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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BRIAN McCABE, Defendant and Appellant.	B283919 (Los Angeles County Super. Ct. No. KA113725)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mike Camacho, Judge. Affirmed.

David M. Thompson, 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, Assistant Attorney General, Steven E. Mercer, Michael C. Keller and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

Brian McCabe appeals the judgment entered following a jury trial in which he was convicted in count 1 of continuous sexual abuse of a child under age 14 (Pen. Code,[1] § 288.5, subd. (a)) and in count 2 of committing a lewd act upon a 14 or 15 year old child (§ 288, subd. (c)(1)). In bifurcated proceedings, the jury found true the allegation that appellant had suffered a prior conviction for first degree burglary. The trial court denied appellant's new trial and *Romero*[2] motions, and sentenced appellant to a total term of 30 years 4 months in state prison.

Appellant contends: (1) The trial court committed a prejudicial abuse of discretion in admitting evidence under Evidence Code sections 352 and 1108 of his prior burglary conviction involving an attempted rape; (2) The prosecutor committed misconduct and defense counsel was ineffective for allowing the jury to learn that appellant was a registered sex offender; (3) The trial court erred in allowing a witness to testify that appellant had served time in prison; (4) The trial court erred in denying appellant's request for an instruction on the lesser included offense of simple assault; (5) The trial court abused its discretion in denying appellant's *Romero* motion; and (6) The cumulative effect of these errors denied appellant a fair trial. We reject appellant's contentions and affirm the judgment of conviction.

In supplemental briefing, appellant contends the recent passage and approval by the governor of Senate Bill No. 1393[3]

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[1] Undesignated statutory references are to the Penal Code.

[2] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

[3] Statutes 2018, chapter 1013, section 2.

requires remand to enable the trial court to exercise its new discretion to strike the serious or violent felony enhancement under Penal Code section 667, subdivision (a)(1). We disagree.

FACTUAL BACKGROUND

Scott D. is K.D.'s father and J.D.'s uncle. He and appellant had been best friends since the ninth grade, and appellant's close relationship with Scott extended to Scott's family. Appellant regularly attended birthday parties for Scott's children and nieces and nephews, bought them birthday and Christmas gifts, and joined Scott's family on camping trips.

Count 1—the continuous sexual abuse of K.D.

When K.D. was eight years old,[4] she slept in the bottom bunk of a bunk bed she shared with her sister Alyssa at her grandmother's house. On one occasion appellant spent the night and slept in the bottom bunk. At some point early the next morning, appellant reached into K.D.'s bed and rubbed and squeezed her buttocks with his hand. K.D. felt scared.

Sometime later, when K.D. was nine years old, she and her family moved to her great-grandfather's house, where K.D. again shared a room and a bunk bed with Alyssa. Appellant stayed with the family almost every weekend and slept on the couch. One night, appellant quietly entered K.D.'s room, pulled a chair up to the lower bunk where K.D. was sleeping, and rubbed and squeezed her buttocks. He did this on as many as five occasions. One night when appellant came into K.D.'s room, he touched her buttocks and also rubbed her vaginal area. He touched K.D.'s vaginal area on one or two other occasions after that. Another

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[4] Born in 2006, K.D. was 11 years old at the time of trial.

night, appellant climbed into K.D.'s bed and laid on top of her. K.D. felt appellant's penis, which she described as something "kind of pointy," on her buttocks. Appellant pressed himself against her as he moved his penis up and down on her buttocks. In an interview about the incident K.D. told the interviewer that appellant made a sound like, "Uhh," as he moved. When K.D. started to roll over, appellant got up and left the room.

On another occasion appellant went on a camping trip with K.D.'s family and a large group of people. Scott, K.D., and K.D.'s brother and sister stayed with appellant in his trailer. Scott and K.D. were sleeping on the bottom bunk of one of the beds one night when appellant sat down at a table next to K.D. Appellant reached out and began rubbing K.D.'s buttocks. When K.D. moved, appellant removed his hand and pretended to be eating chips, but then he touched her again. Appellant touched K.D. several times in this manner; each time she moved appellant would stop rubbing and pretend to be eating chips.

Count 2—lewd conduct with J.D.

Appellant was taking care of J.D. and her siblings for the weekend just before J.D.'s 15th birthday.[5] One morning appellant entered J.D.'s bedroom and shook her awake. He left the room and J.D. went back to sleep. A few moments later appellant returned to the bedroom and laid down next to J.D. in her bed. J.D. was facing the wall pretending to be asleep as appellant reached around her and began touching her chest and lower thighs. He grabbed one of her breasts over her bra and

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[5] J.D. was born in 1997 and was 19 years old at the time of trial.

stroked it in a circular motion. He then reached around J.D.'s waist and moved his hand toward her crotch, rubbing her inner thigh.

A few weeks later, J.D. told her father about the incident in a series of Facebook messages. She did not go into detail, but told her father that appellant "lightly bit [her] neck." Around August 2016, J.D. learned that her cousin K.D. had alleged that appellant had done something similar to her. J.D. never talked with K.D. about K.D.'s allegations nor did she tell K.D. about her own experience with appellant.

