

APPENDIX - A

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

D071450

Plaintiff and Respondent,

v.

(Super. Ct. No. SCN351546)

JOSUE ISRAEL SANCHEZ,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of San Diego County, Harry M. Elias, Judge. Affirmed.

Sheila Quinlan, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Josue Israel Sanchez of forcible rape (Pen. Code, § 261, subd. (a)(2); count 1) and forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)(A); count 2). In a bifurcated proceeding, the court found true allegations Sanchez had a prior serious felony conviction (Pen. Code, §§ 667, subd. (a)(1), 668, 1192.7, subd. (c)) and a prior strike conviction (Pen. Code, §§ 667, subds. (b)-(i), 1170.12 & 668.) The court sentenced Sanchez to 37 years in prison based upon consecutive doubled upper terms (16 years each) for counts 1 and 2 plus five years for the prison prior.

Sanchez contends on appeal (1) the court abused its discretion in admitting evidence of a prior uncharged act under Evidence Code section 1108, (2) the erroneous admission of testimony from the prior assault victim about her belief Sanchez was going to rape her resulted in a miscarriage of justice, (3) the court erred in instructing the jurors with CALCRIM No. 1191 in violation of his due process rights, (4) trial counsel's failure to elicit testimony from the victim concerning her application for a U-visa¹ constituted ineffective assistance of counsel, and (5) reversal of his convictions is required based on the cumulative effect of the foregoing errors. We conclude the court did not abuse its discretion in admitting evidence of the prior act, the erroneous admission of the prior assault victim's belief about the defendant's state of mind was harmless, CALCRIM No. 1191 is constitutional, defense counsel was not prejudicially ineffective for failing to

¹ A U-visa allows a limited number of victims of specified crimes (such as rape) who are helpful to law enforcement to remain in the country temporarily. (8 C.F.R. § 214.14 (2018).)

elicit additional answers regarding the victim's knowledge of a U-visa, and there was no cumulative error warranting reversal.

BACKGROUND

A

The victim rented a bedroom in an apartment for herself and her child from Sanchez's mother. Sanchez and his mother also lived in the apartment and shared the kitchen and the bathroom with the victim.

About a week after the victim moved into the apartment, the victim's child went to stay with the child's father and the victim went out to dinner with a friend. The victim had two beers. The victim and her friend went back to the apartment where they had sex in the bedroom. Afterward, the victim went out to the kitchen to make coffee. When Sanchez arrived at the apartment, the victim said hello. The victim and her friend had coffee in the bedroom and talked until the friend left.

After the victim's friend left the apartment, the victim took a shower. When she was in the shower, she heard someone trying to open the door. She said she was busy, finished the shower quickly, returned to the bedroom, and closed the door. She lay down on her bed dressed in the same clothes she wore to dinner. She did not own pajamas.

As the victim was falling asleep, Sanchez entered the bedroom wearing shorts and no shirt. He lay down on the bed next to her. The victim asked him to leave and not to touch her. She was scared. Instead of leaving, Sanchez lay on top of the victim with his legs on either side of her. The victim struggled and fought, but Sanchez was heavy and

she could not move much.² The victim asked Sanchez to let her go and to leave her alone, but he put one hand on her neck and pushed her down toward the bed as he took her skirt off with his other hand. Sanchez told the victim not to scream.

Sanchez tried to kiss the victim by force. The victim struggled, but was unable to get away because Sanchez was strong and heavy. He removed her underwear and her blouse. As Sanchez pulled the victim's blouse off forcefully, the blouse hurt the victim's face.

Sanchez touched and kissed the victim's body as she struggled. He told her to stop moving and to do everything he asked. Sanchez penetrated the victim's vagina with his penis. He then put his fingers in the victim's vagina. Sanchez told the victim, who was crying and struggling, to stop crying and moving because he was going to do whatever he wanted.

The victim got away momentarily, but Sanchez grabbed her by the waist and put her on top of him. He penetrated her vagina again with his penis. When the victim told Sanchez to stop, he said he was going to do everything he wanted and nobody would hear her if she cried and screamed.

When the victim got away again, Sanchez grabbed her by her feet and pushed her toward the bed where he tried to penetrate her from behind. When she moved away, he

² The victim is 4 feet 3 inches and weighs 102 pounds. Sanchez was approximately 5 feet 10 inches and weighed 195 pounds when he was arrested.

turned her around and penetrated her vagina again from the front with his penis. As the victim continued to struggle and tried to scream, Sanchez covered her mouth.

Sanchez got up, grabbed the victim's hair, and put his penis in her mouth. After he ejaculated in her mouth, he let the victim go and went into the bathroom.

