Supreme Court No. S192531
Second Appellate No. B222214
LA Sup. Ct. No. BA339453

# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| THE PEOPLE OF THE STATE OF CALIFORNIA<br><br>Plaintiff and Respondent,<br><br>vs.<br><br>JUAN JOSE VILLATORO,<br><br>Defendant and Appellant. | Case No. S192531<br><br>Second Appellate No. B222214<br><br>Los Angeles County Superior Court Case No. BA339453<br><br>Hon. William N. Sterling, Judge |

# OPENING BRIEF ON THE MERITS

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## STATEMENT OF THE CASE

The appeal in the present case arises out of convictions for five counts of rape by force or fear (§ 261, subd. (a)(2)), four counts of robbery (§ 211) and one count of kidnapping to commit another crime (§ 209, subd. (b)(1)) involving five complaining witnesses. (2 CT 282-291.) In connection with two of the rape counts, one of the robbery counts and the kidnapping count, the jury also found true the allegation that appellant, Juan Jose Villatoro ("Villatoro"), personally used a firearm in connection with each of the above offenses within the meaning of section 12022.53, subdivision (b). (2 CT 282-286.) With respect to the rape counts, the jury also found true the allegations that Villatoro committed offenses specified in section 667.61, subdivision (c) against more than one victim and that he personally used a dangerous or deadly weapon in committing the rapes. (2 CT 282-283, 286, 288, 290.) The jury acquitted Villatoro on one count of rape and one count of forcible sodomy. (2 CT 292-293.)

The trial court sentenced Villatoro to five terms of 25 years to life under section 667.61, subdivisions (a) and (e) on the rape counts. In addition, the court imposed the upper term of five years on one of the robbery counts and imposed one year terms of one-third the middle term on the remaining three robbery counts. Sentence on the kidnapping count was stayed under section 654. Finally, the court imposed two 10-year terms on the gun use enhancements under section 12022.53, subdivision (b). In total, Villatoro received an indeterminate sentence of life with

a minimum term of 125 years plus a determinate term of 28 years. (2 CT 338-340; 8 RT 3901-3904.)

The lower court imposed a restitution fine of $5,000.00 pursuant to Penal Code section 1202.4, as well as a parole restitution fine in an equal sum pursuant to section 1202.45. (2 CT 341; 8 RT 3904.) Villatoro was also ordered to pay a court security fee in the sum of $300 plus a sex offender fine of $1,500. (2 CT 341; 8 RT 3904.) The Court of Appeal affirmed the judgment. (*People v. Villatoro* (2011) 194 Cal.App.4th 241.) This court granted review on July 20, 2011.

## STATEMENT OF FACTS

**C.C.**

On February 10, 2008, at around 2:45 a.m., C.C. was waiting for a bus near Normandie and King. She had been at a friend's house and was planning to go to her mother's. (3 RT 921.) As she waited, an Hispanic male began to bother C.C. by harassing her and making perverted comments. (3 RT 922.) During this time, C.C. also saw a burgundy Intrepid or Impala parked at a nearby gas station. (3 RT 922.) At some point, Villatoro, the driver of the vehicle, made contact with C.C. and offered her a ride. (3 RT 922-923.) Because of the other man at the bus stop who had been harassing her, C.C. accepted Villatoro's offer of a ride. C.C. admitted that she had worked as a prostitute when she was 16 but denied that she was engaged in prostitution on February 10, 2008. (3 RT 923.)

C.C. got in the front seat of Villatoro's car and asked him to take her to Hollywood. He agreed. (3 RT 924.) C.C. and Villatoro talked for a while, and then C.C. noticed that Villatoro had not been driving to Hollywood but instead had driven to Santa Monica. (3 RT 925.) When C.C. asked Villatoro where they were going, he responded, "Don't worry. I know where I'm going." (3 RT 926.)

When C.C. told Villatoro that she needed to relieve herself, he pulled over along the side of the road and gave C.C. some baby wipes from his back seat. (3 RT 926-927.) Villatoro got out of the car after C.C. and approached her as she was pulling up her pants. C.C. jumped up and asked Villatoro if he was going to take her home, and he responded, "Yes." She then got back in the car. (3 RT 927.)

After C.C. and Villatoro were inside the car, he reached over to her with a taser gun and told her to take off her pants. Villatoro held the taser near C.C.'s throat, pressed the button and sparked the taser. This frightened C.C. (3 RT 928.) In response to Villatoro's command, C.C. removed her pants. Villatoro moved from the driver's seat over to the passenger seat and unzipped his pants as he was facing her. (3 RT 929.) Villatoro told C.C. not to look at him multiple times. (3 RT 930.)

Villatoro struck C.C. in the face and told her to cover her face with her shirt. After he unzipped his pants, he penetrated C.C.'s vagina. He also bit her nipple. C.C. did not know whether Villatoro was wearing a condom or whether he

ejaculated. (3 RT 930-931, 932.) After sexually assaulting C.C., Villatoro went through her pants and took her purse. He then told her "to get the fuck out of his car." (3 RT 932.) C.C. did not want to have sex with Villatoro and did not give him any indication that she wished to engage in intercourse with him. (3 RT 932.)

When C.C. opened the car door, Villatoro threw her pants out. C.C. got out of the car, put on her pants and ran to the nearby houses and began banging on the doors crying "Help me!" (3 RT 936.) A man who had been sleeping in his car flashed his lights, and C.C. went over, asked if she could call the police and told him she had been raped. The man called the police and waited with C.C. until the police arrived. (3 RT 936-937.)

C.C. was taken to the UCLA Rape Crisis Treatment Center and was examined by a nurse during which samples were taken from her genital area. (3 RT 937.) Later, C.C. had a follow up interview with a detective and was asked to help prepare a composite drawing of her attacker. (3 RT 938.)

On cross-examination, C.C. admitted to not wearing underwear on the night of her encounter with Villatoro; however, she denied agreeing to have sex with him for $40.00 or that the sex was consensual. (3 RT 978, 983.)

Michael Chun ("Chun"), a police officer in Santa Monica, received a rape call and was dispatched to the 400 block of Palisades Avenue in Santa Monica where he met C.C., who was crying and very emotional. (3 RT 1202-1203.) Chun interviewed C.C., and she told him what had happened to her. (3 RT 1208-1217.)

Chun also looked around the area and found some wet wipes on the grass near the curb. (3 RT 1208.)

C.C. was examined at the Santa Monica/U.C.L.A. Rape Treatment Center and provided a history similar to her testimony at trial. (6 RT 2137-2139.) The sexual assault examiner noted a bite mark and suction injury to C.C.'s left breast. The examiner also noted tenderness of the hymen as well as tenderness of the fossa navicularis (opening of the vagina). (6 RT 2139.) The examiner concluded that her findings were consistent with the history provided by C.C. (6 RT 2140.)