DISCUSSION

I. The Trial Court Properly Admitted Evidence of Appellant's Prior Uncharged Offense Under Evidence Code Sections 1108 and 352

Appellant contends the trial court abused its discretion and thereby violated his constitutional rights to due process and a fair trial by admitting evidence of a prior uncharged attempted rape pursuant to Evidence Code sections 1108 and 352. We disagree.

*A. **Appellant's prior uncharged sex offense***

Around 10:00 a.m. on April 7, 2004, Maria D. was alone in her apartment with her four-year-old son and six-month-old daughter. Appellant came to the door and asked Maria if he could use her phone. Maria had seen appellant in the building visiting neighbors before and gave him the phone. When he finished his call, appellant handed the phone back to Maria and asked to use her bathroom. Maria hesitated, but after appellant made a pleading motion, she allowed him into her apartment. Appellant entered the apartment and proceeded to the bathroom.

When appellant left the bathroom, he went into Maria's bedroom. Carrying her baby in her arms, Maria went to the bedroom to tell appellant to get out. Appellant began pulling her hair and her clothes, trying to force her into the bedroom. Maria screamed and tried to pull away. During the struggle Maria managed to get to the living room where her son was screaming and crying. Unable to pull Maria into the bedroom, appellant pushed her, and she and her daughter fell to the floor. Appellant ran outside, followed by Maria who was yelling for her neighbors to stop him. One or two men grabbed appellant and held him until the police arrived. Police found a pair of handcuffs in appellant's pants pocket and a condom wrapper in his jacket pocket. Appellant had a condom with semen in it on his penis. Appellant was also found to have taken hair clippers from Maria's bathroom.

During the struggle Maria suffered a scratch on her back that bled. Throughout the incident Maria was afraid and thought appellant planned to rape her.[6]

B. ***Procedural background***

The court ruled that the evidence of the 2004 incident involving Maria D. was admissible under Evidence Code section 1108, subdivision (a). In so ruling, the court found the probative value of the evidence outweighed any prejudicial effect under section 352 and noted that evidence of the uncharged conduct was relevant to determining appellant's intent with respect to the charged crimes.

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[6] The incident resulted in appellant's 2004 first degree burglary conviction.

*C. **Applicable law***

"Character evidence, sometimes described as evidence of propensity or disposition to engage in a specific conduct, is generally inadmissible to prove a person's conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).)" (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1095 (*McCurdy*).) However, section 1101, subdivision (b) provides an exception for admission of such evidence for the limited purpose of establishing identity, common plan, or intent " 'if the charged and uncharged crimes are sufficiently similar to support a rational inference' on these issues." (*People v. Edwards* (2013) 57 Cal.4th 658, 711.)

Evidence Code section 1108 operates as a broader exception to the general rule prohibiting use of character evidence by allowing the admission of evidence of a defendant's uncharged sexual offenses to prove a propensity to commit a charged sexual offense, subject to the trial court's discretion to exclude the evidence under Evidence Code section 352. (*McCurdy*, *supra*, 59 Cal.4th at p. 1095.) As our Supreme Court has observed, "the clear purpose of section 1108 is to permit the jury's consideration of evidence of a defendant's propensity to commit sexual offenses. 'The propensity to commit sexual offenses is not a common attribute among the general public. Therefore, evidence that a particular defendant has such a propensity is especially probative and should be considered by the trier of fact when determining the credibility of a victim's testimony.' [Citations.] '[C]ase law clearly shows that evidence that [a defendant] committed other sex offenses is at least circumstantially *relevant* to the issue of his disposition or propensity to commit these offenses.' " (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1164 (*Villatoro*); *People v. Avila* (2014) 59 Cal.4th 496, 515 (*Avila*) [" 'Section 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' "].)

"Unlike evidence admitted under Evidence Code 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" (*McCurdy*, *supra*, 59 Cal.4th at p. 1095), and there is no requirement under section 1108 that the sex offenses be similar. (*People v. Jones* (2012) 54 Cal.4th 1, 50.) "Such a requirement was not added to the statute because 'doing so would tend to reintroduce the excessive requirements of specific similarity under prior law which [section 1108] is designed to overcome, . . . and could often prevent the admission and consideration of evidence of other sexual offenses in circumstances where it is rationally probative. Many sex offenders are not 'specialists', and commit a variety of offenses which differ in specific character.' " (*People v. Soto* (1998) 64 Cal.App.4th 966, 984.) Accordingly, it is enough for admission under Evidence Code section 1108 that the charged and uncharged offenses are sex offenses as defined in the statute. (*People v. Cordova* (2015) 62 Cal.4th 104, 133 (*Cordova*); *People v. Loy* (2011) 52 Cal.4th 46, 63.)

Under Evidence Code section 1108, evidence of an uncharged sex offense "is presumed admissible and is to be excluded only if its prejudicial effect substantially outweighs its probative value in showing the defendant's disposition to commit the charged sex offense or other relevant matters." (*Cordova*, *supra*, 62 Cal.4th at p. 132.) " 'Like any ruling under section 352, the trial court's ruling admitting evidence under section 1108 is subject to review for abuse of discretion.' " (*Avila*, *supra*, 59 Cal.4th at p. 515; *Cordova*, *supra*, at p. 132.)

D. ***The trial court did not abuse its discretion in admitting evidence of the prior uncharged offense***

Evidence of appellant's uncharged sex offense against Maria in 2004 was admissible under section 1108 because it was probative of appellant's propensity to commit sex offenses as well as his intent when he committed the acts underlying the charged crimes, and it strengthened the credibility of the two child-victims in this case. Appellant, however, contends the trial court should have excluded the evidence under Evidence Code section 352 because its admission was unduly prejudicial. We begin our assessment of appellant's claim by observing that " '[p]rejudice,' as used in . . . section 352, is not synonymous with damaging. [Citation.] Rather, it refers to evidence that uniquely tends to evoke an emotional bias against the defendant as an individual, and has little to do with the legal issues raised in the trial." (*McCurdy*, *supra*, 59 Cal.4th at p. 1095.)

1. The charged and uncharged offenses bore numerous similarities.

Although the prior conduct need not be similar to the charged offense for admission under Evidence Code section 1108, similarity of the offenses is a consideration in the court's section 352 analysis. Here, the prior sexual offense bore sufficient similarities to the charged crimes to support the trial court's exercise of discretion in admitting the evidence.

All of the victims of these offenses were particularly vulnerable. Maria was alone in her apartment holding her infant daughter in her arms and caring for her four-year-old son, while the victims of the charged offenses were eight- and 14-year-old children of whom appellant took advantage while they were asleep in bed. (See *People v. Cromp* (2007) 153 Cal.App.4th 476,

480 [finding prior rape of a developmentally disabled woman to be probative on charges of lewd conduct on young boys based on the victims' vulnerabilities].)

Further, in both the prior and charged offenses, appellant sought to develop his victims' trust before engaging in any unlawful conduct. Feigning an urgent need to use her phone and then her bathroom, appellant was able to overcome Maria's defenses to gain entry to her apartment. Continuing the ruse, he spent several minutes in the bathroom before he initiated his attack from her bedroom. As for the charged offenses, appellant was a close family friend, and both K.D. and J.D. thought of him as an uncle whom they trusted.

Appellant's exploitation of these victims' vulnerabilities and trust also showed careful planning. Appellant was prepared to commit a sexual assault when he went to Maria's apartment with a condom and handcuffs on his person, and he tricked her into letting him in. Similarly, appellant repeatedly used his close family relationships to gain access to the girls when they were alone and particularly vulnerable.

People v. Jandres (2014) 226 Cal.App.4th 340 (*Jandres*) has no application to the instant case. In *Jandres*, the appellate court found the trial court had abused its discretion in admitting evidence of a prior sexual offense because the nature of the conduct was so dissimilar to the charged offense that the evidence failed to rationally support an inference of propensity. (*Id*. at p. 356; see *Villatoro*, *supra*, 54 Cal.4th at p. 1163 [a defendant's other sexual offenses may be dissimilar enough to the charged offenses that the trial court could properly exclude such evidence under Evid. Code, § 352].) In contrast to *Jandres*, we find the numerous similarities between the prior and charged

offenses in this case to be more than sufficient to overcome any possible prejudice from the admission of evidence of appellant's prior sexual assault on Maria.

2. The evidence regarding the uncharged offense was not more inflammatory than the facts of the charged offenses.

We also reject appellant's characterization of the evidence of the prior offense as more inflammatory than the evidence supporting the charged offenses. To be sure, appellant's assault on Maria was violent while the charged offenses were not. But in every other aspect, the evidence supporting the charged offenses, consisting of the details of appellant's continuous sexual abuse of an eight-year-old girl and lewd conduct with a 14-year-old girl, was far more inflammatory than the assault on Maria. Maria was an adult capable of defending herself, while the victims of the charged offenses were children. Further, the evidence presented about the prior incident contained no lurid details of any sexual act. And while the officer testified that appellant was found wearing a condom with semen in it immediately after the incident, no other potentially inflammatory details were given. In contrast, K.D. specifically described instances of appellant simulating sexual intercourse on her buttocks, touching her buttocks on multiple occasions, and touching her vaginal area. J.D. also testified to details of appellant touching her breasts and her thigh near her vagina. Clearly, the details of appellant's sexual abuse of these children were far more inflammatory than any of the evidence presented about his prior offense.

In this regard, appellant's reliance on *People v. Harris* (1988) 60 Cal.App.4th 727 (*Harris*) is misplaced. In *Harris*, the defendant was charged with sex offenses in which he was alleged to have "licked and fondled" two women who were mental health

patients at a treatment center where defendant worked as a nurse. (*Id*. at pp. 730–732, 738.) By contrast, the uncharged offense admitted under Evidence Code section 1108 consisted of what the appellate court described as a "23-year-old act of inexplicable sexual violence," which the court labeled as "inflammatory *in the extreme*" and "heavy with 'undue prejudice.' " (*Harris*, at pp. 738, 740.) Declaring the evidence to be "remote, inflammatory and nearly irrelevant," *Harris* held its admission resulted in a miscarriage of justice requiring reversal. (*Id*. at p. 741.)

Harris plainly does not support appellant's contention that the trial court abused its discretion in this case by admitting evidence of the prior incident. As the trial court found, appellant's assault on Maria was highly probative on the issues of appellant's intent and the victims' credibility in this case, and the offenses shared numerous similarities. And unlike *Harris*, the prior offense here was significantly less inflammatory than the charged molestations of K.D. and J.D. Moreover, there is no indication the evidence of appellant's prior conduct confused the jury, nor, as appellant concedes, was it unduly remote. (See *People v. Branch* (2001) 91 Cal.App.4th 274, 284–285 [no indication evidence of prior offense confused the jury, and 30-year gap between offenses did not make the prior offense too remote]; *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [prior conduct 12 years before charged conduct not too remote]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [prior offenses 20 years before trial not too remote].)

3. The facts underlying appellant's burglary conviction established the offense as a sex crime under Evidence Code section 1108.

Finally, appellant asserts that evidence of the prior incident should have been excluded because he was only convicted of burglary, and it was therefore questionable whether his prior conduct even constituted a sexual offense. To the contrary, the testimony presented constituted substantial evidence that, if believed, established that appellant assaulted Maria with the intent to commit rape: appellant was wearing a condom on his penis before he grabbed Maria and tried to pull her into the bedroom, and the condom had semen in it immediately after their struggle. The fact that appellant ultimately entered a guilty plea to a non-sex offense is irrelevant to the question of whether the evidence underlying that offense was admissible under Evidence Code section 1108. The language of the statute contains no mention of a prior *conviction*, but refers instead only to *evidence* of defendant's commission of another sexual offense. Of course, "evidence" includes testimony, and thus testimony describing a prior uncharged sexual offense plainly qualifies for admission under section 1108. (See *People v. Lopez* (2007) 156 Cal.App.4th 1291, 1298–1299; *People v. Britt* (2002) 104 Cal.App.4th 500, 506.)

II. Asserted Prosecutorial Misconduct and Ineffective Assistance of Counsel

Appellant contends the prosecutor engaged in misconduct by eliciting testimony that informed the jury appellant was a registered sex offender in violation of the trial court's ruling that such evidence was inadmissible. Appellant further asserts defense counsel was ineffective in failing to insulate the jury from this highly prejudicial information. Appellant's claims lack merit.

*A. **Relevant background***

In her cross-examination of J.D., defense counsel attempted to challenge J.D.'s credibility by suggesting that her perception of appellant and her interpretation of his conduct toward her might have been influenced by "rumors" she had heard about his "prior acts." On redirect examination J.D. responded to the prosecutor's question about whether she had heard general or more specific rumors about appellant by testifying, "More sexual. I knew that he wasn't allowed to pick us up from school, because we asked for [*sic*]. He could pick us up from somewhere near school, like, my grandmother's house." The trial court overruled defense counsel's hearsay objection and admonished the jury: "Let me just make sure the jury understands. This evidence is coming in for a very limited purpose, not to prove the truth of the matter asserted, just for purposes of establishing why this witness changed her perception about [appellant] after hearing these rumors. Could be completely mistaken information or incorrect information. It doesn't matter. The point is it changed her perception of the man, [appellant]."

After the trial court's admonition, the prosecutor asked J.D. about how the rumor she had heard affected her perception of appellant. J.D. responded, "I started thinking, well, what if it's true? What if he's actually like that? What if he does things like that?" The prosecutor asked, "Do you think that hearing these rumors means that you just made up this incident in your head that happened between you and the defendant?" J.D. answered, "No, it does not." The prosecutor then asked, "And why are you confident that this information you previously knew didn't affect your perception of what happened?" J.D. answered, "I never knew details. I never knew if [the previous incident involved] an

adult, a child, a male, or a female. I didn't know any details. I just knew that he had possibly some sexual misconduct on his record." She explained that when appellant touched her during the incident her body felt strange, and she did not feel it was "good touching." Rather, it was "very different than any past experience" she had had when appellant would engage in horseplay with her. J.D. insisted that the rumor did not influence her to make anything up about appellant, nor did she misunderstand his touching.

Officer Matthew Quinteros was called by the defense. On direct examination, defense counsel elicited testimony that appellant had suffered only one prior conviction for burglary and no other arrests. On cross-examination the prosecutor inquired further about appellant's 2004 burglary conviction. The officer testified that appellant had been charged with attempted rape as well as burglary, but under the terms of the plea agreement he was only convicted of burglary. The prosecutor then asked if there were any "sexual-related conditions placed on [appellant]" as part of that plea deal. Before the witness could answer, the trial court sustained defense counsel's objection, admonishing the prosecution not to "go down that road." Thereafter, the court denied the defense motion to strike because the question had not been answered and there was nothing to strike. The court added that the jury had already been admonished that only the witnesses' permitted answers—and not the attorneys' questions—constituted evidence for the jury could consider.

B. ***Prosecutorial misconduct***

Respondent contends that appellant forfeited his claim of prosecutorial misconduct as to the prosecutor's redirect examination of J.D. about the rumors because defense counsel

objected only on hearsay grounds. We agree. "To avoid forfeiture of a claim of prosecutorial misconduct, a defendant must object and request an admonition" (*People v. Perez* (2018) 4 Cal.5th 421, 450), " 'and the objection must be made upon the same ground as that which the defendant assigns as error on appeal.' " (*People v. Redd* (2010) 48 Cal.4th 691, 746.) Here, counsel's failure to object on grounds of prosecutorial misconduct or on the specific ground that the prosecutor intentionally elicited testimony from J.D. in violation of the court's ruling, along with the failure to request a curative admonition, forfeited any misconduct claim on appeal.

In any event, both this claim and the claim of prosecutorial misconduct based on the questioning of Officer Quinteros fail. Under the federal Constitution, a prosecutor commits misconduct when his or her behavior constitutes a pattern of conduct so egregious that it" 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citation.] Under California law, a prosecutor commits reversible misconduct when 'he or she makes use of "deceptive or reprehensible methods" when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted.' " (*People v. Clark* (2016) 63 Cal.4th 522, 576–577; *People v. Redd*, *supra*, 48 Cal.4th at pp. 733–734.)

Appellant contends the prosecutor engaged in misconduct because she "went too far" on redirect examination by asking about specific rumors J.D. had heard after defense counsel's cross-examination on the very same subject. However, " ' "[i]t is well settled that when a witness is questioned on cross-examination as to matters relevant to the subject of the direct examination but not elicited on that examination, he [or she] may

be examined on redirect as to such new matter." ' " (*People v. Hamilton* (2009) 45 Cal.4th 863, 921; *People v. Steele* (2002) 27 Cal.4th 1230, 1247–1248.) " 'The extent of the redirect examination of a witness is largely within the discretion of the trial court' " (*id.* at p. 1247), and "[w]here, as here, one side presents evidence on a point, then tries to prevent the other side from responding, trial courts 'should strive to prevent unfairness to either side.' " (*Hamilton*, at p. 921; *Steele*, at p. 1248 [a party may not ask relevant questions and then "prevent all cross-examination (or redirect examination) responding to the same point by successfully asserting that its own question was improper"].)

Regardless of whether J.D.'s testimony about the rumors would otherwise have been admissible, given that the defense had already opened the door on the matter, the trial court properly allowed further inquiry on redirect examination by the prosecution, and the prosecutor committed no misconduct in asking J.D. about the rumors she had heard.[7]

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[7] The prosecutor asked J.D. only if she had heard a general rumor "or something more specific." In answer to that question, J.D. volunteered that appellant was not allowed to pick her up from school. While J.D.'s response might have suggested the fact that appellant could not pick her up was a consequence of his prior offense, it did not convey that appellant was a registered sex offender. Moreover, " '[a]lthough it is misconduct for a prosecutor *intentionally* to elicit inadmissible testimony [citation], merely eliciting evidence is not misconduct.' " (*People v. Chatman* (2006) 38 Cal.4th 344, 379–380; *People v. Mills* (2010) 48 Cal.4th 158, 199.) And "a prosecutor cannot be faulted for a witness's nonresponsive answer that the prosecutor neither

We also reject appellant's claim that the prosecutor engaged in misconduct by asking Officer Quinteros if any "sexual-related conditions" were placed on appellant as part of his plea deal. Even if the question amounted to misconduct, a single instance of misconduct does not constitute a pattern warranting reversal under the federal Constitution. (*People v. Frye* (1998) 18 Cal.4th 894, 979.) Moreover, appellant cannot show an outcome more favorable to him was reasonably probable absent the prosecutor's question. First, because the trial court sustained defense counsel's objection, Officer Quinteros never answered the question. Thus, no information about appellant's registration requirement came before the jury. Second, the trial court immediately reminded the jury that the attorneys' questions do not constitute evidence; "only the witnesses' permitted answers . . . are the evidence." We presume the jury heeded the court's admonition and did not draw any inference from the prosecutor's unanswered question. (*People v. Carey* (2007) 41 Cal.4th 109, 130 [" ' "Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case" ' "].)

C. ***Ineffective assistance of counsel***

Appellant contends that his trial counsel was ineffective because (1) counsel's cross-examination of J.D. opened the door for the prosecutor to question J.D. about rumors of appellant's prior conduct and how they affected her perception of him, and

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solicited nor could have anticipated. (*People v. Valdez* (2004) 32 Cal.4th 73, 125.)" (*People v. Tully* (2012) 54 Cal.4th 952, 1035.)

(2) counsel failed to object to the questions on the subject during the prosecutor's redirect examination.

" 'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation.' " (*People v. Gamache* (2010) 48 Cal.4th 347, 391, quoting *People v. Carter* (2003) 30 Cal.4th 1166, 1211; *People v. Brown* (2014) 59 Cal.4th 86, 109.)

Appellant asserts that there could be no rational tactical purpose for defense counsel's questioning of J.D. about rumors she may have heard about appellant's past. To the contrary, a reasonable explanation is readily apparent on the record, and compels rejection of appellant's claim of ineffective assistance of counsel. The brief questioning about the rumors allowed the defense to challenge J.D.'s account of the incident with appellant by showing she had been influenced by what she had heard, which in turn caused her to misinterpret innocent touching as a

sexual offense. Defense counsel's questions about the rumors thus appear to have been part of a sound trial strategy to cast doubt on J.D.'s testimony and her interpretation of appellant's conduct. The fact that the tactic opened the door for the prosecution to inquire further about the rumors and show that J.D.'s perceptions of appellant's conduct had not been influenced by what she had heard did not undermine the value of the tactic or render counsel's strategy irrational.

Further, defense counsel cannot be faulted for failing to object to the prosecutor's redirect examination on the ground of misconduct, because any such objection would have been appropriately overruled. As the trial court noted in overruling the defense hearsay objection, the defense had opened the door on the topic, making it fair game for the prosecution's inquiry on redirect examination. Defense counsel was not ineffective for failing to make a futile objection. (*People v. Price* (1991) 1 Cal.4th 324, 387 ["Counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile"]; *People v. Maury* (2003) 30 Cal.4th 342, 419.)

III. Appellant Suffered No Prejudice as a Result of a Witness's Fleeting Remark that Appellant Had Been in Prison

Defense counsel asked Scott on cross-examination if he had ever paid any of appellant's bills. Scott responded, "I helped him when he first got out of prison." Defense counsel objected and moved to strike the answer. The court overruled the objection.

Later, after Scott and Maria's testimony, defense counsel moved for a mistrial, arguing that Scott's reference to appellant's release from prison in combination with Maria's testimony left

"the jury sitting with the belief that [appellant] was convicted of a rape and went to prison for it." The trial court denied the mistrial motion, but offered to admonish the jury regarding Scott's testimony. Not wishing to highlight the prison reference, defense counsel declined the court's offer.

Appellant contends the trial court abused its discretion in denying his mistrial motion, but he fails to show that an admonition could not have cured any prejudice from the fleeting reference to appellant's release from prison. We therefore find no error in the trial court's denial of the motion. " ' " 'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' " ' " (*People v. Harris* (2013) 57 Cal.4th 804, 848.) " ' "Although most cases involve prosecutorial or juror misconduct as the basis for the motion, a witness's volunteered statement can also provide the basis for a finding of incurable prejudice." ' " (*Ibid*.) "We review a trial court's ruling on a motion for mistrial for abuse of discretion. [Citation.] Such a motion should only be granted when a defendant's 'chances of receiving a fair trial have been irreparably damaged.' " (*People v. Valdez*, *supra*, 32 Cal.4th at p. 128.)

Here, in denying the motion for a new trial, the court did not abuse its discretion in concluding that the witness's brief volunteered reference to appellant's release from prison had not irreparably damaged appellant's chance of having a fair trial or that any harm could not be cured by admonition. As the trial court noted, the jury had heard evidence that appellant had been

arrested immediately after his attack on Maria. Further, the defense was able to clarify for the jury that appellant had only been convicted of burglary for the attack on Maria, and he had not suffered any other arrests or convictions. Given this evidence, the jury was not left with the erroneous impression that appellant had gone to prison for a rape conviction, but instead could logically assume appellant had served a prison term for his burglary conviction.

IV. The Trial Court Properly Denied Appellant's Request for an Instruction on Simple Assault

Appellant contends the trial court prejudicially erred in refusing to instruct on simple assault as a lesser included offense of continuous sexual abuse or lewd and lascivious conduct. We disagree.

" 'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence.' " (*People v. Smith* (2013) 57 Cal.4th 232, 239.) This duty includes " 'giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.' " (*Ibid.*) The trial court's sua sponte duty to instruct on a lesser offense is triggered when there is substantial evidence from which "a reasonable jury could conclude that the defendant committed the lesser, but not the greater, offense." (*People v. Shockley* (2013) 58 Cal.4th 400, 403 (*Shockley*).)

The offense of lewd conduct on a child under the age of 14[8] is committed by any contact " 'upon or with the body, or any part or member thereof,' " of such child with " 'the *specific intent* of arousing, appealing to, or gratifying the lust of the child or the accused.' " (*People v. Warner* (2006) 39 Cal.4th 548, 556; *People v. Martinez* (1995) 11 Cal.4th 434, 452 (*Martinez*); § 288, subd. (a).) Courts have broadly interpreted the touching element of the offense to include constructive touching, and have focused on the sexually exploitative nature of the conduct rather than the precise details of the offending act. (*People v. Villagran* (2016) 5 Cal.App.5th 880, 890; *Martinez*, at p. 444.) Thus, a violation of section 288 may be established even in the absence of physical touching by the defendant. (*People v. Lopez* (2010) 185 Cal.App.4th 1220, 1229; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115; see also *People v. Mickle* (1991) 54 Cal.3d 140, 176 [actual or constructive disrobing of a child by accused constitutes a lewd act when committed for a sexually exploitative purpose].)

A simple assault is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240; *People v. Williams* (2001) 26 Cal.4th 779, 784.) The prohibited conduct is an "act [that] by its nature will probably and directly result in the application of physical force against another." (*Id.* at p. 790.) In other words, " '[a]n assault is an incipient or inchoate battery; a battery is a

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[8] Because the continuous sexual abuse of K.D. under Penal Code section 288.5 was based upon multiple acts of lewd and lascivious conduct with K.D., the statutory definition of lewd conduct is applicable to both of the charges against appellant for purposes of this argument.

consummated assault.' " (*Id.* at p. 786; *People v. Rocha* (1971) 3 Cal.3d 893, 899 [an assault is an attempt to commit a battery].) A battery, in turn, includes any harmful or offensive touching of another person. (§ 242; *Shockley*, *supra*, 58 Cal.4th at p. 404.) Even " ' "the least touching" may constitute battery.' " (*Ibid.*)

"To ascertain whether one crime is necessarily included in another, courts may look either to the accusatory pleading or the statutory elements of the crimes." (*People v. Robinson* (2016) 63 Cal.4th 200, 207 (*Robinson*).) Where, as here, the accusatory pleading tracks the statutory definition of the charged offense without reciting the facts particular to the offense, the reviewing court must look to the statutory elements to determine if there is a lesser included offense. (*Ibid.*; *Shockley*, *supra*, 58 Cal.4th at p. 404.) " 'The elements test is satisfied if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, such that all legal elements of the lesser offense are also elements of the greater. [Citation.] In other words, " ' " 'i]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' " ' " (*Robinson*, at p. 207.)

Applying the statutory elements test to this case, we conclude that simple assault is not a lesser included offense of lewd conduct because the latter crime, as defined in section 288, may be committed without any actual or attempted touching by the defendant, while an assault requires at least an attempt to commit a battery. (*People v. Colantuono* (1994) 7 Cal.4th 206, 214 & fn. 4 [an assault " 'is an attempt to commit a battery' "].) That is, an assault requires, at a minimum, an attempt to cause the least touching. (*People v. Wright* (1996) 52 Cal.App.4th 203, 210.) Accordingly, the trial court had no duty to instruct on

simple assault as a lesser included offense of lewd conduct in this case. (*Id*. at p. 206.)

Appellant's reliance on *People v. Mosley* (2015) 60 Cal.4th 1044 (*Mosley*) for the proposition that simple assault is a lesser included offense of lewd conduct is misplaced. In describing the relevant factual background to the "single, narrow issue" under *Apprendi v. New Jersey* (2000) 530 U.S. 466 in the case before the court, *Mosley* stated that the jury had acquitted the defendant of lewd conduct, but convicted him of "the lesser misdemeanor offense of simple assault." (*Mosley*, at p. 1049.) The court explained none of the circumstances of that conviction,[9] nor did it even purport to address the question of whether simple assault would be a lesser included offense of lewd conduct under the statutory elements test. "It is of course axiomatic that a case is not precedent for an issue which the court did not consider." (*People v. Rusconi* (2015) 236 Cal.App.4th 273, 280; *People v. Stone* (2009) 46 Cal.4th 131, 140.)

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[9] The defendant's conviction of simple assault in *Mosley* could have several explanations: he could have been charged with both lewd conduct on a child under 14 and simple assault (see *Shockley*, *supra*, 58 Cal.4th at p. 406); the parties could have agreed to a simple assault instruction as a lesser related offense (see *People v. Jennings* (2010) 50 Cal.4th 616, 668 [instructions on lesser related offenses not warranted unless agreed to by both parties]); or, applying the accusatory pleading test, the trial court could have found simple assault to be a lesser included offense of lewd conduct in that case. However, there is nothing in the court's brief procedural summary to suggest that *Mosley* stands for the proposition that simple assault is a lesser included offense of lewd conduct under the statutory elements test.

V. The Court Did Not Abuse Its Discretion in Denying Appellant's *Romero* Motion

Appellant moved to dismiss his 13-year-old prior strike conviction under *Romero* on the grounds that the prior conviction was the only offense in his criminal history, he had a strong family and community support system, and he was a strong candidate for being a productive member of society. Appellant claimed to fall outside the spirit of the Three Strikes law, noting that he was a model inmate when he served his sentence for the prior offense, he had been gainfully employed since his release from prison and supported his elderly parents, and he had not engaged in any criminal conduct in the 13 years since his prior conviction. Appellant also asserted that the crimes in this case involved no force, fear, or violence, but only "inappropriate contact with two minors, over the clothes for only brief moments."

The trial court acknowledged that the strike prior was "somewhat remote," and that appellant's criminal history was limited to the single prior offense. But the court also considered the circumstances of the prior, stating that the crime showed sophistication and planning in the way appellant had gained entry to the victim's home by seeking help and then suddenly attacking her in the presence of her children. As for the current convictions, the court conceded that they did not involve "substantial sexual conduct," but noted that appellant was a trusted family friend when he took advantage of these children by inappropriately touching them. The court noted the offenses involved "a significant breach of trust" which "can destroy a family," and the psychological damage that K.D. has suffered as a result of appellant's conduct is "immeasurable."

Denying appellant's *Romero* motion, the trial court noted that appellant had given no sign of remorse, and specifically found "absolutely no redeeming qualities in the defendant's character, his background, or prospects to warrant treating him as a first-time offender." The court added, "I think it would be an abuse of discretion for any court, including this one, to grant a *Romero* motion under these circumstances."

Under section 1385 a trial court has discretion to strike a prior serious felony conviction for sentencing purposes "in furtherance of justice" upon finding that, "in light of the nature and circumstances of [defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).) We review the trial court's refusal to dismiss a strike prior under section 1385 for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony*); *Williams*, *supra*, at p. 158.) Under this standard, " ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citations.] [Further], a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " '

[Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony*, *supra*, at pp. 376–377.)