The victim dressed and left. She called the friend with whom she had dinner when she got to the street. The friend received the call from the victim around midnight. The victim was nervous and crying. She asked the friend to come over quickly to help her. When the friend arrived, the victim appeared nervous and she did not look right. She was wearing a long dress she usually wore for sleeping. Her shoes were untied and her hair was not neat. The victim said Sanchez had raped and abused her. The friend called the police and reported the rape. Sanchez was arrested after the victim identified him in a curbside lineup.

The victim went to the police station, where she drank water. She then went to the hospital for a sexual assault examination. The victim had petechial injuries to the roof of her mouth and to her perineum. Petechia is bleeding under the skin from broken blood vessels or capillaries due to blunt injury or pressure.

Sanchez was found as one of two possible DNA contributors to a nonsperm sample taken from the external genital area of the victim. The victim's friend was excluded as a possible contributor. Sanchez was also found as a match to a partial sperm DNA profile contained in the same sample. The victim and her friend were excluded as contributors to this profile. Swab samples taken from the victim's left breast and jaw area indicated a DNA mixture of two people with the victim and Sanchez as the possible

contributors. The victim's friend was excluded. No semen was detected on the oral swabs.

B

The court allowed testimony regarding a prior uncharged act. J.S. testified she was working alone in an optometry store on an afternoon in November 2004 when Sanchez came into the store and asked if a doctor was in the office. J.S. said no and suggested another optometry office. As J.S. turned around, Sanchez lunged at her and grabbed her shoulders. He threw J.S. against a filing cabinet and a wash basin before throwing her to the floor where she landed on her back.

Sanchez knelt above J.S. with one knee between her legs and the other knee to the left. Sanchez held J.S. down with his hands on her shoulders as she struggled and screamed. Sanchez put his hand over J.S.'s mouth to try to suppress the screaming. Sanchez pulled on J.S.'s shirt and one of the buttons came open. J.S. continued to struggle, kick, and scream. Sanchez got up and ran out of the store. He did not ask for money, jewelry, or for the location of the cash register.

DISCUSSION

I

Sanchez contends the court abused its discretion in admitting evidence of a prior uncharged act to prove his criminal disposition under Evidence Code section 1108 and the court's error violated his due process rights. We disagree.

"We review claims regarding a trial court's ruling on the admissibility of evidence for abuse of discretion. [Citations.] Specifically, we will not disturb the trial court's

ruling 'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266.)

Evidence Code section 1108 provides, "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Evidence Code section 1108 is a legislative exception to the general rule making character evidence inadmissible to prove conduct. (Evid. Code, § 1101; *People v. Villatoro* (2012) 54 Cal.4th 1152, 1159.) " 'Our elected Legislature has determined that the policy considerations favoring the exclusion of evidence of uncharged sexual offenses are outweighed in criminal sexual offense cases by the policy considerations favoring the admission of such evidence. The Legislature has determined the need for this evidence is "critical" given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial.' " (*People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*).) "By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. [Evidence Code 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." (*Id.* at p. 915.) This bears on the "probability or improbability that the defendant has been falsely or mistakenly accused of such an offense." (*Id.* at p. 912, internal quotations marks omitted.)

The Supreme Court in *Falsetta* rejected a due process challenge to Evidence Code section 1108 concluding the "trial court's discretion to exclude propensity evidence under [Evidence Code] section 352 saves [Evidence Code] section 1108 from defendant's due process challenge." (*Falsetta, supra*, 21 Cal.4th at p. 917.) This is so even in the case of an uncharged offense. (*People v. Villatoro, supra*, 54 Cal.4th at pp. 1165–1166.) Sanchez concedes we must follow *Falsetta*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

"By reason of [Evidence Code] section 1108, trial courts may no longer deem 'propensity' evidence unduly prejudicial per se, but must engage in a careful weighing process under [Evidence Code] section 352." (*Falsetta, supra*, 21 Cal.4th at pp. 916–917.) "Specifically, the court weighs factors such as the 'nature, relevance, and possible remoteness [of the evidence], the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses.'" (*People v. Merriman* (2014) 60 Cal.4th 1, 41 (*Merriman*).) "'This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence.'" (*Falsetta*, at pp. 917–918.)

In this case, the court carefully weighed the probative value of the prior act against the prejudicial effect as required by Evidence Code sections 352 and 1108. The court determined the assault on J.S. was sexual in nature consistent with Penal Code section

220. The court acknowledged the prior act was more than 10 years before the current offense, but concluded the age of the prior act was less significant given Sanchez was incarcerated for a portion of that time. The court exercised its discretion to admit the testimony stating the prior uncharged act was not unduly aggravated or severe and there were sufficient similarities in the conduct to support admissibility under Evidence Code section 1108.