**N.G.**

During the early morning hours of June 21, 2006, N.G. and her sister were at her sister's boyfriend's house. When they left to go home, the two had an argument, and N.G. walked ahead of her sister. (3 RT 1238-1239.) When N.G. approached a bus stop at Olympic and Western, her sister was still behind her and across the street. (3 RT 1239-1240.) Near the bus stop, Villatoro drove up in a car, pointed a gun at N.G. and told her to get inside the vehicle.[1] (3 RT 1240-1241.) N.G. got inside the car because she was scared. (3 RT 1241.)

N.G. sat in the front passenger seat, and Villatoro drove through several intersections and then parked in a dark area. He then told N.G. not to look at him and pushed her face away so she could not see him. (3 RT 1241-1242.) Villatoro then pulled down his pants, got on top of N.G. and had sex with her. (3 RT 1243.)

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[1] In an interview with police, N.G. stated that Villatoro told her, "Get in the car or I will kill you." (3 RT 1385.)

During this time, he put the gun in the back seat and showed N.G. either a knife or a razor. (3 RT 1243-1244.) N.G. did not want to have sex with Villatoro nor did she agree to have sex with him nor give him any indication that this was something she wanted. The only reason she had sex with him was because he had a gun, and she was scared. (3 RT 1245.) During the encounter with Villatoro, his penis touched her vagina, and he touched her breasts with his hands. (3 RT 1247.)

Villatoro drove N.G. to a secluded residential area. Though only a five-minute drive from where Villatoro picked up N.G., it was darker and more isolated than the bus stop on Olympic and Western which was in a commercial area. (3 RT 1246.)

After Villatoro was finished having sex with N.G., he took her cell phone and her rings. He tried to take off her necklace but she told him it was stuck. (3 RT 1250.) Villatoro also took N.G.'s sunglasses. (3 RT 1255.) Then, Villatoro told N.G. to leave the car. She got out of the vehicle, and Villatoro drove away. (3 RT 1255.) N.G. saw a small movie set nearby and ran to the people there to get help. She spoke to a male security officer. N.G. was crying and upset, and she was concerned for the safety of her sister. (3 RT 1256, 1356-1357.) The police were called, and they came to the location. (3 RT 1257.)

N.G. was eventually taken to UCLA Santa Monica for medical treatment. There, she was examined by a nurse, and swabs were taken from her vagina, breast and other parts of her body. (3 RT 1258-1259.) N.G. admitted to working

as a prostitute after the incident but denied that she was engaged in prostitution on the night in question. (3 RT 1263-1264.) On cross-examination, N.G. admitted several convictions for prostitution. (3 RT 1268-1269.)

Sandra Wilson ("Wilson"), a family nurse practitioner at Santa Monica/U.C.L.A. Rape Treatment Center, who also worked as a sexual assault nurse examiner, examined N.G. on June 21, 2007. (6 RT 2117-2118, 2124-2125.) N.G. gave Wilson a history generally consistent with her trial testimony. (6 RT 2125-2127.) During the examination, Wilson collected vaginal swabs and noted the presence of motile sperm. (6 RT 2127.) Wilson also collected swabs from other areas where N.G. reported being kissed or licked. (6 RT 2127-2128.) Based on her examination of N.G., Wilson concluded that the examination was consistent with the history given to her by N.G. (6 RT 2128.)

**B.G.**

On February 3, 2008, at approximately 2:30 a.m., B.G. was working as a prostitute in the area of Western and 11th Streets in Los Angeles. (4 RT 1503-1504.) At that time, B.G. saw Villatoro pull up to two other working girls. When they did no get into Villatoro's car, he drove around the block, pulled up beside B.G. and asked, "How much?" B.G. responded, "A hundred dollars." Villatoro said, "Too much." He then drove away. (4 RT 1504.)

About 15 or 20 minutes later, Villatoro came by again and asked, "60?" B.G. again quoted one hundred dollars, and Villatoro drove away a second time.

(4 RT 1504-1505.) When Villatoro pulled up a third time, he said, "Okay. A hundred." B.G. then got in the front passenger seat of Villatoro's car, which she described as a burgundy Stratus or Concord. (4 RT 1505.) B.G. told Villatoro to take her to one of the hourly motels because she did not do "dates" in cars. (4 RT 1506.)

Villatoro did not take B.G. to a motel. After driving about three or four blocks, Villatoro said, "Police." B.G. then ducked down. Villatoro kept driving trying to find a back street, supposedly to get away from the police. (4 RT 1507.) Eventually, Villatoro stopped the car in a residential neighborhood where there were a lot of trees and no street lights. (4 RT 1507-1509.) Once the car stopped, Villatoro pulled a stun gun on B.G., put it to her neck and told her, "Don't move." (4 RT 1509-1510.) Villatoro screamed at B.G., "Don't look at me. Don't look at me" and threatened to kill her if she did. Villatoro also reached over with his right hand and pulled the passenger seat back. He then jumped over the seat, got on top of B.G. and threw her purse in the back seat. (4 RT 1510-1511.)

Villatoro pushed up B.G.'s skirt, moved her panties, and vaginally raped her. Whenever B.G. tried to look at him, Villatoro would slap her or spit in her face. (4 RT 1511.) Villatoro penetrated B.G. more than once. After initially penetrating her, Villatoro began to lose his erection. Each time he was unable to keep an erection, Villatoro became frustrated and slapped B.G. or spit on her. After he regained an erection, he tried to penetrate B.G.'s anus, but he was unable

to do so, and this frustrated him more. The entire encounter with Villatoro lasted about 15 minutes. (4 RT 1513.)

According to B.G., the normal procedure when she is working as a prostitute is that she is paid before engaging in any sexual acts. (4 RT 1511.) With Villatoro there was never a discussion of exchanging money and then they would have sex. (4 RT 1512.) When Villatoro had sex with her, B.G. did not want to do so. She had sex with him only because he had a stun gun, and she was terrified. (4 RT 1512.)

After the rape, Villatoro drove the car down the street three or four houses and then told B.G. to get out. He sparked the gun and opened the door, and she jumped out. B.G. tripped on the curb and then ran down the street. (4 RT 1512.) When she got out of the car, her personal property was still in the back seat and she never had a chance to recover it. (4 RT 1512-1513.) B.G. ran to a nearby Chevron gas station and telephoned her boyfriend. Her boyfriend came and took her to the hospital. (4 RT 1514.)

At the hospital, B.G. gave a false name because she had outstanding warrants for prostitution. She eventually spoke with police officers but did not tell the entire truth about what had happened because of the warrants. She told the police that she had been walking home from a party when someone grabbed her in an alley and raped her. (4 RT 1517.) Later, when she was contacted by a detective, B.G. told the truth about what had occurred. (4 RT 1518.)

**K.J.**

On April 4, 2008, K.J., fifteen years old, went with a female friend to a 7-11 store on Western Avenue and Maplewood Avenue between the evening and early morning hours. (5 RT 1878-1879.) After leaving the 7-11, K.J. returned to working as a prostitute in the area of Western and Maplewood where she saw Villatoro. (5 RT 1880-1881.) K.J. was standing on the corner, when Villatoro pulled up. K.J. walked up to the car, which was a burgundy Intrepid. Villatoro asked, "Are you police?" K.J. responded, "No." K.J. asked Villatoro if he was police, and he responded that he was not. K.J. then got in the front passenger seat. They then drove to a back street and parked in a dark area. (5 RT 1881-1882.)

