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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

REPLY BRIEF ON THE MERITS

Edward J. Haggerty, 125779
Edward J. Haggerty, P.C.
20955 Pathfinder Road, Ste. 100
Diamond Bar, CA 91765
(626) 912-5551
(909) 843-6488

Attorney for Appellant,
Juan Jose Villatoro

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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

REPLY BRIEF ON THE MERITS

Edward J. Haggerty, 125779
Edward J. Haggerty, P.C.
20955 Pathfinder Road, Ste. 100
Diamond Bar, CA 91765
(626) 912-5551
(909) 843-6488

Attorney for Appellant,
Juan Jose Villatoro

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. SUPREME COURT CASES

CALIFORNIA SUPREME COURT CASES

CALIFORNIA APPELLATE COURT CASES

CALIFORNIA STATUTES

COURT RULES

JURY INSTRUCTIONS

INTRODUCTION

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.) 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.)

Following affirmance by the Court of Appeal, this court granted review on the following question: Was the modification of CALJIC (sic) No. 1191, which told the jurors they could consider evidence of a charged offense in determining defendant's propensity to commit the other charged offenses (see Evid. Code, § 1108), reversible error when the court also informed the jurors that all charged offenses must be proved beyond a reasonable doubt?

The modification of CALCRIM No. 1191 was error because Evidence Code section 1108, by its terms, necessarily applies only to uncharged acts evidence. Further, since charged offenses cannot be excluded under Evidence Code section 352, consideration of charged offenses for propensity violates due process. 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 because the instruction failed to expressly advise the jurors as to what standard of proof applied to their consideration of an offense as propensity evidence.

ARGUMENT

I.

INSTRUCTION THAT THE JURORS COULD CONSIDER CHARGED OFFENSES FOR PROPENSITY PURPOSES WAS REVERSIBLE ERROR DESPITE THE FURTHER INSTRUCTION THAT ALL CHARGES HAD TO BE PROVED BEYOND A REASONABLE DOUBT

A. Since, By Its Terms, Evidence Code Section 1108 Necessarily Applies Only To Uncharged Acts, The Modified Propensity Instruction Was Erroneous

In modifying the CALCRIM No. 1191 propensity instruction, the trial court allowed the jurors to consider charged offenses as evidence of the defendant's proclivity to commit other charged crimes. This was in direct violation of the terms of Evidence Code section 1108 which provides for juror consideration of only uncharged acts as evidence of a propensity. That the Legislature intended only uncharged offenses as propensity evidence is manifest from the express

requirement that trial courts are to weigh the probative value of the other acts evidence against any potential prejudice under Evidence Code section 352 prior to determining admissibility. Evidence of the charged offenses is necessarily before the jurors, and it cannot be excluded under section 352 since its probative value will always outweigh its prejudicial impact. Therefore, the Legislature necessarily intended that section 1108 would apply only to uncharged offenses. (*People v. Quintanilla* (2005) 132 Cal.App.4th 572, 579, 583.) (Appellant's opening brief, pp. 21-25.)

Respondent disputes this interpretation of Evidence Code section 1108. According to respondent, the plain wording of section 1108 does not distinguish between charged and uncharged sexual offenses. (Respondent's brief, pp. 10-17.) Noting that the Legislature used the word "another" in reference to sexual offenses as opposed to "uncharged," respondent claims that the legislative intent was clearly to permit the admission of both charged and uncharged offenses to demonstrate propensity. (Respondent's brief, p. 12.) Respondent also argues that charged offenses should be admissible to prove propensity under section 1108 because charged crimes have been held to be admissible to demonstrate intent, motive, etc. under Evidence Code section 1101, subdivision (b). (Respondent's brief, pp. 12-14.) Finally, respondent asserts that the opinion in *Quintanilla* was in error because that court effectively rewrote the statute by inserting the word "uncharged" into section 1108. (Respondent's brief, p. 16.)

In arguing that the plain language of section 1108 does not distinguish between charged and uncharged offenses, respondent effectively ignores the language of the statute that expressly calls for application of the balancing of probative value versus prejudice under Evidence Code section 352. Under the express terms of section 1108, subdivision (a), evidence is admissible to demonstrate propensity only if it "is not inadmissible pursuant to Section 352." Charged offense evidence is necessarily highly probative of the crime charged. As a consequence, evidence of a charged offense is not excludable under section 352. Thus, since the Legislature explicitly has mandated that propensity evidence be subjected to the section 352 balancing analysis, the Legislature must have intended that only uncharged acts evidence would be admissible to show propensity under section 1108.