Sanchez contends testimony regarding the prior conduct should not have been admitted because it was too dissimilar from the current charges and the evidence was too weak to support an inference the prior act was a sexual act. However, in both instances, there was evidence Sanchez took advantage of a woman alone, forced himself on top of her, pulled on her shirt, and tried to silence her by placing his hand over her mouth as she screamed. The court acknowledged the two acts may not have been sufficiently similar to admit the prior conduct as pattern evidence under Evidence Code section 1101, but there is a "distinction between admissibility under Evidence Code section 1101[, subdivision] (b), which requires a sufficient degree of similarity between charged and uncharged offenses, and admissibility under Evidence Code section 1108, which does not." (*Merriman, supra*, 60 Cal.4th at p. 41.) The Supreme Court stated, "although lack of similarity is relevant to the court's decision whether to exclude Evidence Code section 1108 propensity evidence as more prejudicial than probative, that factor is not dispositive." (*Id.* at pp. 41–42.)

"We find nothing arbitrary, capricious, or patently absurd in the trial court's ruling." (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286.) Sanchez "has failed to carry his

burden of rebutting the strong presumption of admissibility of the sexual assault crimes evidence under Evidence Code section 1108." (*Merriman, supra*, 60 Cal.4th at p. 42.)

He also failed to establish a violation of due process.

II

Sanchez next contends the court erred by allowing J.S. to testify about her belief Sanchez was going to rape her. During trial, J.S. said she was scared when she was struggling with Sanchez. When the prosecutor asked J.S. why she was scared, defense counsel objected. The court overruled the objection stating, "[g]oes to state of mind." J.S. responded, "I was certain he was there to rape me. There was no other reason." The court overruled defense counsel's objection and motion to strike stating the testimony was "admissible for purposes of state of mind."

The People concede J.S.'s belief or state of mind as to what Sanchez intended when he assaulted her was not relevant to a material issue. (See *People v. Greene* (1973) 34 Cal.App.3d 622, 651 [". 'It is the state of mind of the defendant, not of the victim, which is in issue' " for assault with intent to commit rape].) However, the People contend the error was harmless.

We agree any error did not result in a miscarriage of justice. "We do not reverse a judgment for erroneous admission of evidence unless 'the admitted evidence should have been excluded on the ground stated and ... the error or errors complained of resulted in a miscarriage of justice.' " (*People v. Earp* (1999) 20 Cal.4th 826, 878; citing Evid. Code, § 353.) " "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is

reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."'" (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 327.)

The jury was instructed it could consider evidence of the uncharged crime of assault with intent to commit rape "only if the people have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense." The jury was then instructed about the difference between proof beyond a reasonable doubt and proof by a preponderance of the evidence. If the jury determined, by a preponderance of the evidence, the uncharged offense occurred, the jury was instructed it could, but was not required to conclude Sanchez was disposed or inclined to commit sexual offenses and was likely to and did commit the acts charged. The court instructed the jury to only consider the uncharged offense as one factor along with all the other evidence and the uncharged offense alone was not sufficient to convict Sanchez of forcible rape or oral copulation.

There was evidence Sanchez ensured J.S. was alone before he attacked her. Sanchez did not ask for money or jewelry or otherwise suggest the attack was theft-related. Sanchez threw J.S. to the ground, kneeled over her, and held her down as he pulled at her blouse, which became unbuttoned. Although there were differences, this conduct was similar to how the charged sexual offenses in this case began. Even without J.S.'s comment she believed Sanchez intended to rape her, there was sufficient evidence for the jury to conclude, based on a preponderance of the evidence, Sanchez committed the uncharged offense of assault with intent to rape.

The jury sent several notes with questions during the deliberation process. Only one question involved the uncharged offense. Shortly after the case was submitted to the jury, they sent a note asking if the instruction referring to "uncharged sex offense" related to the testimony of J.S. Thereafter, the four additional jury questions focused entirely on the evidence regarding the charged offenses and requested readback of testimony related to the victim's statements immediately after the incident and the DNA evidence. It is evident from the record the jury took their job seriously. We conclude it is not reasonably probable the jury would have reached a result more favorable to Sanchez without the comment from witness J.S. about her belief about Sanchez's intention.

III

To preserve the issue for federal review, Sanchez contends the court violated his right to due process by instructing the jury with CALCRIM No. 1191 permitting the jury to consider evidence of prior uncharged sexual offenses.³ Sanchez acknowledges the

³ The court instructed the jury with CALCRIM No. 1191 as follows:

"The People have presented evidence that the Defendant committed a crime of assault with intent to commit rape that was not charged in this case. This crime is defined for you later in these instructions. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense.

"Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden, you must disregard this evidence entirely.