Once they parked, Villatoro leaned K.J.'s seat back and jumped on top of her. He told her to shut up or he was going to kill her. He also told her not to say anything. Villatoro pulled out a stun gun and turned it on and off to scare her. (5 RT 1883.) Villatoro pushed K.J.'s head to the side toward the window and told her not to look at him or he was going to kill her. (5 RT 1884-1885.)

K.J. offered Villatoro a condom. Villatoro then pulled down her panties and skirt, took a minute, possibly to put on the condom, and then tried to put his penis inside her. (5 RT 1885.) Villatoro was able to put his penis inside K.J. but he was having difficulty in maintaining an erection. (5 RT 1887.) Villatoro rubbed his penis against K.J.'s vagina to get it hard. He tried to penetrate her three

times before he was successful. As he had intercourse with K.J., Villatoro kept pushing her head and telling her not to look at him. (5 RT 1887-1888.)

K.J. did not want to have sex with Villatoro. She did so only because she was forced to and did not have an option. (5 RT 1888-1889.) At the time of her encounter with Villatoro, K.J. was wearing jewelry. Villatoro took that jewelry as well as K.J.'s cell phone. (5 RT 1890.) After he finished having sex with K.J., Villatoro moved back to the driver's seat and then opened the passenger door. He pulled out the stun gun and said, "Hurry up and get out, get out." K.J. quickly jumped out of the car. (5 RT 1889.) K.J. ran down the street, screaming and hollering and knocking on doors. K.J. finally found her friend and told her what happened. K.J.'s friend called another friend who picked them up and took them to K.J.'s mother's house. K.J. then told her mother what had happened. (5 RT 1891-1892.) Later in the morning, K.J. and her mother went to the police station and made a report. (5 RT 1892.)

On cross-examination, K.J. admitted that she had agreed to have sexual intercourse with Villatoro for a sum of money. (5 RT 1902.) K.J. also conceded that she expected to have sex with him in his car. (5 RT 1903.)

On April 3, 2008, Robin Constable ("Constable") resided at 160 South Van Ness in Los Angeles County. (4 RT 1590-1591.) On that date, during the early morning hours between 4:15 and 4:30 a.m., Constable heard what he described as

a "gut wrenching" "primeval" scream from a female that woke up both him and his wife. (4 RT 1591.)

On April 3, 2008, Frank Military ("Military") lived at 202 South Van Ness Boulevard near Wilton Place and Second Street. (4 RT 1607.) At about 4:30 a.m. on that date, Military was awakened by shrill screaming and crying. He woke up, went to his bathroom window, which looks out onto Second Street and saw a woman crying and running down the street. (4 RT 1607-1608.)

Wilson, the sexual assault examiner, performed an examination on K.J. on April 4, 2008. (6 RT 2129.) Wilson obtained a history from K.J. that was generally consistent with her trial testimony. (6 RT 2130-2132.) In examining K.J., Wilson noted that she had small vaginal injuries, including bruising and tenderness of the hymen. (6 RT 2132.)

**R.I.**

On May 25, 2005[2], during the early morning hours, R.I. was in the area of Western and Beverly in Hollywood working as a prostitute. (5 RT 1824.) As she was working, Villatoro, who was driving in a car, approached R.I. and offered her money, specifically he asked if she wanted to have sex with him for money. (5 RT 1824-1826.) R.I. got in the car, and Villatoro drove to a dark, residential area near Windsor and Beverly. (5 RT 1827-1828.)

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[2] Though the district attorney referred to the date of April 25, 2005 in questioning Rowenna, the Information identified the date as May 25, 2005 (1 CT 149) and in questioning a detective who investigated the crime, the district attorney at that time used the date of May 25, 2005. (5 RT 1872.)

Villatoro stopped the car, reached behind the seat and pulled a gun. He told R.I. not to look at him and that he would kill her if she moved. (5 RT 1828.) Villatoro crawled over to the passenger side of the vehicle, got on top of R.I. and penetrated her vaginally and anally. (5 RT 1829-1830.) When Villatoro got off R.I., he told her to turn around and lay on her stomach. R.I. saw extension cords in the back seat. (5 RT 1831.) Initially, R.I. did not remember being whipped with the extension cords but recalled being treated for injuries at the hospital. (5 RT 1833.) R.I. recognized injuries to her back shown in a video but did not recall how she received them. However, she did not have the injuries when she got in Villatoro's car but did have them when she got out of it. (5 RT 1835-1836.) Later, when shown a written statement she had made, R.I. remembered that she had received the wounds to her back as the result of Villatoro whipping her with extension cords. (5 RT 1839-1840.)

R.I. got out of Villatoro's car when he told her to leave. (5 RT 1833.) When she had entered the vehicle, she had a cell phone. Villatoro took the phone and removed the battery. He did not give them back to her. (5 RT 1833-1834.)

On cross-examination, R.I. acknowledged that she had agreed to have sex with Villatoro for $80.00. However, R.I. claimed that Villatoro did not pay her. (5 RT 1846.)

R.I. was examined by a sexual assault examiner at the Santa Monica/U.C.L.A. Rape Treatment Center and provided a history of her assault that

was essentially the same as her testimony at trial. (6 RT 2135-2136.) The examiner's findings were consistent with the history R.I. provided to the examiner. (6 RT 2137.)

**DNA Evidence**

It was stipulated that C.C., K.J., R.I. and N.G. were examined by certified sexual assault examiners at the Santa Monica Rape Treatment Center and that, as part of the examinations, swabs were taken from areas where their assailant may have ejaculated or touched them with his mouth. It was also stipulated that a DNA profile was found in each of the following samples that did not belong to the respective woman sampled: (1) a swab taken from the left breast of C.C.; (2) sperm found in a vaginal swab taken from C.C.; (3) sperm found in a vaginal swab taken from K.J.; (4) sperm found in a vaginal swab taken from N.G.; and (5) sperm found in a vaginal swab taken from R.I. It was further stipulated that a DNA sample was taken from Villatoro on April 21, 2008. Villatoro's DNA profile matched the profile found on the vaginal swabs from C.C., K.J., R.I. and N.G. His profile also matched that found on C.C.'s breast. The parties also stipulated that "[i]n the absence of an identical twin, the DNA found on each of the women originated from Juan Villatoro." Finally, it was further stipulated that proper procedures were followed in the collection, storage, transportation and testing of the items tested. (5 RT 1933-1935.)

**Investigation**

Michael Cross ("Cross") worked at Sunny's Laundromat with Villatoro for a short time. (4 RT 1594-1595.) Cross acquired a stun gun from Villatoro. Cross had seen Villatoro with a stun gun in the office at the laundromat and asked him what it was. (4 RT 1595.) Cross asked Villatoro if he could get one for him. Villatoro said that he could get one for $40.00. A few days later, Villatoro got a stun gun for Cross. (4 RT 1596.)