In *People v. Quintanilla*, *supra*, 132 Cal.App.4th at p. 572, the Attorney General asserted the same argument as that present here, namely that the language of the analogous Evidence Code section 1109 permits the admission of other crimes evidence for propensity whether those crimes are charged or uncharged. (*People v. Quintanilla*, *supra*, 132 Cal.App.4th at p. 583.) The First District in *Quintanilla* rejected this contention because section 1109, like section 1108, makes a weighing of probative value versus prejudice a condition to admissibility of propensity evidence. Since "evidence relevant to other charged offenses cannot be excluded under section 352 . . . the statute does not contemplate the use of other

charged offenses to prove a defendant's disposition to commit domestic violence." (*Ibid.*)

Respondent criticizes the holding in *Quintanilla* by contending that the First District effectively amended the statute to insert the word "uncharged" as a modifier of "domestic violence" in section 1109. According to respondent, this form of judicial amendment violates a basic principle of statutory construction which dictates that courts are not to add language to statutes. (Respondent's brief, p. 16, citing *People v. Guzman* (2005) 35 Cal.4th 577, 587.) However, the *Quintanilla* court did not add any verbiage to section 1109. Rather, it simply construed that statute as necessarily applying only to uncharged offenses because only uncharged offenses could be subject to the weighing of probative value versus prejudice required under section 352. Since the Legislature required such weighing before other evidence was admissible for propensity purposes, charged offenses were necessarily, if implicitly, excluded from the provisions of both sections 1108 and 1109. This is the holding of *Quintanilla* and is not a rewrite of the statute to incorporate the word "uncharged."

Respondent's claim that the Legislature's use of the adjective "another" instead of "uncharged" demonstrates its intent that charged offenses may be considered for propensity likewise fails for the reasons set forth above and in the *Quintanilla* opinion. That the Legislature referred to "another sexual offense or offenses" does not mean that it intended for both charged and uncharged offenses

to be admissible for propensity. The express inclusion of the weighing process under section 352 demonstrates that the Legislature implicitly excluded charged offenses as propensity since the evidence of such an offense would be more probative than prejudicial given its nature as the object of prosecution.

With respect to respondent's argument that charged offenses have been held to be admissible to show motive, identity, intent, etc. under Evidence Code section 1101, subdivision (b), that contention ignores the fundamental difference between consideration of evidence for a discreet purpose such as intent or identity and for the more significant determination of propensity. In the case of section 1101, subdivision (b), the jury is simply allowed to rely on evidence of the other charged offense to establish a disputed matter in issue such as motive, intent or identity. With respect to section 1108, consideration of a charged offense for propensity allows the jury to conclude that the defendant has a proclivity to commit the other charged offenses and that he was likely to and did commit those offenses. This is a much more significant conclusion than those permitted under section 1101, subdivision (b). As such, respondent's analogy to that statute is inapposite.

B. The Exclusion Of Charged Offenses For Propensity Purposes Can Be Harmonized With The General Policy In Favor Of Joinder

Respondent argues that construction of Penal Code section 1108 to exclude charged offenses as propensity evidence is inconsistent with California's preference for joinder of offenses as evidenced by Penal Code section 954 and specifically section 784.7 which permits consolidation of certain sex offenses committed in different counties for purposes of a single trial. (Respondent's brief, pp. 17-20.) Respondent is incorrect. Joinder of separate sex offense charges involving separate victims would not be deterred by precluding consideration of charged offenses for propensity. Prosecutors could still join the various sex crimes in a single action; they simply could not rely on each of the separate charges as evidence of propensity in relation to the other offenses.

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

In *People v. Falsetta* (1999) 21 Cal.4th 903, 917, this court found that Evidence Code section 352 shields section 1108 from unconstitutionality by protecting the defendant from the admission of unduly prejudicial evidence of prior bad acts. Since evidence of other charged offenses cannot be excluded regardless of how prejudicial, it is fundamentally unfair to allow the jury to infer the defendant's propensity to commit sex crimes based on his commission of other charged sex offenses. (Appellant's opening brief, pp. 25-31.) Respondent

disagrees and contends that, while section 352 analysis cannot apply to the admissibility of charged offense evidence, the weighing of probative value versus undue prejudice may be undertaken in deciding whether the charged offenses may be considered for propensity purposes and whether the jury should be so instructed. In this way, Evidence Code section 352 remains pertinent to the consideration of charged offenses for propensity so that due process is not violated. (Respondent's brief, pp. 21-22.)