As our Supreme Court has explained, the Three Strikes law establishes certain sentencing norms and "creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*Carmony*, *supra*, 33 Cal.4th at p. 378.) "In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss." (*Ibid.*) The high court continued: " '[W]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]. Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Ibid.*)

In denying appellant's *Romero* motion here, the trial court was plainly aware of its discretion to dismiss appellant's strike prior but declined to do so. After weighing all the relevant

factors, the court determined that factors such as appellant's employment and support system did not mitigate the offenses in this case. Indeed, appellant sexually abused both of these girls despite having gainful employment and a support system in place. The trial court did not abuse its discretion in denying appellant's *Romero* motion.

VI. There Was No Cumulative Error

Appellant contends that the multiple cumulative errors in this case created an atmosphere of unfairness that resulted in a gross miscarriage of justice requiring reversal. We reject the assertion for the simple reason that, having found no merit in any of appellant's assignments of error, we must conclude there was no cumulative error requiring reversal. (*People v. Beeler* (1995) 9 Cal.4th 953, 994 ["If none of the claimed errors were individual errors, they cannot constitute cumulative errors that somehow affected the . . . verdict"]; *People v. Manriquez* (2005) 37 Cal.4th 547, 591.)

VII. Senate Bill No. 1393

Appellant contends the case must be remanded for reconsideration of the imposition of the five-year enhancement under section 667, subdivision (a). On September 30, 2018, the Governor signed Senate Bill No. 1393, which amends sections 1385 and 667 to give trial courts discretion to strike the five-year enhancement under section 667, subdivision (a)(1). The law becomes effective on January 1, 2019. Respondent concedes that once the new legislation takes effect, it will apply retroactively to

cases in which judgment is not yet final on appeal.[10] (See *In re Estrada* (1965) 63 Cal.2d 740, 748 [for a non-final conviction, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed"]; *People v. Francis* (1969) 71 Cal.2d 66, 75–78 [where statute enacted during pending appeal gave trial court discretion to impose a lesser penalty, remand was required for resentencing].) Nevertheless, the Attorney General maintains that remand in this case is unwarranted because the trial court's statements at sentencing clearly indicated it would not exercise its new discretion to strike the section 667, subdivision (a)(1) enhancement. We agree.

Prior to Senate Bill No. 1393, section 1385, subdivision (b), expressly prohibited a trial court from striking "any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (*People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045, [under § 1385, subd. (b), trial court has no discretion to strike § 667, subd. (a) enhancement].) Senate Bill No. 1393 eliminates this restriction.

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[10] Respondent contends that appellant's claim should be denied because it is not ripe. However, given that appellant's conviction will certainly not become final until after January 1, 2019 (see *People v. Vieira* (2005) 35 Cal.4th 264, 306 [" 'for the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed' "]), we will address the merits of appellant's argument in the interests of judicial economy.

In determining whether remand is appropriate in this case, case authority addressing the application of Senate Bill No. 620 is instructive. Senate Bill No. 620 gave trial courts the discretion to dismiss certain firearm enhancements under sections 12022.5 and 12022.53 in furtherance of justice just as Senate Bill No. 1393 does for prior serious felony enhancements under section 667, subdivision (a)(1). In the context of Senate Bill No. 620, courts have held that remand to allow the trial court to exercise its discretion to strike a firearm enhancement "is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110.) However, where " ' "the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand [for resentencing] would be an idle act and is not required." ' " (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; *People v. McVey* (2018) 24 Cal.App.5th 405, 419 (*McVey*); see also *People v. Fuhrman* (1997) 16 Cal.4th 930, 944 ["remand is not required where the trial court's comments indicate that even if it had authority to strike a prior felony conviction allegation, it would decline to do so"].) In *McVey*, given the trial court's comments at sentencing we found "no possibility that, if the case were remanded, the trial court would exercise its discretion to strike the enhancement altogether." (*McVey*, *supra*, 24 Cal.App.5th at p. 419.) We therefore concluded that remand "would serve no purpose but to squander scarce judicial resources." (*Ibid.*)

In the present case, although the trial court's comments were not as pointed as in *McVey*, they nevertheless made clear the trial court's view that it would not be in furtherance of justice

to reduce appellant's punishment for any reason. The trial court found the multiple aggravating factors outweighed "any factors in mitigation that could be offered." And although the trial court showed leniency in selecting the mid-term for the continuous sexual abuse conviction in count 1, it imposed a consecutive term on count 2. In choosing a consecutive term, the court expressly stated it had discretion to impose a concurrent term but had elected not to do so. Given that the court refused to reduce appellant's overall sentence by a mere 16 months, there appears no likelihood it would decrease the sentence by five years if given the opportunity to strike the section 667, subdivision (a)(1) enhancement. In addition, as discussed above, in denying appellant's *Romero* motion, the trial court expressly stated that appellant had given no sign of remorse, and it specifically found "absolutely no redeeming qualities in the defendant's character, his background, or prospects to warrant treating him as a first-time offender."

Taken as a whole, the trial court's comments unambiguously communicate its judgment that the sentence imposed was appropriate for appellant's crime under the circumstances. Given that the trial court exercised its discretion to impose a consecutive rather than a concurrent term on count 2, and denied the *Romero* motion based on appellant's lack of remorse, the psychological damage he had caused K.D., and the well-planned manner in which he had carried out his current and prior crimes, it plainly appears that a remand for the court to consider whether to strike the enhancement would be a useless act.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.