Robert Heiserman ("Heiserman") was working as a Los Angeles police officer on April 19, 2008. Based on a crime bulletin, Heiserman was aware of a series of rapes in the area and the description of a suspect and car possibly involved – an Hispanic male, 25 to 30 years of age, mustache, driving a burgundy Dodge Intrepid, model years 1999-2003. Heiserman had also seen composite drawings of the suspect. (5 RT 1807-1808.)

At approximately 3:45 in the morning of April 19, Heiserman was on patrol in the area of Western and Hollywood. (5 RT 1806-1807.) At that time, he noticed a burgundy Dodge Intrepid with tinted windows. Based on the possible illegal tinting of the windows, Heiserman pulled over the vehicle. (5 RT 1810-1811.) The driver of the Intrepid was Villatoro. The Intrepid was consistent with the description of the vehicle, and Villatoro fit the descriptions and composite drawings of the rape suspect. (5 RT 1812.)

A search of Villatoro's car resulted in the discovery of a box of Huggies wet wipes in the backseat as well as the recovery of three women's bracelets and

an earring. (3 RT 1363.) Also found in the vehicle were a box cutter and a condom, and a bottle of perfume was found in the trunk. (3 RT 1363-1364, 1369.)

**Stun Gun Testimony**

John Wong ("Wong"), a Los Angeles police sergeant, testified that he had been trained in the use of stun guns and tasers. (6 RT 2182, 2220-2221.) Wong described a stun gun as a high voltage, low amperage device that discharges currents into a person's body. (6 RT 2221.) When discharged, a stun gun causes involuntary muscle contractions, loss of body control, pain, fatigue, disorientation and loss of balance. If a person is stunned for three seconds or more, he or she will fall to the ground. (6 RT 2222.) Wong was trained to use caution when using a taser or a stun gun due to the risk of injury or death in its use. (6 RT 2223.)

According to Wong, a person can be blinded by electrical current near their eyes. There is also a risk of fainting, seizure and heart attack associated with being tased or stunned. When a stun gun is used and touches the skin, it can result in burns, scarring, infection and risk of central nervous system injury and soft tissue damage. (6 RT 2224.)

**Defense Evidence**

Larry Smith ("Smith"), an expert witness in the areas of use of force, police misconduct and tasers, testified for the defense. (6 RT 2468.) Smith informed the jury that, when a taser is used to stun without probes being released to attach to the skin, this is called a "drive stun." (6 RT 2480-2481.) Smith testified that a drive

stun may result in a burn mark when the stun gun makes direct contact with the skin; however, a drive stun does not cause serious injuries. (6 RT 2481.) In his research of stun guns and tasers, Smith had never seen reports of any grave or serious bodily injuries or death attributable to the deployment of a drive stun or the use of a stun gun. (6 RT 2482.)

Smith researched the Storm stun device used by Villatoro and reviewed the literature put out by the manufacturer. (6 RT 2484-2485.) According to the manufacturer, touching an assailant will cause minor muscle spasm and a dazed mental state. These affects are temporary, and the Storm stun will not cause permanent injury. (6 RT 2486.) Smith stated that the reason for the lack of permanent injury is that the batteries to the device do not last long enough. (6 RT 2486-2487.) Smith opined that if the probe made contact with the eye, that would cause a problem; however, merely discharging the device on the cheek would not cause blindness. Also, holding the device to the chest would not cause a heart attack. (6 RT 2489.)

On cross-examination, Smith conceded that he would not stun himself on his temple, his neck or his genitals or near gasoline or electronic equipment or multiple times over a prolonged period because each of those things could cause serious injury. (7 RT 2740.)

# ARGUMENT

## I.

## THE MODIFIED CALCRIM No. 1191 INSTRUCTION THAT ADVISED THE JURORS THEY COULD CONSIDER CHARGED OFFENSES AS EVIDENCE OF THE DEFENDANT'S PROPENSITY TO COMMIT OTHER CHARGED OFFENSES WAS REVERSIBLE ERROR EVEN WHERE THE TRIAL COURT INSTRUCTED THAT ALL CHARGES HAD TO BE PROVED BEYOND A REASONABLE DOUBT

### A. Introduction

The jury was instructed with a modified version of CALCRIM No. 1191 as follows:

> The People presented evidence that the defendant committed the crime of rape as alleged in counts 2, 4, 7, 9, 12 and 15 and the crime of sodomy as alleged in count 14. These crimes are defined for you in the instructions for these crimes.
>
> If you decide that the defendant committed one of these charged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit the other charged crimes of rape or sodomy, and based on that decision also conclude that the defendant was likely to and did commit the other offenses of rape and sodomy charged. If you conclude that the defendant committed a charged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove the defendant is guilty of another charged offense. The People must still prove each element of every charge beyond a reasonable doubt and must prove it beyond a reasonable doubt before you may consider one charge as proof of specific intent of another charge. (2 CT 249.)

In *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016, this court held that CALJIC No. 2.50.01, the former propensity evidence instruction given in sex offense cases, correctly states the law and that it does not violate due process. In recent cases, the appellate courts have held that CALCRIM No. 1191 is sufficiently similar to the CALJIC No. 2.50.01 instruction so that it withstands the same constitutional challenges rejected in *Reliford.* (See e.g., *People v. Cromp* (2007) 153 Cal.App.4th 476, 480; *People v. Reyes* (2008) 160 Cal.App.4th 246, 253.)

In the present case, the trial court modified the standard CALCRIM No. 1191 instruction by permitting the jurors to consider the charged offenses as evidence of the defendant's propensity to commit other charged crimes. This was error because Evidence Code section 1108 permits juror consideration of only uncharged acts as evidence of a propensity to commit the charged offenses. It does not authorize jurors to consider charged acts as evidence of a propensity to commit other charged offenses.

In crafting Evidence Code section 1108, the Legislature expressly included a provision requiring trial courts to weigh the probative value of the other acts evidence against any potential prejudice under Evidence Code section 352. Since the evidence of the charged offenses is necessarily before the jurors and is not subject to exclusion under a section 352 analysis, it is apparent that the Legislature

did not intend section 1108 to apply to charged offenses. (*People v. Quintanilla* (2005) 132 Cal.App.4th 572, 579, 583.)

The modified propensity instruction given in this case also violated due process because a key consideration of this court in upholding the constitutionality of Evidence Code section 1108 was the protection against undue prejudice provided by the balancing of probative value versus prejudice under Evidence Code section 352. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.) As noted above, since charged offense evidence is not excludable under section 352, the safeguards of that statute do not apply to the evaluation of charged offenses as propensity evidence. Absent the protections of section 352, juror consideration of propensity evidence violates due process by rendering the defendant's trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70; *Spencer v. Texas* (1967) 385 U.S. 554, 560-561[87 S.Ct. 648, 17 L.Ed.2d 606].)