The problem with respondent's argument is that section 1108 does not provide for a section 352 analysis in determining whether to instruct on an offense as propensity evidence. Instead, the statute talks about other sexual offenses as being ***admissible*** "if the evidence is not inadmissible pursuant to Section 352." As noted previously, evidence of another charged offense is always admissible given its probative value in proving the offense. There is nothing in the language of section 1108 which suggests that courts are to undertake a section 352 analysis to determine whether the jury should be instructed to consider other charged offenses for propensity.

Further, Evidence Code section 352, by its express terms, is a statute governing the exclusion of evidence. It makes no mention of the consideration of evidence for propensity purposes or whether instruction should be provided to jurors concerning propensity.

In arguing for the weighing of probative value versus prejudice in deciding whether to instruct on charged offenses for propensity, respondent can cite no authority for the trial court to undertake such an analysis. This lack of express authorization in section 1108 is a further indication that the Legislature did not intend for charged offenses to be considered for propensity purposes.

In *People v. Falsetta*, *supra*, 21 Cal.4th at p. 903, this court held that the availability of exclusion of other offense evidence under section 352 preserved section 1108 from unconstitutionality. Exclusion of other charged offense evidence is not possible under section 352 because such evidence is inherently more probative than prejudicial. Since there is no authorization for a section 352 analysis to determine whether charged offenses should be considered as propensity evidence, section 352 cannot serve to salvage section 1108 as applied to charged offenses. Therefore, in the context of charged offenses, section 1108 violates due process.

D. The Modified CALCRIM No. 1191 Instruction Interfered With The Presumption Of Innocence Because It Permitted The Jury To Infer Guilt Based On A Standard Of Proof Less Than Beyond A Reasonable Doubt

The modified CALCRIM No. 1191 instruction given in the present case advised the 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.) These last two sentences of the instruction were insufficient to protect Villatoro's right to the presumption of innocence and his 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].) This is so because the instruction failed to advise the jurors that they had to find the charged offenses were proved beyond a reasonable doubt before they could be considered as proof of a propensity to commit other charged offenses. The instruction merely required the beyond a reasonable doubt finding before the jury could consider the evidence on the "specific intent of another charge." (Appellant's opening brief, pp. 31-37.)

Respondent claims that there was no denial of the presumption of innocence or the beyond a reasonable doubt standard of proof because the jurors were instructed that the propensity inference was available only if they "decide[d] that the defendant committed a charged offense." (Respondent's brief, p. 29.) However, this begs the question of what standard of proof the jurors were to apply in making that decision. The modified CALCRIM No. 1191 instruction does not clearly specify that the standard is beyond a reasonable doubt before the other offense may be considered for propensity purposes. Indeed, no mention was made as to what standard of proof applied to the jury's determination of a charged offense as evidence of propensity. The lack of instruction as to the pertinent

standard of proof to apply before other crimes evidence could be considered for propensity left a vacuum into which the jurors could have employed any standard or none at all in determining that one crime was sufficiently proved to show a propensity to commit other charged offenses.

A similar concern was raised by the court in *People v. Quintanilla*, *supra*, 132 Cal.App.4th at p. 572. There, a modified domestic violence instruction allowed the jury to use the preponderance standard for drawing a propensity inference but the reasonable doubt standard for purposes of deciding the defendant's guilt. (*People v. Quintanilla*, *supra*, 132 Cal.App.4th at p. 583.) The *Quintanilla* court found error in these conflicting standards of proof and determined that the Legislature did not intend for juries to evaluate the evidence under two different standards of proof.

Respondent criticizes the holding in *Quintanilla* and argues that jurors are capable of applying different standards of proof for different purposes. (Respondent's brief, p. 28.) However, this debate is beside the point because, in the present case, the jury was provided with no standard of proof with which to evaluate other crimes for propensity purposes. There is nothing in the modified CALCRIM No. 1191 that advised the jurors of any standard to be applied to that evaluation. Such instruction was necessarily confusing for jurors because they were provided with no guidance on this crucial determination. In the absence of a

clear standard, the jurors were free to consider other crimes evidence without any identifiable degree of proof for doing so.

Another serious consequence of the failure of the modified instruction to set forth an explicit standard of proof for the propensity determination is that it risked the jury concluding that the presumption of innocence as to the other charges no longer existed upon the jury's conclusion that another charged offense had been proved under some undefined standard of proof. A fair reading of the modified CALCRIM No. 1191 instruction could lead a lay juror to conclude that, once the defendant is determined to have committed any charged offense under an undefined standard of proof, then the presumption of innocence as to the other charged crimes no longer applies and he is likely guilty so that even a minimal quantum of proof is sufficient to convict him.

Even if the jurors did not abandon the presumption of innocence as a result of the modified propensity instruction, there was still the very real and clear risk that the undefined standard used in making the propensity determination then could have been employed 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* (1994) 511 U.S. 1, 5 [114 S.Ct. 1239, 127 L.Ed.2d 583].)

E. The Erroneous Propensity Instruction Was Prejudicial

An error in misdescribing the standard of proof amounts to structural error and is reversible per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 [113 S.Ct. 2078, 124 L.Ed.2d 182].) However, where the instruction is merely deemed "ambiguous," and there is a reasonable likelihood that the jury applied the instruction in a manner violative of the Constitution, the error is reversible unless respondent can show that it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) A mere state law violation under Evidence Code section 1108 warrants reversal if 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.)

Under either the *Chapman* or *Watson* standards of prejudice, the instructional error in this case was prejudicial. (Appellant's opening brief, pp. 38-41.) Respondent disagrees and asserts that the error was harmless because there is no reasonable likelihood of a different outcome even in the absence of the challenged instruction given the overwhelming evidence of Villatoro's guilt. (Respondent's brief, p. 30.)

Respondent's characterization of the conclusiveness of the prosecution's case is exaggerated. Though DNA evidence showed that 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 connecting Villatoro to the rape of B.G. Thus, the evidence on the

B.G. rape count (count 12) was considerably weaker than on the others. In addition, the jurors were skeptical of B.G.'s credibility which they demonstrated in rejecting 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.)

B.G. also acknowledged that she was a prostitute and that she had entered Villatoro's car for the purpose of exchanging sex for money. (4 RT 1504-1505.) The combination of this evidence of a consensual encounter, the lack of DNA evidence and the skepticism created by B.G.'s belated claim of an earlier rape, there is a reasonable likelihood that the jury would not have convicted Villatoro of the B.G. rape in the absence of the erroneous propensity instruction.

The propensity instruction likely contributed to several of the other rape convictions as well. For example, K.J. also admitted that she was working as a prostitute when she voluntarily got into Villatoro's car. (5 RT 1880-1881.) She also testified that she had agreed to have sex with Villatoro for money and that this activity was to take place in Villatoro's car. (5 RT 1902-1903.)

Similarly, R.I. was also working as a prostitute when Villatoro approached her in his car. She got in his vehicle voluntarily in the expectation of engaging in sex for money. (5 RT 1824-1826.) R.I. initially was unable to recall how she received injuries to her back. Only after she was shown a written statement did

she inform the jury that these wounds were the result of Villatoro whipping her with extension cords. (5 RT 1839-1840.)

C.C. denied engaging in prostitution on the night she encountered Villatoro, but she testified that she had worked as a prostitute when she was 16 years old. (3 RT 923.) She also conceded that she was not wearing underwear on the night in question. (3 RT 978.) N.G. denied engaging in prostitution on the date she claimed Villatoro raped her, but 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.) Further, both C.C. and N.G. were out on the street during the early morning hours at the time the alleged rapes occurred. (3 RT 921, 1238-1239.)

In summary, each of the complaining witnesses suffered from credibility problems arising out of their histories of prostitution and/or the consensual nature of their initial contacts with Villatoro. Under these circumstances, there is a strong likelihood that the modified CALCRIM No. 1191 instruction persuaded at least some jurors to disregard the weaknesses in the prosecution's evidence and to rely on the other charged incidents to overcome any reasonable doubts that they may have had regarding an individual count. This was especially likely in regard to the B.G. count (count 7) since the jurors refused to convict on 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 3,625.

Dated:

Respectfully submitted,

_____

Edward J. Haggerty
Attorney for Appellant

PROOF OF SERVICE

Edward J. Haggerty, P.C.
20955 Pathfinder Road, Suite 100
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 REPLY 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 December 3, 2011.

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

Executed on December 3, 2011 at Diamond Bar, California.

_____
Edward J. Haggerty

PROOF OF SERVICE LIST

Clerk of the Court
Second Appellate Dist., Div. Eight
300 South Spring Street
Los Angeles, CA 90013

Office of the Attorney General
300 South Spring Street
North Tower, Suite 5001
Los Angeles, CA 90013

California Appellate Project
Los Angeles Office
520 South Grand Avenue
Fourth Floor
Los Angeles, CA 90071

Hon. William N. Sterling
Los Angeles County Superior Court
210 West Temple Street
Los Angeles, California 90012

Ms. Ann Marie Wise, Esq.
Office of the District Attorney
210 West Temple Street, Room 17-1007
Los Angeles, CA 90012

Mr. Juan Jose Villatoro, AC5230
H.D.S.P., B-5-115
P.O. Box 3030
Susanville, CA 96127