepdaughter's party before being raped, and that D.M. was raped after advertising her services as an exotic dancer on Web sites allegedly known for advertising prostitution, and after going to appellant's home to perform a nude dance. Thus, he contends the life circumstances of the two victims rather than the violent nature of the two rapes should have been the focus of the trial court's inquiry. We cannot agree.

In our view, it was the nature of the rapes, not the life circumstances of the victims, that should have be considered. Both offenses were heinous, and neither offense was more inflammatory than the other. Moreover, the offer of proof regarding the proposed testimony as to each offense was equally strong. Appellant's argument is off the mark for the additional reason that it was the province of the jury rather than the trial court to decide credibility issues. (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1463 ["'[T]he credibility of witnesses and the weight to be given to their testimony are matters within the *sole* province of the trier of fact. . . .'"]) As a result, this factor did not favor exclusion of the uncharged forcible rape.

The *Harris* court's second factor was the probability the evidence of the uncharged offense would confuse the jury. In *Harris*, the court found a probability of confusion because it was likely the jury thought the defendant had not been punished for his prior sexual offense, and that this increased the danger the jury would want to remedy that lack of punishment. (*Harris*,

supra, 60 Cal.App.4th at p. 738.) Here, appellant notes that N.C. was the prosecution's first witness. He argues this created a risk of confusing the jury into thinking the trial was about N.C. rather than D.M., and that this was a basis for exclusion under Evidence Code section 352. For a variety of reasons, we disagree. Appellant does not indicate the trial court knew the prosecution's order of witnesses at the time it ruled on the pretrial motion. Nor does appellant cite any law establishing that a court can direct the order of witnesses on Evidence Code section 352 grounds, or that Evidence Code section 352 would allow a trial court to either allow or disallow evidence based on the order of witnesses. By its plain language, Evidence Code section 352 is focused on the nature of evidence, not the timing of its presentation. Finally, even if the trial court could have anticipated that the timing of N.C.'s testimony might mislead the jury at the beginning of the trial, the trial court could have reasonably assumed any confusion would be cleared up by opening and closing statements, the testimony of D.M. and the jury instructions. Consequently, this factor did not suggest the evidence should be excluded.

The third and fourth *Harris* factors were remoteness of the prior sex offense and the consumption of time. (*Harris*, *supra*, 60 Cal.App.4th at p. 739.) Appellant does not discuss these factors. Rather, he moves on to the fifth factor, which is an evaluation of the probative value of the prior sex act. Appellant contends this is the most significant factor. (*Id.* at pp. 739–741.)

Harris explained that the materiality and necessity of evidence are important to a determination of its probative value. (*Harris*, *supra*, 60 Cal.App.4th at p. 740.) A trial court "'should not permit the admission of other crimes until it has ascertained

that the evidence tends logically and by reasonable inference to prove the issue upon which it is offered, that it is offered on an issue material to the prosecution's case, and is not merely cumulative.' [Citation.]" (*Id*. at pp. 739–740.)

Appellant concedes that the probative value of propensity evidence that he forcibly raped N.C. is "indisputably high." But he argues it should have been excluded because of "the differences between N.C. and D.M. as victims, as well as the starkly different circumstances." Once again, he suggests that N.C.'s testimony should have been excluded based on the life circumstances of the victims in the two rapes rather than based on the details of those rapes. That is not a proper consideration when examining probative value. The question is whether the prior forcible rape tended logically and by reasonable inference to prove appellant's propensity to engage in forcible rape of women. The answer is yes.

That the evidence was admissible is backed by public policy. "Available legislative history indicates [Evidence Code] section 1108 was intended in sex offense cases to relax the evidentiary restraints [Evidence Code] section 1101, subdivision (a), imposed [on prior bad act evidence] to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*Falsetta*, *supra*, 21 Cal.4th at p. 911.) Given the legislative intent, it would be absurd to conclude that the uncharged forcible rape of N.C. should have been excluded on Evidence Code section 352 grounds because N.C. was more credible than D.M. The purpose of Evidence Code section 1108 was to permit the jury to consider N.C.'s testimony in determining D.M.'s credibility. As it turned out, that was a pivotal issue because defense counsel's

position in closing argument was that D.M. engaged in sex for money with appellant, and when he did not pay, she claimed she was raped so she would not be arrested for prostitution.

Given that the trial court's ruling did not violate Evidence Code section 352, we conclude that the admission of the uncharged forcible rape did not render the trial unfair under due process principles.

IV. The One-Year Enhancement is Proper.

Appellant contends that his Health and Safety Code section 11379 conviction was reclassified as a misdemeanor under Proposition 47 and should not have been used to impose a one-year section 667.5, subdivision (b) enhancement. (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 746.)

Proposition 47 amended sections 11350, 11357 and 11377 of the Health and Safety Code to make certain drug possession offenses punishable as misdemeanors unless they were committed by ineligible defendants. (*People v. Bush* (2016) 245 Cal.App.4th 992, 1000; *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) "These offenses had previously been designated as either felonies or wobblers[.]" (*Ibid.*) Also, Proposition 47 enacted section 1170.18, subdivision (f), which provides: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors."

To obtain resentencing under section 1170.18, subdivision (f), a defendant must file an application with the trial court. (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1331–1332 (*Diaz*).) An appellate court cannot decide the issue in the first instance. (*Id*. at p. 1332; *People v. Shabazz* (2015) 237 Cal.App.4th 303, 309 (*Shabazz*) ["the voters have not expressed an intention to permit us on *direct appeal* to reduce defendant's felony convictions to misdemeanors without the filing of an application"].) Appellant did not file an application under section 1170.18, subdivision (f). As a consequence, this issue is premature. (*Diaz*, *supra*, 238 Cal.App.4th at p. 1328.)

According to appellant, he should not be required to file an application. He points out that during sentencing, the trial court stated: "[G]iven the length of time [appellant is] going to be sentenced, I don't want to complicate it for the Court of Appeal on an issue like [Proposition 47]. So I'm going to find [Proposition 47] applies to [appellant's Health and Safety Code section 11377 conviction] and not use that as a one-year prior." This leads appellant to argue: "By making this ruling, the [trial court] determined that appellant qualified for Proposition 47 relief. . . . The [trial court] simply determined at the sentencing hearing that the felony was now a misdemeanor for purposes of the alleged enhancement." He contends we should not impose a procedural requirement on him that the trial court did not see fit to impose, and that we should reduce his prior to a misdemeanor.

Appellant's arguments are unavailing. The trial court did not purport to reduce appellant's Health and Safety Code section 11379 conviction to a misdemeanor. Proposition 47 is unambiguous; it required appellant to file an application in the trial court. As a consequence, we cannot decide the issue in the first instance. We find no basis to depart from *Diaz* and *Shabazz*.[8]

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

---

[8] Appellant and the People represent that whether Proposition 47 applies to Health and Safety Code section 11379 is under review with our Supreme Court. We need not reach that issue.

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