The modified CALCRIM No. 1191 instruction given in this case also interfered with the presumption of innocence and made conviction possible without proof beyond a reasonable doubt. Though the instruction advised the jurors that each charged offense had to be proved beyond a reasonable doubt, it failed to expressly advise the jurors as to what standard of proof applied to their consideration of the offense as propensity evidence. In the absence of such instruction, the jury could have used any standard of proof in determining that one

crime was sufficiently proved to show a propensity to commit other charged offenses.

## B. The Modified Instruction Guiding The Jury In Its Use Of Evidence Admitted Pursuant To Section 1108 Was Erroneous Because Evidence Code Section 1108, By Its Terms, Necessarily Applies Only To Uncharged Acts Evidence

In modifying CALCRIM No. 1191 to permit juror consideration of charged offenses as evidence of propensity to commit other charged offenses, the trial court in the present case ignored the clear language and intent of Evidence Code section 1108. That statute reads in relevant part as follows:

> (a) 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 Section 1101, if the evidence is not inadmissible pursuant to Section 352.
>
> (b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions of Section 1054.7 of the Penal Code.
>
> (c) This section shall not be construed to limit the admission or consideration of evidence under any other section of this code.

As can be seen, under the express language of subdivision (a) of section 1108, evidence is admissible for propensity purposes only if it "is not inadmissible pursuant to Section 352." Since charged offense evidence is necessarily highly

probative of the crime charged, it is not excludable under section 352. Given that the Legislature expressly required that propensity evidence be subjected to weighing under section 352, it is apparent that the Legislature intended for only uncharged acts evidence to be admissible to show propensity.

In *People v. Quintanilla, supra*, 132 Cal.App.4th at p. 572, the First District Court of Appeal considered the propriety of a modified CALJIC No. 2.50.02 instruction relating to the consideration of charged offenses to show propensity to commit other charged crimes. CALJIC No. 2.50.02 addresses the admissibility of domestic violence evidence in cases involving domestic violence and is analogous in all material respects with CALJIC No. 2.50.01, the sex offense propensity instruction.

In *Quintanilla*, the Attorney General argued that the language of Evidence Code section 1109 permits other crimes evidence whether those crimes are charged or uncharged. (*People v. Quintanilla, supra*, 132 Cal.App.4th at p. 583.) However, because that statute, like section 1108, conditions admissibility on a weighing of probative value versus prejudice, the First District concluded that "the statute does not contemplate the use of other charged offenses to prove a defendant's disposition to commit domestic violence." (*Ibid.*) This is so because "evidence relevant to other charged offenses cannot be excluded under section 352. Accordingly, the statute does not contemplate the use of other charged offenses to prove a defendant's disposition to commit domestic violence." (*Ibid.*)

In *People v. Wilson* (2008) 166 Cal.App.4th 1034, the Sixth Distrct rejected the holding in *Quintanilla* and observed that Evidence Code section 1108 "does not distinguish between charged and uncharged offenses." (*Id.* at p. 1052.) The Court of Appeal in the present case agreed with the *Wilson* court's interpretation of section 1108, noting that the statute "never mentions uncharged offenses" and refers instead to "evidence of 'another sexual offense or offenses.'" (*People v. Villatoro*, *supra*, 194 Cal.App.4th at p. 255.)

In this regard, the *Wilson* court and the Court of Appeal below are incorrect. While section 1108 may not expressly distinguish between charged and uncharged offenses, by incorporating the analysis required under section 352, the statute does effectively distinguish between charged and uncharged offenses. As noted above, only uncharged offenses would be subject to the analysis of probative value versus prejudice required for admissibility under section 352. (*People v. Quintanilla*, *supra*, 132 Cal.App.4th at p. 583.)

Beyond the express language of the statute which supports the interpretation of the *Quintanilla* court, the legislative history behind Evidence Code section 1108 also confirms that the Legislature intended the statute to apply to uncharged offenses as opposed to charged crimes. For example, in a bill analysis prepared for the Senate Committee on Criminal Procedure, one of the issues posed by Assembly Bill 882, which later became section 1108, was: "Should an exception . . . be made to allow the introduction of evidence of

***uncharged*** sexual acts to show that the defendant committed the sexual offense in question?" (Sen. Com. on Criminal Procedure, Analysis of Assem. Bill No. 882 (1995-1996 Reg. Sess.) as amended May 15, 1995, p. 2.) In describing the purpose behind the bill, the Senate analysis stated, "[t]he purpose of this bill is to allow in evidence that the defendant committed another sexual offense when the defendant is being prosecuted or sued for a sexual offense." (*Id.* at p. 3.)

In summary, since Evidence Code section 1108 mandates evaluation of propensity evidence under section 352 before it is admissible, it is apparent that the Legislature intended section 1108 to apply to uncharged acts evidence only and not to evidence of other charged offenses. As such, the trial court erred in this case in modifying CALCRIM No. 1191 to permit the jury to consider the charged offenses as evidence of propensity to commit the other charged offenses. This is true even though the trial court instructed the jury that each of the charged offenses had to be proved beyond a reasonable doubt. That the trial court reiterated the correct standard of proof does not obviate the error in permitting the jury to consider as propensity evidence, evidence of other charged offenses that the Legislature never intended to be considered under Evidence Code section 1108.

As noted by the court in *People v. Quintanilla*, *supra*, 132 Cal.App.4th at p. 580, "it is fundamentally unfair to allow the jury to infer the defendant's propensity to commit crimes of domestic violence from his commission of other

charged offenses." This is so because the other charged evidence is not excludable under section 352. The evidence of a particular charged offense may be highly prejudicial, particularly when used to show a predeliction to commit another sexual offense, especially one that is not nearly so serious. Mere reiteration of the instruction that all crimes must be proved beyond a reasonable doubt does not cure or reduce in any way the undue prejudice from the consideration of the other crimes evidence for purposes of propensity.

## C. Consideration Of Charged Offenses For Propensity Violates Due Process Because Such Evidence Is Not Excludable As Unduly Prejudicial Under Section 352

In *People v. Falsetta*, *supra*, 21 Cal.4th at p. 917, this court rejected a due process challenge to Evidence Code section 1108, finding that the statute was saved from unconstitutionality because it incorporates the balancing required under Evidence Code section 352. In reaching this conclusion, the *Falsetta* court acknowledged the longstanding rule against admission of propensity evidence but declined to find that rule a "fundamental unalterable constitutional principle" given the specific "ambivalence" about prohibiting other sex crimes evidence in sex offense cases. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 914; *see also*, *People v. Fitch* (1997) 55 Cal.App.4th 172, 179-181.) More importantly, this court found that section 352 shields section 1108 from unconstitutionality by protecting the defendant from the admission of unduly prejudicial evidence of prior bad acts. Specfically, this court stated the following:

> '[S]ection 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. Such evidence is still subject to exclusion under . . . section 352. [citation omitted.] By subjecting evidence of uncharged sexual misconduct to the weighing process of section 352, the Legislature has ensured that such evidence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. [citation omitted.] This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. [citation omitted.] *With this check upon the admission of evidence of uncharged sex offenses in prosecutions for sex crimes, we find that . . . section 1108 does not violate the due process clause.*'"

(*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 917-918, quoting *People v. Fitch* (1997) 55 Cal.App.4th 172, 183.)

In *People v. Quintanilla*, *supra*, 132 Cal.App.4th at p. 572, the First District Court of Appeal found error in a modified jury instruction involving the consideration of charged offenses to show propensity to commit other charged crimes of domestic violence. A key consideration of the *Quintanilla* court in determining that charged offenses were not to be considered as propensity evidence was its view that this court had relied heavily on the fact that evidence of other offenses may be excluded if unduly prejudicial when it upheld Evidence Code section 1108 in *Falsetta*. (*People v. Quintanilla*, *supra*, 132 Cal.App.4th at p. 572, 582.) Because "[e]vidence of other charged offenses cannot be excluded . . . no matter how prejudicial it may be," the *Quintanilla* court concluded that "it is

fundamentally unfair to allow the jury to infer the defendant's propensity to commit crimes of domestic violence from his commission of other charged offenses." (*Id.* at pp. 579-580.)

In the present case, the Court of Appeal determined that, while analysis under section 352 does not apply to the admissibility of charged offense evidence, that weighing of probative value versus undue prejudice should be undertaken in deciding whether the propensity evidence instruction should be given in connection with charged offenses. In this regard, the Court of Appeal below made the following observation:

> Although the appellate discussion of the competing probative and prejudicial factors has usually arisen in the context of the admissibility of *uncharged* offenses, we believe that the analysis has relevance when the trial court determines whether the jury is permitted to use evidence of one *charged* offense on the defendant's propensity to commit another *charged* offense. Even where a defendant is charged with multiple sex offenses, they may be dissimilar enough, or so remote and unconnected to each other, that the trial court could apply the criteria of section 352 and determine that it is not proper for the jury to consider one or more of the charged offenses as evidence that the defendant likely committed any of the other charged offenses. In those situations a modified CALCRIM No. 1191 instruction should not be given, or it may be appropriate to give only a modified version of CALCRIM No. 375 (evidence of uncharged offense to prove identity, intent, common plan, etc.). (See *Quintanilla, supra*, 132 Cal.App.4th at p. 586 (conc. opn. of Pollak, J.).)
>
> And even where multiple sex offenses are charged that pass muster under section 352, in some

> cases those charges might also be joined with unrelated or tangentially related offenses that do not. In short, before the jury can be instructed that its finding of guilt on a charged offense allows it to draw the propensity inference as to other charged offenses, the relationship between those offenses must be sufficient to justify drawing that inference.

(*People v. Villatoro*, *supra*, 194 Cal.App.4th at pp. 256-257.)

In upholding the modified CALCRIM No. 1191 instruction in this case, the Court of Appeal went on to conclude that, while the trial court did not enage in an explicit analysis under section 352, its reliance on the decision in *People v. Wilson*, *supra*, 166 Cal.App.4th at p. 1034, raised an inference that the weighing of probative value and prejudice had been undertaken since the trial court in *Wilson* had conducted the proper section 352 analysis before giving the propensity instruction in that case. (*People v. Villatoro*, *supra*, 194 Cal.App.4th at p. 257.)

The Court of Appeal was in error in inferring the section 352 analysis in this case. Other than the reliance on the *Wilson* decision, there is nothing in the record that indicates the trial court engaged in any of the balancing of probative value and prejudice required under section 352.

This court has made clear that, in admitting evidence of prior bad acts, the record must affirmatively show that the trial court weighed prejudice against probative value. (*People v. Wright* (1985) 39 Cal.3d 576, 582; *People v. Green* (1980) 27 Cal.3d 1, 25.) Though this court has held that an implicit weighing by the trial court may be inferred, such inferences have generally been based on the

arguments of counsel or the trial court's comments involving the issues of probative value and prejudice. (*People v. Garceau* (1993) 6 Cal.4th 140, 179; *People v. Clair* (1992) 2 Cal.4th 629, 660-661; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1016-1017; *People v. Montiel* (1985) 39 Cal.3d 910.)

In this case, neither the comments of the trial court nor the statements of counsel suggest that the trial court engaged in any type of balancing between probative value and prejudice in deciding whether to give the modified CALCRIM No. 1191 instruction. The parties did not argue whether any of the charged offenses were unduly prejudicial nor did the trial court make any mention of probative value or prejudice. Instead, the trial court simply noted that the modified CALCRIM No. 1191 instruction was "based on the instruction given in *Wilson*." (7 RT 2770.) Contrary to the Court of Appeal's conclusion, this brief reference to *Wilson* as the basis for the modified instruction raises no inference that the trial court engaged in the type of balancing of probative value versus undue prejudice required under section 352.

Since there was no indication that the trial court engaged in the proper balancing of probative value versus undue prejudice required under section 352, the giving of the modified propensity instruction in this case violated due process. Here, the protection of the section 352 analysis, which this court found to be vital in *People v. Falsetta*, *supra*, 21 Cal.4th at p. 903, was absent.

In *People v. Wilson*, *supra*, 166 Cal.App.4th at p. 1034, the Sixth District Court of Appeal considered and upheld a modified version of CALCRIM No. 1191 involving the jury's consideration of charged offenses. However, in *Wilson*, the instruction did not relate to the use of charged offenses for propensity but instead "for the limited purpose of determining the specific intent of the defendant in certain charged offenses." (*Id.* at p. 1045.) In effect, the amendment to CALCRIM No. 1191 at issue in *Wilson* transformed the instruction from one addressing the use of charged crimes as evidence of propensity to the use of such crimes in determining the defendant's mental state as relevant to other charged offenses. For this more limited purpose, the instruction at issue in *Wilson* did not implicate the defendant's constitutional right to the presumption of innocence and proof beyond a reasonable doubt. Thus, the *Wilson* opinion is distinguishable and is inapposite to issues in the present case.

That the jury was also instructed that the prosecution still had the burden to prove each element of the charged offenses beyond a reasonable doubt did not cure the error in the modified instruction. Were reasonable doubt instruction so remedial, there would never be error in the admission of unduly prejudicial evidence under section 352 since jurors are always admonished with the instruction that the prosecution bears the burden of proof to establish the charges beyond a reasonable doubt. (CALCRIM No. 220.) Despite this instruction, the admission of unduly prejudicial evidence that outweighs probative value is an

abuse of discretion and thus error. (See e.g., *People v. Leon* (2008) 161 Cal.App.4th 149, 169; *People v. Archer* (2000) 82 Cal.App.4th 1380, 1394.)

Here, the mere fact that the jurors were advised of the proper burden of proof as to each charged offense does not obviate the error in instructing that the charged offenses could be considered for propensity purposes. Consideration of evidence of a particularly inflammatory instance of charged misconduct as propensity may be highly prejudicial in impacting the jury's evaluation of less egregious charged offenses or offenses where the level of proof is less apparent. The prejudicial impact of the jury's consideration of the more serious charged offense results regardless of the fact that the jury is reminded that the prosecution bears the burden of proof on each charged crime. The jury is still invited to consider the highly inflammatory evidence as propensity to commit another, less egregious or potentially weaker charged offense. That the jury is reminded of the prosecution's burden of proof does not lessen the prejudicial impact of the consideration of the propensity evidence.

## D. The Modified Propensity Evidence Instruction Is Constitutionally Infirm Because It Interfered With The Presumption Of Innocence And Allowed The Jury To Infer Guilt And To Make A Finding Based On A Standard Of Proof Less Than Beyond A Reasonable Doubt

Under Evidence Code section 1108, the prosecution needs to prove prior misconduct by only a preponderance of the evidence. However, jury instructions concerning other crimes evidence must not abrogate the requirement of proof

beyond a reasonable doubt of all the elements of the charged offenses. Due process still requires that the jury be convinced beyond a reasonable doubt of the "ultimate fact" of the defendant's guilt of the crimes for which he is currently on trial. (*People v. Medina* (1995) 11 Cal.4th 694, 763-764; see also *People v. Lisenba* (1939) 14 Cal.2d 403, 430.)

Recognizing the failure of earlier versions of CALJIC Nos. 2.50.01 and 2.50.02 to meet these due process requirements, in 1999, the CALJIC drafters revised these two instructions to inform jurors that, although they may infer from the defendant's commission of prior offenses that he or she "did commit" the charged crimes, that is not sufficient by itself to prove beyond a reasonable doubt that he or she committed the charged offenses. (See *People v. Falsetta*, *supra*, 21 Cal.4th at pp. 923-924.)

To avoid any due process problems of the type initially encountered by CALJIC Nos. 2.50.01 and 2.50.02, the CALCRIM committee modified the language of CALJIC No. 2.50.01 and drafted CALCRIM No. 1191 in a way that advises jurors that "[i]f you decide that the defendant committed the uncharged offense[s], you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit [and did commit] <insert charged sex offense[s]>, as charged here." The modified CALCRIM No. 1191 instruction in the present case also advised jurors that "[i]t [*the other*

*charged sex offense evidence* ] is not sufficient by itself to prove that the defendant is guilty of another charged offense. The People must still prove each element of every charge beyond a reasonable doubt and must prove it beyond a reasonable doubt before you may consider one charge as proof of specific intent of another charge." (2 CT 249.)

The inclusion of these final sentences of the instruction failed to protect Villatoro's due process right to the presumption of innocence because the jury was not clearly advised that it had to find the charged offenses beyond a reasonable doubt before considering any of them as evidence of a propensity to commit other charged offenses. Instead, the instruction merely required the beyond a reasonable doubt finding before the jury could consider the evidence on the "specific intent of another charge."

In *People v. Quintanilla*, *supra*, 132 Cal.App.4th at p. 572, the First District Court of Appeal considered the propriety of a modified domestic violence instruction involving charged offenses as propensity to commit other charged crimes. In rejecting the consideration of charged offenses as propensity evidence, the *Quintanilla* court concluded that the Legislature did not intend for juries to weigh the evidence supporting domestic violence charges under two different standards of proof – preponderance of the evidence for propensity purposes and beyond a reasonable doubt in determining guilt of the charge. In *Quintanilla*, the modified instruction permitted the jury "to consider charged offenses under the

preponderance standard for purposes of drawing a propensity inference, while also weighing the same evidence under the reasonable doubt standard for purposes of deciding Quintanilla's guilt on each charge." (*People v. Quintanilla*, *supra*, 132 Cal.App.4th at p. 583.) The First District concluded that "[s]uch mental gymnastics may or may not be beyond a jury's ability to perform, but we are confident they are not required by section 1109." (*Ibid.*)

In the present case, though the modified CALCRIM No. 1191 instruction did not tell the jurors that the preponderance of the evidence standard applied to the determination of an offense for propensity purposes, there was still a deficiency in the instruction because it failed to inform the jurors of any standard to be applied to that evaluation. Instead, the instruction stated that the reasonable doubt standard applied to the consideration of the offense as proof of "specific intent of another charge." (2 CT 249.) No standard of proof was set forth with respect to a charged offense as evidence of propensity to commit another charged crime. In the absence of such instruction, the jury could have used any standard of proof or no standard in determining that one crime was sufficiently proved to show a propensity to commit other charged offenses.

Both the instruction in *Quintanilla* and that in the present case are confusing for jurors since in the former the jury was called upon to apply two different standards of proof to the same evidence, while in this case, the jurors were provided with no instruction on the proper standard of proof applicable to the

charged offenses as propensity evidence. The result was an interference with the presumption of innocence and the due process right to proof of each element of the charged offenses under the beyond a reasonable doubt standard of proof. (*In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368].)

In *Estelle v. Williams* (1976) 425 U.S. 501, 503, the United States Supreme Court observed that the "presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." (*Taylor v. Kentucky* (1978) 436 U.S. 478, quoting *Coffin v. United States* (1895) 156 U.S. 432, 453.) Though the Constitution does not mandate jury instructions to contain any specific language, it does require that they convey the presumption of the defendant's innocence and the prosecution's burden to establish guilt by proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 5 [114 S.Ct. 1239, 127 L.Ed.2d 583].)

In the present case, there is a reasonable likelihood that the jury construed CALCRIM No. 1191 as superseding the presumption of innocence, such that the presumption no longer applied once the other charged offense or offenses had been established by some degree of proof not specified in the instruction. Given the structure and language of the modified CALCRIM No. 1191, it is likely that

the jury reasonably interpreted the instruction to mean that the defendant, who has been charged with another sex offense, no longer has a presumption of innocence once the jury has determined, under an undefined standard of proof, that he committed any one of the other charged sex offenses. Instead, he is likely guilty, and any minimal amount of evidence supportive of any other sex crime is sufficient to convict.

By failing to clearly designate that the jury had to find each charged offense proved beyond a reasonable doubt before that offense could be considered as propensity to commit another charged offense, the modified CALCRIM No. 1191 instruction interfered with the presumption of innocence. With no clear guidance on the standard of proof applicable to the consideration of a charged offense as propensity evidence, a juror could have found an offense proved by only a preponderance of the evidence, and then based on that finding, could have applied the offense as propensity evidence to find guilt on another charged offense. In this process, the juror would likely have abandoned the presumption of innocence and would have initiated his or her evaluation of the other charged offense from the premise of a likelihood of Villatoro having committed that offense since the juror had already determined that Villatoro had committed another charged offense.

The effect of this type of reasoning would have been to deprive Villatoro of the presumption of innocence based solely on the juror's conclusion that he had committed another charged crime -- a conclusion reached not on a beyond a

reasonable doubt finding but one premised on the much lower preponderance standard or some other unknown criteria applied at the whim of the individual juror.

In addition, the failure to designate any clear standard of proof to the determination of a charged offense for propensity purposes also risked the type of confusion noted by the court in *People v. Quintanilla*, *supra*, 132 Cal.App.4th at p. 583. Here, without any guidance from the modified instruction, the jury was free to apply the preponderance of the evidence standard or any other standard to the determination of a charged offense for propensity purposes. The jury was then required to assess guilt of that charged offense under the reasonable doubt standard. As suggested by the *Quintanilla* court, such mental gymnastics are inappropriate in a criminal case where the defendant has a fundamental, constitutional right to a jury determination of all elements of the crime under the reasonable doubt standard of proof. (*In re Winship*, *supra*, 397 U.S. at p. 364 [90 S.Ct. at p. 1068, 25 L.Ed.2d at p. 368].) To the extent that the jurors applied a lesser, unknown standard to the propensity question, there was the very real and clear risk that this same undefined standard could have been then relied upon by the jurors, if only subconsciously, to the determination of guilt. The result of such reasoning would be a denial of the defendant's due process right to a jury verdict based on the reasonable doubt standard of proof. (*Victor v. Nebraska*, *supra*, 511 U.S. at p. 5 [114 S.Ct. at p. 1239, 127 L.Ed.2d at p. 583].)

## E. Reversal Is Required Under Any Possible Standard Of Prejudice

"[T]he essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 [113 S.Ct. 2078, 124 L.Ed.2d 182].) Such an error is considered structural in nature and is thus not subject to harmless error analysis. Reversal is constitutionally required. (*Id.* at pp. 280-282.) However, where the instruction is merely deemed "ambiguous," it will violate due process where there is a reasonable likelihood that the jury applied the instruction in a manner violative of the Constitution. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72 [112 S.Ct. at p. 475, 116 L.Ed.2d at p. 385].)

In the present case, the deficiencies in the modified CALCRIM No. 1191 are so significant that they resulted in a misdescription of the applicable standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281.) As a result, the error is reversible per se. However, should the problems with the modified CALCRIM No. 1191 constitute mere ambiguity, the judgment should nevertheless be reversed because respondent will be unable to show that the due process violation was harmless beyond a reasonable doubt.[3] (*Chapman v. California* (1967) 386 U.S.

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[3] Among those appellate courts which found constitutional deficiencies in the pre-1999 versions of CALJIC Nos. 2.50.01 and 2.50.02, there was a split of

18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) Finally, even if this court finds no denial of due process but simply a state law violation under Evidence Code section 1108, there is a reasonable likelihood that the jury would have reached a different outcome in the absence of the instructional error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

First of all, the evidence on some of the charged offenses was stronger than on others. While the DNA evidence showed Villatoro had engaged in vaginal intercourse with C.C., K.J., R.I. and N.G. (5 RT 1933-1935), there was no DNA evidence linking Villatoro to B.G. As such, the evidence on that rape count (count 12) was considerably less compelling than on the others. Further, the jury clearly had concerns about B.G.'s credibility given its rejection of her testimony that Villatoro had sodomized her and that he had raped her on a prior occasion a year earlier. (1 CT 159-160; 2 CT 292-293; 4 RT 1513, 1525-1526.) That the jurors had doubts concerning B.G.'s veracity is not surprising since she admitted that she initially gave a false name to the police and had originally told them that she had been walking home from a party when she was attacked and raped in an alley. (4 RT 1517.)

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authority as to the whether the error was reversible *per se* or subject to *Chapman* harmless error analysis. (See *People v. Vichroy* (1999) 76 Cal.App.4th 92, 100-101 and *People v. Orellano* (2000) 79 Cal.App.4th 179, 186 [error reversible *per se*]; *People v. James*, *supra*, 81 Cal.App.4th at pp. 1361-1365 [*Chapman* harmless error test applied].)

In addition, B.G. admitted that she was a prostitute and that she had agreed to enter Villatoro's car to engage in sex for money. (4 RT 1504-1505.) In light of this evidence suggesting a consensual encounter, as well as the lack of DNA evidence and the credibility issues raised by B.G.'s belated claim of an earlier rape, it is apparent that the jury's consideration of the other rape counts as propensity evidence likely had a significant impact on their determination of the B.G. rape count (count 7).

The propensity instruction also likely aided the prosecution's effort to convict Villatoro on several of the other rape counts. Like B.G., K.J. admitted that she was working as a prostitute when she encountered Villatoro and voluntarily got in his car. (5 RT 1880-1881.) She acknowledged on cross-examination that she had agreed to have sex with Villatoro for money and that she expected that this sexual activity would occur in Villatoro's car. (5 RT 1902-1903.)

R.I. also acknowledged that she was working as a prostitute when Villatoro approached her in his car. After Villatoro offered her money for sex, she got in his vehicle. (5 RT 1824-1826.) Though R.I. suffered injuries to her back, she initially could not recall how she had received those wounds and only later, when shown a written statement, did she assert that they were the result of Villatoro whipping her with extension cords. (5 RT 1839-1840.) On cross-examination, R.I. admitted that she had agreed to have sex with Villatoro for $80.00 though she claimed he did not pay her. (5 RT 1846.)

While C.C. denied working as a prostitute on the night she encountered Villatoro, she admitted that she had worked as a prostitute when she was 16 years old. (3 RT 923.) She also admitted that she was not wearing underwear on the night in question. (3 RT 978.) Similarly, though N.G. denied engaging in prostitution on the date she claimed Villatoro raped her, she admitted that she had worked as a prostitute after the incident and that she had several convictions for prostitution. (3 RT 1263-1264, 1268-1269.) Though both C.C. and N.G. denied working as prostitutes at the time they got into Villatoro's car, it should also be pointed out that each young woman was out on the street during the early hours of the morning at the time the alleged rapes occurred. (3 RT 921, 1238-1239.)

Given the credibility problems of each of the complaining witnesses, including their involvement in prostitution either on the night of the incidents or at other times, there is a reasonable probability that the modified CALCRIM No. 1191 instruction induced the jurors to ignore the deficiencies in the prosecution's evidence and to rely on the other charged incidents to overcome any reasonable doubts that they may have had regarding each individual count of rape. This is particularly true with respect to the B.G. count (count 7) since the jurors rejected the sodomy and other rape charge she alleged against Villatoro. Therefore, the instructional error in this case was prejudicial.

## CONCLUSION

Based on the preceding arguments, Villatoro urges this court to find that the modification of CALCRIM No. 1191 in this case constituted reversible error despite the fact that the instruction reiterated that the jurors must find the charged offenses proved beyond a reasonable doubt.

Dated:

Respectfully submitted,

_____

Edward J. Haggerty
Attorney for Appellant

## CERTIFICATE OF COMPLIANCE

In compliance with rule 8.520(c)(1) of the California Rules of Court, I certify that the word count generated by Microsoft Word 2010 for the foregoing brief is 10,621.

Dated:

Respectfully submitted,

_____

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Diamond Bar, CA 91765

Case No. B222214

I, the undersigned, say: I am over the age of 18, employed in the County of Los Angeles, State of California, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is 20955 Pathfinder Rd., Ste. 100, Diamond Bar, California. I served the **APPELLANT'S OPENING BRIEF ON THE MERITS** of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

SEE ATTACHED SERVICE LIST

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Rowland Heights, California, on August 26, 2011.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 26, 2011 at Diamond Bar, California.

_____
Edward J. Haggerty

## PROOF OF SERVICE LIST

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