California Supreme Court rejected a due process challenge to former CALJIC No. 2.50.01 (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1013), which is substantially the same as the instruction given here (*People v. Johnson* (2008) 164 Cal.App.4th 731, 739–740 [CALCRIM No. 1191 is "similar in all material respects" to the "version of CALJIC No. 2.50.01 considered in *Reliford*"]). Sanchez concedes we are bound by the Supreme Court's decision on this issue. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.)

IV

Sanchez contends his trial counsel provided ineffective assistance of counsel in questioning the victim about her efforts to obtain a U-visa. We conclude there was no prejudicial ineffective assistance of counsel.

To establish ineffective assistance of counsel, a defendant has the burden to show counsel's performance fell below the standard of reasonableness under prevailing professional norms and the attorney's deficient performance was prejudicial, i.e., the defendant would have obtained a more favorable result absent the alleged error.

(*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694; *People v. Ledesma* (1987) 43

"If you decide the defendant committed the uncharged offense, you may, but are not required to, conclude that the evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision also conclude the defendant was likely to commit and did commit forcible rape and oral copulation by force as charged here. If you conclude the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all of the other evidence. It is not sufficient by itself to prove the defendant is guilty of forcible rape or oral copulation by force. The People must still prove each of those charges beyond a reasonable doubt."

Cal.3d 171, 215–217.) "The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof ... must be a demonstrable reality and not a speculative matter!" (*People v. Karis* (1988) 46 Cal.3d 612, 656.) We must give deference to the tactical decisions of trial counsel. (*People v. Mayfield* (1993) 5 Cal.4th 142, 199.) Competency is presumed unless the record affirmatively excludes a rational basis for trial counsel's choice. (*People v. Ray* (1996) 13 Cal.4th 313, 349.)

"[A] criminal defendant must also establish prejudice before he can obtain relief on an ineffective-assistance claim." (*Ledesma, supra*, 43 Cal.3d at p. 217.) Although prejudice is conclusively presumed in certain contexts, prejudice generally must be affirmatively proved. (*Ibid.*) "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. ... The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome!" (*Id.* at pp. 217–218.)

Prior to trial, the court stated it would allow defense counsel to ask the victim if she told police officers she had immigrant documentation. The court also stated questions about the victim's U-visa status were relevant for the jury to assess her credibility.

During a Evidence Code section 402 hearing, the victim stated she had not heard of a U-visa before someone mentioned it at her therapist's office after the rape incident. She said she did not understand a U-visa well, but the person told her she could get some

help, "something to be here." She said she did not know if she could obtain the U-visa or if it would benefit her or not.

At trial, the victim testified the police asked and she did not tell them she was documented. As such, defense counsel established indirectly the victim was an undocumented immigrant.

The victim stated she first learned about a U-visa during an examination several months before trial. The victim testified she met with lawyers. When asked if she is applying for the U-visa stating she is a rape victim, the victim responded, "That's what I was explained when I was taken to the center. But I'm not here for that." She stated she applied for the U-visa but did not know if she would qualify. The victim stated she understood she was cooperating with prosecutors in the case.

The court sustained objections to the phrasing of a series of questions about whether the victim had to cooperate with police to qualify for a U-visa, if cooperating would help with the U-visa, and whether the U-visa will help her stay in the country. Sanchez contends defense counsel was ineffective for failing to rephrase these questions to seek the victim's understanding rather than legal questions. Because of counsel's error, he claims "the jury never heard evidence that [the victim's] changing stories may have been caused by a desire to ensure that she was viewed as a crime victim" so she could obtain a U-visa "and remain in the country legally."

However, in closing statements, defense counsel made exactly this argument. Defense counsel argued the victim added accusations and details after she learned about applying for a U-visa as a rape victim, which counsel suggested would benefit her in the

immigration process. Defense counsel asked the jury to consider inconsistencies in the victim's accounts as well as the U-visa motive "to be classified as a rape victim." The jury had sufficient evidence to consider this defense argument.

Therefore, even if defense counsel was ineffective in failing to reformulate questions of the victim, Sanchez has not established a reasonable probability "that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Ledesma, supra*, 43 Cal.3d at pp. 217-218.)

V

Sanchez has not established the cumulative effect of combined errors requires reversal. The one or two errors that occurred during trial were harmless, when considered individually or collectively. Sanchez was "entitled to a fair trial but not a perfect one." (*People v. McDowell* (2012) 54 Cal.4th 395, 442; *People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

IRION, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

05/10/2018

KEVIN J. LANE, CLERK

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Deputy Clerk



APPENDIX - B

SUPREME COURT
FILED

JUL 18 2018

Jorge Navarrete Clerk

Court of Appeal, Fourth Appellate District, Division One - No. D071450

Deputy

S249282

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JOSUE ISRAEL SANCHEZ, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice