Filed 10/30/03

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER ANTHONY GUTIERREZ, Defendant and Appellant.	B160082 (Los Angeles County Super. Ct. No. BA223060)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael E. Pastor, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

---

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III B., C., D., E., and F.

I. Introduction

Defendant Christopher Anthony Gutierrez was convicted by a jury of forcible oral copulation and forcible sexual penetration with a foreign object while acting in concert. Prior to trial, Gutierrez moved for *Pitchess*[1] disclosure of information in the personnel records of the two officers who arrested him. The trial court declined to conduct an in camera hearing, finding Gutierrez had failed to establish good cause as required by Evidence Code section 1043, subdivision (b)(3).

Gutierrez contends that the statutory *Pitchess* framework, as applied in criminal cases, conflicts with the principles expressed in *Brady v. Maryland* (1963) 373 U.S. 83, in violation of his due process rights. According to Gutierrez, the statutory *Pitchess* procedures (1) impermissibly interfere with the prosecutor's duty to ascertain and disclose material, exculpatory evidence to the defense, and (2) improperly place upon the defendant the burden of establishing good cause for *Brady* disclosure. Gutierrez further contends that the trial court erred by admitting evidence of his prior conviction pursuant to Evidence Code section 1108, a statute he complains is unconstitutional; admitting hearsay evidence; and instructing the jury with CALJIC Nos. 2.50.02 and 17.41.1.

In the published portion of this opinion, we reject Gutierrez's claims that the statutory *Pitchess* procedures run afoul of *Brady*. In the unpublished portion of the opinion, we reject Gutierrez's other claims. Accordingly, we affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts.*

On August 12, 2001, shortly before midnight, the victim, Sandra C., was working as a prostitute. Gutierrez and Robert Ruiz were driving in a Honda Civic when they encountered Sandra and agreed to pay her $15 or $20 for sexual services for both of them. Sandra entered the car and directed them to drive to a motel, but Ruiz, who was driving, took her to another location. When Sandra entered the Honda, she stated, "I get paid first." Gutierrez replied, "Shut up, bitch. Bitch, you're going to do what we tell you

---

[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

to do." He put his hand around Sandra's throat and shoved her back into the car, causing abrasions on her shoulder. Gutierrez lowered his pants. Sandra remained huddled in the corner of the car and asked whether Gutierrez was going to hurt her. He replied, "No. As long as you do what we tell you to do." Gutierrez forced her to orally copulate him and digitally penetrated her vagina. From comments made by Gutierrez and Ruiz, Sandra surmised they were armed with a gun. She was afraid of them. Ruiz at one point stated, "What do we do if the cops come[?]" Gutierrez replied, "We'll just blast them. You got your nine?" Ruiz replied affirmatively. When Sandra pleaded to leave and promised not to tell police about the incident, Gutierrez replied, "No. You're just gonna do what we tell to you do [*sic*]." Ruiz also forced her to orally copulate him while Gutierrez digitally penetrated her anus. Gutierrez then forcibly removed all Sandra's clothing and Ruiz attempted to rape her. Ruiz stated, "Ah, man, she got a good look at our face. What are we gonna do now?" Gutierrez did not reply but forced Sandra to orally copulate him again. During this episode, when Sandra saw the lights of passing cars, she attempted to exit the Honda, but was prevented by Gutierrez.

Officer Jason Schwab of the Los Angeles Police Department and his partner were on patrol in the area and pulled alongside Gutierrez's car. When Schwab illuminated the Honda with a spotlight, Sandra pulled her head from Gutierrez's lap area, jumped from the vehicle, naked and "hysterical," and said, "Help me. They're raping me." She informed Schwab that the men had a gun. When Sandra had raised her head before jumping out of the vehicle, Gutierrez had attempted to push her head back down. According to Schwab, prostitutes normally do not completely disrobe when working in vehicles, in order to make it "harder for vice to try to catch them." Sandra's dress, missing its straps, and her bra were found in the Honda. No gun was discovered. The two men only had $6.10 in cash between them.

Ruiz pleaded guilty to rape in concert in exchange for a three year prison sentence. Part of the plea agreement was that Ruiz would testify truthfully and completely at all future proceedings regarding the incident. Sandra's whereabouts were unknown at the

time of trial, and she did not testify. Her statements to Officer Schwab recounting the incident were admitted into evidence as spontaneous statements.

B. *Procedure.*

Trial was by jury. Gutierrez was found guilty of forcible sexual penetration by a foreign object while acting in concert (Pen. Code, § 264.1)[2] and two counts of forcible oral copulation (§ 288a, subd. (c)(2)). The jury acquitted Gutierrez of rape while acting in concert, of one count of forcible sexual penetration by a foreign object, and of unlawfully driving or taking a vehicle. In a bifurcated proceeding, the trial court found true allegations that Gutierrez had suffered a prior "strike" conviction for attempted murder (§§ 667, subds. (b) – (i), 1170.12, subds. (a) – (d), 667, subd. (a)(1)). The trial court further found Gutierrez had served one prior prison term within the meaning of section 667.5, subdivision (b). It denied his *Romero*[3] motion to strike a prior conviction allegation and sentenced him to a total term of 55 years in state prison. It also imposed restitution, parole revocation, and other fines. Gutierrez appeals.

III. DISCUSSION

A. *California's statutory Pitchess scheme does not infringe upon Gutierrez's due process rights or violate Brady v. Maryland.*

1. *Additional facts.*

Gutierrez filed a pretrial *Pitchess* motion seeking disclosure of personnel and administrative records of Officer Schwab and his partner, Officer Farell, "concerning any acts involving falsification of testimony, fabrication of evidence, false police reports, perjury, aggressive behavior, racial or gender bias," and actual or attempted violence and excessive force. Defense counsel's supporting declaration averred that the requested discovery was material and relevant because the encounter between Gutierrez and Sandra was consensual; Sandra was alleging rape as a way to avoid prosecution for prostitution; and the arresting officers were "lying when they allege [Gutierrez] was holding the

---

[2] All further undesignated statutory references are to the Penal Code.

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

victim's head down forcibly . . . in order to bolster victim's rape claim." In his memorandum of points and authorities in support of the requested disclosure, Gutierrez argued, "*Pitchess* compliance must include and be consistent with the defendant's constitutional right to *Brady* evidence." The Los Angeles Police Department opposed the motion.

The trial court denied the *Pitchess* motion because Gutierrez had failed to show good cause. Gutierrez's allegations, the trial court found, amounted to nothing more than a general denial of the charges, and the theory advanced in his moving papers was implausible. The trial court pointed out that officers would have been unlikely to fabricate the fact that Gutierrez held the victim's head down because such action was not an element of the crime.

2. *Discussion.*

Gutierrez urges that his convictions must be reversed because the trial court failed "to order full disclosure of police officer character evidence under *Brady v. Maryland.*" He does not challenge the trial court's finding that he failed to establish good cause for the disclosure.[4] Instead, he contends that the statutory *Pitchess* procedures (sections 832.5, 832.7, 832.8, and Evidence Code sections 1043 and 1045) unconstitutionally infringe upon his due process rights in three respects. First, he asserts, "*Brady* dictates more generous discovery than *Pitchess,*" and to the extent the statutory *Pitchess* scheme shields *Brady* evidence from disclosure, the *Pitchess* provisions are invalid. Second, he posits that *Brady* imposes upon prosecutors a duty to examine the personnel records of "all significant police officer witnesses" and disclose any exculpatory or impeaching information. The statutory *Pitchess* procedures, he complains, undercut the prosecutor's ability to carry out these duties. Third, he argues the statutory scheme impermissibly burdens a defendant by requiring that he or she establish good cause for disclosure of information that the prosecutor is already under a duty to disclose. For these reasons, he contends, the *Pitchess* procedures are unconstitutional when applied in criminal cases.

---

[4] Accordingly, we express no opinion on the question of whether Gutierrez established good cause for the requested in camera review.

We disagree.[5] Gutierrez's claims are foreclosed by the California Supreme Court's recent decisions in *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1 (*Brandon*) and *Alford v. Superior Court* (2003) 29 Cal.4th 1033.

a. *Brady disclosure.*

Under *Brady, supra,* 373 U.S. at page 87, a prosecutor must disclose any evidence that is favorable to the defendant and material on the issues of guilt or punishment. (*Brandon, supra,* 29 Cal.4th at p. 7; *People v. Jordan* (2003) 108 Cal.App.4th 349, 358.) The *Brady* disclosure obligation encompasses both impeachment and exculpatory evidence, and exists regardless of whether the defendant makes a specific request for the information. (*Strickler v. Greene* (1999) 527 U.S. 263, 280; *United States v. Bagley* (1985) 473 U.S. 667, 676; *Brandon, supra,* at p. 8; *In re Brown* (1998) 17 Cal.4th 873, 879.) "The scope of this disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge 'any favorable evidence known to the others acting on the government's behalf[,]" including the police. (*In re Brown, supra,* at p. 879; *Strickler v. Greene, supra,* 527 U.S. at pp. 280-281; *Kyles v. Whitley* (1995) 514 U.S. 419, 437-438.)

Evidence is material under *Brady* if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. (*Brandon, supra,* at pp. 7-8; *Strickler v. Greene, supra,* 527 U.S. at pp. 289-290.) "A 'reasonable

---

[5] The People argue that Gutierrez has waived his claim that the *Pitchess* procedures are unconstitutional because he did not raise it below. However, as noted, Gutierrez's memorandum of points and authorities in support of his *Pitchess* motion argued that "*Pitchess* compliance must include and be consistent with the defendant's constitutional right to *Brady* evidence" and "the due process rights guaranteed by the U.S. Constitution and explained by *Brady* cannot be limited or restricted by state law." This argument sufficiently raised the issue to preserve it for review. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *People v. Scott* (1978) 21 Cal.3d 284, 290 [objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide; in a criminal case, an objection will be deemed preserved if, despite inadequate phrasing, the record shows the court understood the issue presented].) Moreover, we may consider for the first time on appeal a pure question of law which is presented by undisputed facts. (*People v. Yeoman* (2003) 31 Cal.4th 93, 118.)

probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' [Citation.]" (*Kyles v. Whitley, supra,* 514 U.S. at p. 434; *In re Brown, supra,* 17 Cal.4th at p. 886.) "Although *Brady* disclosure issues may arise 'in advance of,' 'during,' or 'after trial' [citation], the test is always the same. [Citation.] *Brady* materiality is a 'constitutional standard' required to ensure that nondisclosure will not 'result in the denial of defendant's [due process] right to a fair trial.' [Citation.]" (*Brandon, supra,* at p. 8.) *Brady,* however, does not require the disclosure of information that is of mere speculative value. "[T]he prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense." (*In re Littlefield* (1993) 5 Cal.4th 122, 135, italics omitted; *Kyles v. Whitley, supra,* 514 U.S. at pp. 436-437; *People v. Jordan, supra,* 108 Cal.App.4th at p. 361.) *Brady* did not create a general constitutional right to discovery in a criminal case. (*People v. Jordan, supra,* 108 Cal.App.4th at p. 361.)

b. *Pitchess disclosure.*

"For approximately a quarter-century our trial courts have entertained what have become known as *Pitchess* motions, screening law enforcement personnel files in camera for evidence that may be relevant to a criminal defendant's defense." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1225, fn. omitted.) In 1978, the Legislature codified the *Pitchess* privileges and procedures, and they are now embodied in sections 832.5, 832.7 and 832.8, and Evidence Code sections 1043 through 1047. (*People v. Mooc, supra,* 26 Cal.4th at p. 1226; *Alford v. Superior Court, supra,* 29 Cal.4th at p. 1037; *Brandon, supra,* at pp. 8-9.) This statutory scheme provides that peace officer personnel records are confidential and may be discovered only pursuant to the procedures set forth in the Evidence Code. (*Alford, supra,* at pp. 1037-1038; *Brandon, supra,* at p. 9.) Evidence Code sections 1043 and 1045 establish a two-step procedure for a criminal defendant's discovery of peace officer records. (*California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1019.) First, pursuant to Evidence Code section 1043, the defendant must file a written motion for discovery, including a description of the type of information sought, and supported by affidavits showing, among other things, good cause

for the discovery and setting forth the materiality of the requested information to the subject matter of the pending litigation. (*People v. Mooc, supra,* 26 Cal.4th at p. 1226; *California Highway Patrol, supra,* 84 Cal.App.4th at p. 1019.) The threshold for discovery embodied in Evidence Code section 1043 is "relatively low." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83 (*City of Santa Cruz*); *Brandon, supra,* 29 Cal.4th at p. 10.) The accused " 'may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial.' [Citation.] In contrast to the detailed showing required by some civil discovery statutes [citations], the requisite showing in a criminal matter 'may be satisfied by general allegations which establish some cause for discovery' other than a mere desire for all information in the possession of the prosecution." (*City of Santa Cruz, supra,* 49 Cal.3d at pp. 84-85; *Brandon, supra,* 29 Cal.4th at p. 14.)

If a defendant shows good cause, the trial court examines the relevant materials in camera to determine whether disclosure should be made. (Evid. Code, § 1045, subd. (b); *People v. Mooc, supra,* 26 Cal.4th at p. 1226; *City of Santa Cruz, supra,* 49 Cal.3d at p. 83.) The "relatively relaxed" standards for a showing of good cause under Evidence Code section 1043, subdivision (b), i.e., "materiality" to the subject matter of the pending litigation and a "reasonable belief" that the agency has the type of information sought, insure that all potentially relevant documents will be produced for inspection. Evidence Code section 1045's in camera review procedure and disclosure guidelines, on the other hand, balance the officer's privacy interests against the defendant's need for disclosure. (*Alford v. Superior Court, supra,* 29 Cal.4th at p. 1039.)

c. *The statutory Pitchess procedure does not unconstitutionally infringe upon Gutierrez's due process rights.*

Gutierrez must meet a heavy burden to prevail upon his claim that the statutory *Pitchess* procedures are unconstitutional. (*Brandon, supra,* at p. 10.) " 'The courts will presume a statute is constitutional unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity.' [Citations.]" (*Id.* at pp. 10-11.)

Contrary to Gutierrez's assertion, the *Pitchess* scheme does not unconstitutionally trump a defendant's right to exculpatory evidence as delineated in *Brady.* Instead, the two schemes operate in tandem. "*Pitchess* . . . and its statutory progeny are based on the premise that evidence contained in a law enforcement officer's personnel file may be relevant to an accused's criminal defense and that to withhold such relevant evidence from the defendant would violate the accused's due process right to a fair trial." (*People v. Mooc, supra,* 26 Cal.4th at p. 1227.) *Brandon* rejected a claim that Evidence Code 1045's five-year limitation on discovery was contrary to *Brady* and violated a defendant's right to due process. (*Brandon, supra,* 29 Cal.4th at pp. 11-12.) *Brandon* explained, the " ' "*Pitchess* process" operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information.' " (*Brandon, supra,* at p. 14; see also *People v. Mooc, supra,* 26 Cal.4th at p. 1225 [*Pitchess* procedural mechanism "must be viewed against the larger background of the prosecution's constitutional obligation to disclose to a defendant material exculpatory evidence so as not to infringe the defendant's right to a fair trial"].)

In other words, the statutory *Pitchess* procedures implement *Brady* rather than undercut it, because a defendant who cannot meet the less stringent *Pitchess* standard cannot establish *Brady* materiality. "Our state statutory scheme allowing defense discovery of certain officer personnel records creates both a broader and lower threshold for disclosure than does the high court's decision in *Brady, supra,* 373 U.S. 83. Unlike *Brady,* California's *Pitchess* discovery scheme entitles a defendant to information that will 'facilitate the ascertainment of the facts' at trial [citation], that is, 'all information pertinent to the defense' [citation]." (*Brandon, supra,* at p. 14.) To obtain disclosure "[u]nder *Pitchess*, a defendant need only show that the information sought is material 'to the subject matter involved in the pending litigation.' [Citation.] *Because Brady's constitutional materiality standard is narrower than the Pitchess requirements, any citizen complaint that meets Brady's test of materiality necessarily meets the relevance standard for disclosure under Pitchess.* [Citation.]" (*Brandon, supra,* at p. 10, italics added.) Thus, if a defendant meets the good cause requirement for *Pitchess* discovery,

any *Brady* material in an officer's file will necessarily be included. Stated conversely, if a defendant cannot meet the less stringent *Pitchess* materiality standard, he or she cannot meet the more taxing *Brady* materiality requirement. Therefore, Gutierrez's premise, that "*Brady* dictates more generous discovery than *Pitchess,*" is flawed in respect to the issue presented here.[6]

Gutierrez's assertion that the prosecutor was obliged to conduct a review of the files of "all significant police officer witnesses" and disclose any *Brady* material likewise fails. The *Pitchess* procedure is the only avenue by which citizen complaints may be discovered. (*People v. Jordan, supra,* 108 Cal.App.4th at p. 360.) *Alford* held that a prosecutor is not entitled to the fruits of a successful *Pitchess* motion made by the defense. (*Alford, supra,* 29 Cal.4th at p. 1046.) While the prosecution is free to seek such information by bringing its own *Pitchess* motion in compliance with the procedures set forth in Evidence Code sections 1043 and 1045, "[a]bsent such compliance . . . *peace officer personnel records retain their confidentially vis-à-vis the prosecution*." (*Alford, supra,* 29 Cal.4th at p. 1046, italics added.) Given *Alford*'s limitation on disclosure to prosecutors, the *Brady* review suggested by Gutierrez is not tenable. As we recently explained in *People v. Jordan, supra,* 108 Cal.App.4th at p. 358, a "prosecutor's duty under *Brady* to disclose material exculpatory evidence applies to evidence the prosecutor, or the prosecution team, *knowingly possesses or has the right to possess*" that is "actually or constructively in its possession or accessible to it." (Italics added.) Because under *Alford* the prosecutor does not generally have the right to possess and does not have access to confidential peace officer files, Gutierrez's argument for routine review of the complete files of all police officer witnesses in a criminal proceeding necessarily fails.

Gutierrez's further argument that the statutory *Pitchess* scheme offends constitutional due process by requiring that a defendant establish good cause for the

---

[6] *Brady* discovery is broader than *Pitchess* discovery, of course, in the sense that the statutory *Pitchess* scheme applies only to peace and custodial officer records, whereas *Brady*'s mandates apply to all exculpatory or impeaching evidence, whether or not related to the conduct or records of officers.

disclosure of evidence the prosecution is already "under a pre-existing obligation to provide," is likewise unavailing. First, as we have explained, *Alford*'s holding obviously prohibits a prosecutor from routinely reviewing peace officer personnel files, and therefore implicitly suggests that imposition of the *Pitchess* good cause requirement is constitutional.

Second, a demonstration of materiality is a valid prerequisite to the disclosure of evidence in conditionally privileged state agency files, such as the peace officer records at issue here. In *Pennsylvania v. Ritchie* (1987) 480 U.S. 39 (*Ritchie*), the defendant was charged with molesting his 13-year-old daughter. He sought disclosure of reports compiled by the state protective services agency that had investigated the charges. Because the records were conditionally privileged under Pennsylvania law, the agency refused to disclose them. The Supreme Court held that the defendant's right to discover exculpatory evidence did not "include the unsupervised authority to search through" the state's files. (*Id.* at p. 59.) Both the defendant's and the state's interest could be protected by requiring that the files be submitted to the trial court for an in camera review, in which the court could ascertain whether the records contained *Brady* material, i.e., evidence that probably would have changed the outcome of his trial. (*Id*. at pp. 57-61.) Most significant here, the Court further clarified: "[the defendant], of course, may not require the trial court to search through the [agency] file without first establishing a basis for his claim that it contains material evidence." (*Id.* at p. 58, fn. 15; *Brandon, supra,* 29 Cal.4th at pp. 14-15 [citing *Ritchie*].)

The material at issue here is conditionally privileged under California law. The *Pitchess* statutory scheme " 'carefully balances two directly conflicting interests: the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to his defense.' " (*Alford, supra,* 29 Cal.4th at p. 1039 [quoting *City of Santa Cruz, supra,* 49 Cal.3d at pp. 81-84].) Therefore, *Brady* is not violated by requiring disclosure only after an in camera review conditioned upon a showing of materiality. (*Brandon, supra,* at p. 15.) Accordingly, we discern no constitutional infirmity in the statutory *Pitchess* procedures.

B. *Admission of evidence of Gutierrez's prior conviction was proper.*

1. *Additional facts.*

Over objection, the prosecutor was allowed to elicit evidence that Gutierrez attempted sexual offenses against a former neighbor approximately 11 years before the instant crimes. The trial court considered various factors, including the similarity of the two crimes, the prior crime's remoteness, and the nature of Gutierrez's defense, and concluded that the evidence of the prior crimes had "extreme probative value" and was not unduly prejudicial under Evidence Code section 352. Accordingly, it found the evidence admissible under both Evidence Code sections 1101, subdivision (b), and 1108. The trial court excluded evidence that Gutierrez had injured the victim's two children after demanding sexual acts from the victim in the earlier incident.

Consistent with the trial court's ruling, Griselda A. testified that in 1990, Gutierrez lived in an apartment neighboring hers. On December 29, 1990, at approximately midnight, Gutierrez knocked on her door and requested help with a purported emergency involving his son. When Griselda opened the door, Gutierrez displayed a knife, grabbed her by the throat, forced her into a bedroom, and ordered her to remove her clothing because he wished to have sexual relations with her. He told her that if she removed her clothing he would not hurt her. She struggled and he stabbed her twice and beat her, causing black eyes and bruises. Griselda attempted to telephone for help, but lost consciousness. Gutierrez was gone when she woke up. The parties stipulated that Gutierrez was convicted of attempted murder and two counts of assault with a deadly weapon, for which he was sentenced to 12 years in prison.

2. *Discussion.*

Gutierrez asserts that evidence of the crimes against Griselda was inadmissible under Evidence Code section 1101, subdivision (b) and was unduly prejudicial and therefore inadmissible under Evidence Code section 1108. We disagree.

Evidence Code section 1101 generally precludes admission of evidence about a defendant's prior misconduct to show a propensity to commit the charged offense. Evidence Code section 1108, however, provides an exception to this principle. Evidence

Code section 1108 provides in pertinent part: "(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 [Evidence Code] Section 1101, if the evidence is not inadmissible pursuant to Section 352." The import of Evidence Code section 1108 is that a jury may now consider evidence of prior sex crimes " '*for any relevant purpose*' [citation], subject only to the prejudicial effect versus probative value weighing process required by [Evidence Code] section 352." (*People v. Britt* (2002) 104 Cal.App.4th 500, 505; *People v. Falsetta* (1999) 21 Cal.4th 903, 912; *People v. Reliford* (2003) 29 Cal.4th 1007, 1013.)

A determination under Evidence Code section 352 is entrusted to the sound discretion of the trial court and will not be overturned except upon a finding of manifest abuse, i.e., a conclusion that the decision was "palpably arbitrary, capricious and patently absurd." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314; *People v. Waidla* (2000) 22 Cal.4th 690, 724.) Evidence is substantially more prejudicial than probative if it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome (*People v. Waidla, supra,* at p. 724), and uniquely tends to evoke an emotional bias against the defendant without regard to relevance. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 650.) Among the factors a trial court may consider are the nature of the prior misconduct, its relevance to the current proceeding, its remoteness, the degree of certainty the defendant committed the uncharged offense, the likelihood of confusing or distracting jurors from the main inquiry before them, the similarity of the prior offense to the charged offense, the burden on the defendant in defending against the prior offense, the existence of less prejudicial alternatives, and the possible exclusion of inflammatory details surrounding the offense. (*People v. Falsetta, supra,* 21 Cal.4th at p. 917.)

The evidence of the crimes against Griselda A. was not unduly prejudicial. "Evidence of a prior sexual offense is indisputably relevant in a prosecution for another sexual offense." (*People v. Fitch* (1997) 55 Cal.App.4th 172, 179.) This was especially true in the instant case, where Gutierrez's defense was consent. Gutierrez was convicted of the prior offense, avoiding any risk the jury would be distracted by having to make a

separate determination whether Gutierrez committed the attack on Griselda. (*People v. Falsetta, supra,* 21 Cal.4th at p. 917.) The trial court exercised its discretion to eliminate inflammatory details when it excised from Griselda's testimony any mention that her children were present or were beaten by Gutierrez.

Moreover, the fact that the jury knew Gutierrez had been convicted and sentenced to prison for the offenses against Griselda reduced any prejudicial effect. (*People v. Steele* (2002) 27 Cal.4th 1230, 1245; *People v. Falsetta, supra,* at p. 917.) The prior crime occurred in 1990, whereas the current offense occurred in 2001. However, "the passage of a substantial length of time does not automatically render the prior incidents prejudicial." (*People v. Soto* (1998) 64 Cal.App.4th 966, 991; *People v. Steele, supra,* 27 Cal.4th at p. 1245 [although prior killing occurred 17 years prior to charged killing, time lapse did not compel a finding of prejudice].) Because Gutierrez was convicted of the prior crime and was incarcerated during much of the intervening time between the two offenses, the lapse of time is less significant. (*People v. Steele, supra,* at p. 1245.)

Gutierrez argues that the offenses against Griselda were more egregious than those committed against Sandra, and therefore their admission was prejudicial. We are unconvinced. On the one hand, Griselda was stabbed and beaten, whereas Sandra did not suffer serious injury. The offense against Griselda was an unprovoked attack against an innocent woman, begun when Gutierrez used a ruse to prey upon the victim's willingness to assist a neighbor. The assault on Sandra began as a consensual transaction between a prostitute and a customer. On the other hand, Sandra was actually and repeatedly sexually assaulted, whereas Gutierrez's attempt to sexually assault Griselda was thwarted. Force was used against Sandra: she was lured into a car where she was outmatched by two adult men, whom she reasonably believed had guns; Gutierrez pushed and choked her. We believe Gutierrez makes too much of the fact that Sandra was a prostitute who had initially agreed to a sexual transaction with the defendants. This was not a situation where she simply did not receive payment after a consensual encounter. Shortly after she entered the car, it became apparent that she was not in control of the situation and would be physically forced to do whatever the men said, similar to the

situation faced by any sexual assault victim. Given the totality of the facts, we cannot say that the offenses against Griselda were so much more egregious that a finding of prejudice was required as a matter of law. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405; cf. *People v. Harris* (1998) 60 Cal.App.4th 727, 737-738, 744 [where evidence of prior sex crime was inflammatory in the extreme, it should have been excluded under Evidence Code section 352].) In sum, the record demonstrates that the trial court appropriately weighed prejudice against probative value and fulfilled its responsibilities under Evidence Code section 352. (*People v. Jennings, supra,* 81 Cal.App.4th at p. 1315.)

Because we conclude the evidence was properly admitted under Evidence Code section 1108, we find it unnecessary to consider whether it was also properly admitted pursuant to Evidence Code section 1101, subdivision (b). (*People v. Britt, supra,* 104 Cal.App.4th at p. 505.)

C. *Evidence Code section 1108 does not violate a defendant's due process or equal protection rights.*

Gutierrez next complains that Evidence Code section 1108 violates a defendant's due process and equal protection rights. He acknowledges that *People v. Falsetta, supra,* 21 Cal.4th at p. 916, rejected a due process challenge to section 1108. He urges, however, that *Falsetta* must be reconsidered in light of *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, reversed on other grounds, 123 C. St. 1398, in which, Gutierrez argues, "the Ninth Circuit held [that] using other crimes evidence to infer criminal propensity violates the Due Process Clause." The simple answer to Gutierrez's argument is that we are bound to follow the decisions of the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Conversely, we are not bound by the decisions of the lower federal courts. (*People v. Cleveland* (2001) 25 Cal.4th 466, 480; *People v. Bradford* (1997) 15 Cal.4th 1229, 1292.)

Moreover, *Garceau* does not conflict with *Falsetta.* Garceau was charged with the murder of his girlfriend and her son. Evidence was admitted that he had previously manufactured illegal drugs and murdered his drug partner. The California trial court erroneously instructed the jury that it could consider the prior crimes evidence for any

purpose, including the defendant's criminal disposition. (*Id.* at p. 773.) The California Supreme Court concluded this error was harmless. (*Id.* at p. 776.) The Ninth Circuit disagreed, concluding that the "express propensity instruction" violated the defendant's due process rights. (*Id.* at p. 775.) However, *Garceau* did not address the use of propensity evidence in the unique context of sexual crimes, and thus is not helpful to Gutierrez. To the contrary, *United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018, found a federal rule allowing evidence of prior child molestation did *not* violate a defendant's due process rights. (*Id.* at p. 1025-1027.)

Gutierrez's equal protection claim is similarly unavailing. *People v. Fitch, supra,* 55 Cal.App.4th 172, rejected an identical equal protection challenge to Evidence Code section 1108. (*Id.* at p. 184.) *Fitch* reasoned that section 1108, a statute creating two classifications of accused or convicted defendants without implicating a constitutional right, was subject to a rational-basis analysis. The Legislature's determination -- that the serious, secretive nature of sex offenses justified the admission of relevant evidence of a defendant's prior sex offenses --provided a rational basis for the law. (*Ibid.*) *Fitch* was favorably mentioned in *People v. Falsetta, supra,* 21 Cal.4th at page 918, and other decisions are in accord. (E.g., *People v. Waples* (2000) 79 Cal.App.4th 1389, 1394-1395; cf. *People v. Jennings, supra,* 81 Cal.App.4th at pp. 1310-1311 [holding that Evidence Code section 1109's parallel provision allowing admission of prior domestic violence evidence does not violate equal protection principles].) *Fitch*'s reasoning is persuasive, and we adopt it here. Accordingly, we conclude Gutierrez's constitutional challenges to Evidence Code section 1108 lack merit.

D. *The victim's statements were properly admitted as spontaneous statements.*

1. *Additional facts.*

Prior to trial, the trial court held a hearing pursuant to Evidence Code section 402 to determine the admissibility of the victim's statements to police under the spontaneous statement exception to the hearsay rule (Evid. Code, § 1240). Officer Schwab testified to Sandra's description of events consistent with his eventual trial testimony, set forth *supra.* When Sandra first saw the patrol car and pulled her head up, she appeared

"visibly upset." When she immediately jumped from the car, yelling, " 'they're raping me,' " she was completely naked, crying, trembling, and "appeared extremely upset." After the officers detained the men, and within two to five minutes after Sandra initially jumped from the car, she told Schwab what had happened. At that point, "She was still crying. Her eyes were filled with tears. She was visibly upset. Trembling. She kept thanking [the officers] for showing up." At the crime scene, Sandra "was telling everything at once 'cause she was upset." She provided the entire account of what had transpired while talking to police at the scene, within one half hour of her initial escape from the car. Schwab continued to talk to her on the way to the hospital to try to determine the chronological order of events. On the drive to the hospital, she was "still upset, but she was going out of moods now of being angry that it had taken place, apologizing to us, thanking us for showing up." She still had tears in her eyes and her voice was trembling. After considering the relevant factors, the trial court ruled that Sandra's statements at the scene and in the patrol car on the way to the hospital were admissible as spontaneous statements pursuant to Evidence Code section 1240.

2. *Discussion.*

Evidence Code section 1240 provides an exception to the hearsay rule for spontaneous statements. That statute provides: " 'Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) was made spontaneously while the declarant was under the stress of excitement caused by such perception.' " In order to qualify as a spontaneous declaration, " '(1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' " (*People v. Poggi* (1988) 45 Cal.3d 306, 318; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 590.) A statement that meets these requirements is deemed sufficiently trustworthy to be admitted

as evidence of the truth of the matter asserted despite its hearsay nature. (*Rufo v. Simpson, supra,* at p. 590.) Neither the lapse of time nor the fact that the statements were made in response to questioning deprives the statements of spontaneity, " 'if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance.' " (*People v. Raley* (1992) 2 Cal.4th 870, 893; *People v. Poggi, supra,* at p. 319.)

Whether the requirements of section 1240 are met is a question of fact largely within the discretion of the trial court. (*People v. Poggi, supra,* at p. 318; *Rufo v. Simpson, supra,* 86 Cal.App.4th at p. 590.) The trial court's finding will not be disturbed on appeal unless the facts upon which it relied are not supported by a preponderance of evidence. (*People v. Trimble* (1992) 5 Cal.App.4th 1225, 1234.)

Here, sufficient evidence supported the trial court's ruling. Certainly being forced to perform sexual acts by two men whom the victim reasonably believed were armed with a gun would have been a startling and stressful event. While Sandra initially agreed to perform the sexual acts for money, the situation drastically changed when Gutierrez refused to pay her, choked her, told her she would do what he told her to, and intimated that he was armed. What was a consensual encounter became a frightening assault. It was not unreasonable for the trial court to conclude that the incident was startling enough to produce nervous excitement and render Sandra's statements spontaneous and unreflecting.

The second element is met as well. Sandra's first statements – that Gutierrez and Ruiz were raping her and had a gun – were made within seconds of the stressful event, when police pulled up alongside the Honda. Two to five minutes later, she began telling Schwab the remaining information. All Sandra's statements were made within the 30 minutes following the sexual assault. (E.g., *People v. Poggi, supra,* 45 Cal.3d at pp. 317-320 [rape victim's statements to police, made 30 minutes after attack, were spontaneous statements].) When Sandra fled from the Honda, she was "visibly upset" and was crying and trembling while making her statements to Schwab. The extent of her fear was demonstrated by her hasty flight from the Honda despite the fact she was completely

nude. When describing events to Schwab at the scene, Sandra was so upset she was "telling everything at once." Sandra clearly volunteered her initial statements that she was being raped and that her assailants possessed a gun. While the record is not entirely clear, it appears that Sandra's remaining statements were made spontaneously rather than in response to questioning. In any event, general questions such as, "What happened?" do not show a lack of spontaneity if the victim was still under the influence of the stressful event. (*People v. Poggi, supra,* 45 Cal.3d at pp. 319-320; *People v. Jones* (1984) 155 Cal.App.3d 653, 662.) Under these circumstances, the evidence supported the trial court's finding that the statements were made before the victim had a chance to reflect or contrive.

Finally, all the statements described the circumstances of the sexual offenses. Gutierrez does not argue otherwise, nor does he suggest that the statements were too extensive to qualify as spontaneous statements. (See, e.g., *People v. Poggi, supra,* 45 Cal.3d at pp. 316-317 [rape victim's statements while being questioned at crime scene by police, including that "the perpetrator was a stranger; he came into her home; he had a knife; he took about $90; he beat her up; he raped her in her son's bedroom; he forced her to fill the bathtub, said he was going to drown her, and attempted to do so; they fought in the tub, and he was unsuccessful; he than said, 'I gotta stab you. You gotta die,' and he stabbed her; she first identified her attacker as Black or very dark complected and subsequently answered yes to a question whether he could be Mexican," qualified as spontaneous statements].)

Gutierrez argues that the statements lacked trustworthiness because the victim had an incentive to claim she was being raped in order to avoid prosecution for prostitution. He points to evidence that a urine sample taken from Sandra the night of the incident contained a significant amount of metabolite cocaine, morphine, and codeine; Sandra told Schwab she was a heroin user and that she had a syringe in her purse; and a misdemeanor warrant for Sandra's arrest on prostitution charges was pending at the time of the incident. He argues that Sandra was a "prostitute on probation, caught in the act of violating her probation, a syringe in her purse, cocaine, morphine and codeine in her

system, and a warrant out for her arrest." According to Gutierrez, therefore, Sandra had a motive to fabricate her story.

We are unpersuaded. The record does not reflect that Sandra was on probation for prostitution, and, contrary to Gutierrez's argument, Schwab did not testify that Sandra would necessarily have been arrested on the outstanding warrant. In any event, while the argument that Sandra had a motive to lie was a legitimate one for the jury's consideration, "[w]hether the requirements of the spontaneous statement exception are satisfied in any given case is, in general, largely a question of fact. [Citation.] The determination of the question is vested in the court, not the jury." (*People v. Poggi, supra,* 45 Cal.3d at p. 318.) "The discretion of the trial court is at its broadest when it determines whether the nervous excitement still dominated and the reflective powers were still in abeyance." (*Rufo v. Simpson, supra,* 86 Cal.App.4th at pp. 590-591.) The trial court's comments demonstrate that it was well aware that the issue of trustworthiness was the basis for the Evidence Code section 1240 exception. Moreover, as the prosecutor pointed out in argument below, Gutierrez's argument regarding Sandra's purported motive to lie was undercut by the facts that Sandra readily and immediately admitted to Schwab that she was a working prostitute who had entered the car after making an agreement to provide sexual services for money, and was a heroin user with a syringe in her purse. Where the trial court's finding is supported by substantial evidence, we will uphold it on appeal. (*People v. Poggi, supra,* 45 Cal.3d at p. 320; *People v. Gutierrez* (2000) 78 Cal.App.4th 170, 177-178.) As we have explained, the evidence was sufficient to support the trial court's finding of trustworthiness.

E. *Instruction with CALJIC No. 2.50.01 was proper.*

Gutierrez next asserts that the trial court erred by instructing the jury with the 1999 revision of CALJIC No. 2.50.01,[7] which informed the jury that it could infer from

---

[7] That instruction provided, in pertinent part: "Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense other than that charged in the case. . . . [¶] . . . If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to

evidence of Gutierrez's prior sexual offenses that he had a predisposition to commit the charged crimes. Gutierrez argues that the instruction was constitutionally infirm because it "conflates and confuses the standards of proof as well as suggest[s] the section 1108 evidence by itself may be dispositive proof of present guilt." Gutierrez's contention, however, was considered and rejected in *People v. Reliford, supra,* 29 Cal.4th 1007, decided after Gutierrez's opening brief was filed.[8] *Reliford* concluded that "the 1999 version of CALJIC No. 2.50.01 correctly states the law[]" (*id.* at p. 1009), and rejected the argument that the instruction impermissibly dilutes the People's burden of proof or misleads the jury concerning the purposes for which the evidence may be considered. (*Id.* at pp. 1013-1016.) Gutierrez's claim of instructional error therefore lacks merit.

F. *Instruction with CALJIC No. 17.41.1 was not prejudicial error.*

Finally, Gutierrez asserts that the trial court prejudicially erred by instructing the jury with CALJIC No. 17.41.1.[9] Gutierrez contends that CALJIC No. 17.41.1 chilled the jury's independent deliberations, thereby denying him the right to a jury trial and

---

commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. The weight and significance of the evidence, if any, are for you to decide."

[8] Gutierrez requests that we take judicial notice of the California Court of Appeal's opinion below in *People v. Reliford* (2001) 93 Cal.App.4th 973, review granted February 13, 2002, S103084. He suggests that we may take judicial notice of the opinion "as [an] analytical tool," despite the fact that review was granted. California Rules of Court, rules 976, subdivision (d) [no opinion superseded by a grant of review shall be published] and 977, subdivision (a) [an unpublished opinion shall not be cited or relied on by a court or a party in any action or proceeding] preclude Gutierrez's request, which is moot in any event given the California Supreme Court's decision in *Reliford, supra,* 29 Cal.4th 1007.

[9] That instruction, as provided to the jury, read: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

infringing upon jurors' free speech rights. Gutierrez acknowledges that our Supreme Court rejected such challenges to the instruction in *People v. Engelman* (2002) 28 Cal.4th 436, but contends that *Engleman* was wrongly decided. We are, of course, required to follow *Engelman.* (*Auto Equity Sales, Inc. v. Superior Court, supra,* 57 Cal.2d at p. 455.) *Engleman* held that CALJIC No. 17.41.1 "does not infringe upon defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict . . . ." (*Id.* at pp. 439-440.) The court decided that because the instruction could be misunderstood or misused, it is "inadvisable and unnecessary" for trial courts to give it in the future. (*Id.* at p. 445.) However, because the jury is duty-bound to follow the trial court's instructions, CALJIC No. 17.41.1, while inadvisable, does not violate a defendant's constitutional rights. (*Id.* at p. 441.) Gutierrez's argument that *Engleman* "did not address the issue of CALJIC No. 17.41.1 as [an] anti-nullification instruction" is simply wrong. To the contrary, *Engelman* explicitly held "the jury lacks the right to engage in nullification." (*Id.* at p. 441.) Accordingly, while trial courts should not give this instruction in the future, we conclude there was no prejudicial error in the instant case.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

ALDRICH, J.

We concur:

KLEIN, P.J.

CROSKEY, J.