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CERTIFIED FOR PARTIAL PUBLICATION[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY RAMONA MEDINA, Defendant and Appellant.	D041113 (Super. Ct. No. 161951)

APPEAL from a judgment of the Superior Court of San Diego County, Laura P. Hammes, Judge. Affirmed as modified.

David M. McKinney, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Peter Quon, Jr. and Andrew S. Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

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1 Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts IIIA, C, D, E, F, G, and IV.

I.

INTRODUCTION

A jury convicted Anthony Ramona Medina of forcible oral copulation (Pen. Code,[2] § 288a, subd. (c)), forcible penetration by a foreign object (§ 289, subd. (a)), and three counts of forcible rape (§ 261, subd. (a)(2)). In addition, the jury found true the allegation that Medina used a firearm during the commission of each of the offenses (§ 12022.3, subd. (a)). The trial court imposed the upper term of eight years for each of the five convictions and ordered four of the five terms to be served fully and consecutively and the fifth to be served concurrently, for an aggregate term of 32 years. In addition, the court imposed the middle term of four years for each of the five firearm use enhancements and ordered four of the terms to be served fully and consecutively and the remaining term to be served concurrently, for an additional aggregate term of 16 years. Medina was sentenced to a total aggregate term of 48 years in prison.

Medina claims that the trial court's admission of evidence of a sexual offense not charged in this case, pursuant to Evidence Code section 1108, constituted error, for a number of reasons. In the published portion of this opinion, we reject Medina's contention that evidence of the uncharged sexual offense was not admissible pursuant to section 1108 because it occurred after the charged offense. In the unpublished portions of the opinion, we reject Medina's other claims of error, except that we strike the parole revocation fine imposed pursuant to section 1202.45.

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2 Unless otherwise specified all subsequent references are to the Penal Code.

II.

FACTUAL BACKGROUND

A. The Charged Sexual Assault

In September 1993, at approximately 11:00 p.m., the victim, Monica, and a few friends drove together to a bar in Pacific Beach. At around 1:00 a.m., Monica talked with some other friends who were waiting in line outside the bar. When she came back inside the bar about 30 minutes later, she could not find the friends with whom she had come to the bar. Assuming that they had left without her, Monica decided to walk home.

As Monica was walking home near the La Jolla Lutheran Church, Medina jumped out from behind some bushes, grabbed her, and pointed a gun at her head. Medina pushed her onto the steps of the church, lifted her skirt, and unsnapped her bodysuit. Medina then penetrated her external vaginal lips with his penis. He was not fully erect and was unable to achieve full penetration. Medina tried again to penetrate Monica's vagina with his penis, but was able still only to penetrate her external vaginal lips.

Medina then pushed Monica around the corner of the church, away from the street where cars were passing by. With the gun pointed at Monica's head, Medina penetrated her vagina with his penis for a third time. He ordered Monica to put her fingers inside her vagina and forced his penis inside her mouth. After a short period of time, Medina removed his penis and ejaculated on Monica's stomach area. Medina then fled. Monica was examined at a hospital and various samples of physical evidence were taken from her body and clothing. These specimens were provided to law enforcement.

B. The Arizona Incident

In February 2001, in Oro Valley, Arizona, Frank P.'s seventh-grade daughter left her house to catch her school bus at a nearby bus stop. A few minutes later she came back inside the house. Frank P. and his daughter then looked out the window and saw a black truck parked in their driveway. Medina was leaning against the rear of the truck facing the school bus stop, masturbating. There were children at the bus stop, which was 100-150 feet from where Medina was standing. Frank P. called the police, who arrived after Medina had left. The police obtained a sample of semen Medina had left on Frank P.'s driveway. Medina was arrested and pled guilty to one count of public sexual indecency.

C. The DNA Match

In March 2001, the Oro Valley Police Department collected a known sample of DNA from Medina. The DNA from the semen sample from the Frank P.'s driveway was positively matched to the known sample taken from Medina. DNA in both the semen sample and the known sample taken from Medina positively matched the DNA contained in the samples from the 1993 sexual assault of Monica. The chance of someone other than Medina having left the samples gathered from the sexual assault in 1993 was no greater than one in one-half quadrillion.

D. The Defense

Medina testified that he was living in Pacific Beach in 1993 at the time Monica was sexually assaulted. He denied he had assaulted her. He testified that he had a consensual sexual encounter with a woman on the beach in Pacific Beach in September

1993. He claimed that although he and the woman did not have intercourse, he ejaculated. Medina testified that although he could not recall if this woman was Monica, it was possible his DNA was discovered as a result of this incident.

III.

DISCUSSION

A. Medina Waived His Claim That The Uncharged Sexual Offense Is Not Within The Scope Of Offenses Listed In Evidence Code Section 1108

Medina claims the trial court improperly admitted evidence of the Arizona incident because the offense he committed in Arizona constituted merely lewd conduct (§ 647), and not indecent exposure (§ 314). Medina claims indecent exposure requires that a defendant direct public attention to his genitals. Lewd conduct is not admissible pursuant to Evidence Code section 1108, but indecent exposure is.

In support of his claim, Medina notes that the evidence presented by the People regarding the Arizona incident demonstrated that he masturbated behind his truck while viewing a number of children at a school bus stop. Medina claims that "these facts, without more, constitute lewd conduct, not indecent exposure." He asserts that additional facts would have to have been brought forth in order to establish that he committed the offense of indecent exposure.

We need not consider the precise nature of the elements of these two offenses or whether the Arizona incident constituted indecent exposure because, as Medina concedes, he did not raise this objection in the trial court. (See Evid. Code, § 353 [precluding reversal of a decision based on the erroneous admission of evidence unless there was "an

objection to . . . the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion"].) At trial, Medina's counsel conceded that the facts of the Arizona offense constituted indecent exposure (§ 314).[3] Medina may not concede in the trial court that masturbating in public is *sufficient* to establish the offense of indecent exposure, and then claim on appeal that masturbating in public is *insufficient* to establish the same offense. Even if the facts in the record were insufficient to establish that the Arizona offense constituted indecent exposure—a conclusion we emphasize we do not reach here—the People could have attempted to cure any such evidentiary deficiency if they had been apprised of Medina's objection. The requirement that there be a contemporaneous objection, contained in Evidence Code section 353, is fully applicable under these circumstances.

Accordingly, Medina has waived his claim that the Arizona incident was inadmissible because it constituted lewd conduct and not indecent exposure. For the same reasons, Medina has also waived his related claim that the trial court abused its discretion under Evidence Code section 352 by failing to consider whether the offense committed in Arizona was within the scope of those acts deemed admissible under

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3 Specifically, Medina's trial counsel stated the following: "[T]he first problem I have is relevance. I don't see how -- and just see, you know the facts of the [section] 314 are masturbating in public or indecent exposure. That's why its indecent exposure. I don't see how that is relevant to a violent rape with a gun."

Evidence Code section 1108.[4] Finally, we also decline Medina's request, made for the first time in a footnote in his reply brief, to consider whether his trial counsel's failure to object to the introduction of this evidence on the basis raised in Medina's appeal constituted ineffective assistance of counsel. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894 ["'points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before'"] quoting *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.)

B. Offenses Committed Subsequent To The Charged Offense May Be Admitted Pursuant To Evidence Code Section 1108

Medina claims that Evidence Code section 1108 "does not apply to offenses committed after the charged offense, and certainly not where the time gap between the offenses is substantial, as it was in the instant case." Evidence Code section 1108, subdivision (a) provides:

> "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."

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4 We note that at trial, Medina's counsel claimed the evidence of the Arizona incident should be excluded under Evidence Code section 352 on the ground that its probative value would be substantially outweighed by undue prejudice, because the Arizona offense was not similar to the charged offense, eight years passed between the two events, and the Arizona offense occurred after the charged offense. However, we do not consider that issue in this opinion because Medina has not raised this claim in his appeal.

The plain language of Evidence Code section 1108 does not limit evidence of uncharged sexual offenses to those committed *prior* to the charged offense. On the contrary, the statute broadly states that evidence of the "defendant's commission of *another* sexual offense," is not made inadmissible by the prohibition on the introduction of character evidence contained in Evidence Code section 1101. (Evid. Code, § 1108, subd. (a), italics added.) This language strongly suggests that evidence of an uncharged sexual offense committed after the charged offense is within the scope of section 1108. (Accord *People v. Yovanov* (1999) 69 Cal.App.4th 392, 404 [concluding evidence of uncharged sexual offenses was property admitted under Evidence Code section 1108 and noting the "uncharged sex acts were . . . close in time insofar as they led up to and *continued after* the charged offenses," italics added].)

In *People v. Falsetta* (1999) 21 Cal.4th 903, the California Supreme Court noted that Evidence Code section 1108 permits "the admission, in a sex offense case, of the defendant's other sex crimes for the purpose of showing a propensity to commit such crimes." (*Id*. at p. 907.) We have not found any California cases that expressly discuss whether evidence of subsequent offenses are admissible to prove propensity, pursuant to Evidence Code section 1108. However, in considering an analogous question, in *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 447-448, the Court of Appeal for the Third

District concluded that evidence of a victim's character could be proved by subsequent acts under Evidence Code section 1103.[5] The *Shoemaker* court reasoned:

> "As Wigmore astutely observed, the time of character evidence ' . . . as a question of [r]elevancy, is simple enough . . . . Character at an earlier or later *time* than that of the deed in question is relevant only on the assumption that it was substantially unchanged in the meantime, *i.e*. the offer is really of character at one period to prove character at another, and the real question is of relevancy of this evidence to prove character, not of the character to prove the act.' [Citation.] He then concluded that '. . . there is no difficulty from the point of view of the relevancy of character; a man's trait or disposition a month or a year after a certain date is as evidential of his trait on that date as his nature a month or a year before that date; because character is a more or less permanent quality and we may make inferences from it either forward or backward.' [Citation.] We find Wigmore's views compelling. We therefore hold that evidence of the victim's subsequent acts of violence, when offered by the defendant in a criminal case, is relevant and admissible under section 1103 to prove the victim's violent character at the time of the earlier crime." (*People v. Shoemaker, supra*, 135 Cal.App.3d at pp. 447-448, fn. omitted.)

We agree with the *Shoemaker* court that both prior and subsequent acts may constitute relevant evidence of a person's character. Thus, interpreting Evidence Code section 1108 to allow for the admission of sexual offenses that occur after the charged offense is consistent with the statute's purpose of allowing the admission of evidence showing "a propensity to commit [sex] crimes." (*People v. Falsetta*, *supra*, 21 Cal.4th at

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5 Evidence Code section 1103, subdivision (a), provides: "In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character."

p. 907.) We conclude that evidence of subsequently committed sexual offenses may be admitted pursuant to Evidence Code section 1108.

Medina relies heavily on the dissent in *United States v. Wright* (2000) 53 M.J. 476 (*Wright*), which concluded that a similar rule, rule 413 of the Federal Rules of Evidence, does not authorize admission of evidence of sexual offenses committed after the charged offense.[6] (*Id*. at p. 486 [Gierke. J, dissenting].) The dissent in *Wright* relied primarily on the fact that "[a] week after the evidentiary changes were adopted, Senator Robert Dole, a co-sponsor of the changes, described them on the Senate floor as 'establishing a general presumption that evidence of *past* similar offenses in sexual assault and child molestation cases is admissible at trial.'" (*United States v. Wright, supra*, 53 M.J. at p. 486, quoting Sen. Dole, 140 Cong. Rec. S. 12990 (daily ed. September 20, 1994) [italics added in *Wright*] [Gierke. J, dissenting].)

We find the *Wright* dissent unpersuasive in this case, for several reasons. First, the plain language of both Federal Rule of Evidence 413 and Evidence Code section 1108 contain no temporal requirement pertaining to evidence of uncharged sexual offenses. Second, the California Supreme Court has "frequently stated . . . the statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a

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6 Federal Rules of Evidence, rule 413 provides: "In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."

whole in adopting a piece of legislation." (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062.) Third, Senator Dole's statement itself does not purport to describe the full scope of Federal Rule of Evidence 413 and does not state that evidence of subsequent uncharged offenses would be inadmissible pursuant to that Rule. We reject Medina's reliance on the dissent in *Wright*.

Medina also argues that principles of due process and equal protection are violated by the introduction of evidence of uncharged sex offenses committed after the charged offense.[7] The California Supreme Court has rejected the argument that the use of propensity evidence, as authorized by Evidence Code section 1108, violates principles of due process. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 907.) Medina argues that in "after-the-fact circumstances, there is simply no commonsense connection to establishing a *predisposition* to having committed a prior offense." (Italics added.) What Medina fails to acknowledge is that section 1108 is not limited to evidence that establishes a *pre*disposition on the part of the defendant to commit a sexual offense. Rather, it permits evidence of the defendant's commission of "another sexual offense or offenses" to establish the defendant's *propensity* to commit sexual offenses. There is no requirement that the other offenses precede in time the charged offense. (See *People v. Shoemaker, supra*, 135 Cal. App.3d at p. 447.) We reject Medina's claim that Evidence Code section

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7 Medina cites no authority or legal reasoning in support of his equal protection argument. Accordingly, we deem it waived. (See, e.g., *Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401, 1413 ["unless a party's brief contains a legal argument with citation of authorities on the point made, the court may treat it as waived and pass on it without consideration"].)

1108 violates due process to the extent it authorizes the admission of evidence of uncharged sexual offenses committed after the charged offense.

C. The Trial Court Properly Instructed The Jury Pursuant To CALJIC No. 2.50.01

Medina claims that the giving of CALJIC No. 2.50.01, which pertained to the Arizona incident, violated his right to due process. The court instructed the jury pursuant to CALJIC No. 2.50.01 in relevant part as follows: "[I]f you find by a *preponderance of the evidence* that the defendant committed a prior[8] sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime." (Italics added.) Medina claims this part of CALJIC No. 2.50.01 violated his right to due process because it suggested to the jury that if it were to find Medina committed another sexual offense by a quantum of proof *greater than* a preponderance of the evidence, such a finding would be sufficient to prove beyond a reasonable doubt that Medina committed the charged offense. As Medina concedes, this argument was rejected by the California Supreme Court in *People v. Reliford* (2003) 29 Cal.4th 1007. Accordingly, Medina's claim is foreclosed by *Reliford*. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

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8 We note that although there are repeated references in the record and briefs in this case to whether the defendant committed a *prior* sexual offense, section 1108 refers to a defendant's commission of "*another* sexual offense or offenses." (Italics added.)

D. Evidence Code Section 1108 Does Not Violate A Defendant's Right to Due Process

Medina concedes that his claim that Evidence Code section 1108 violates his right to due process is foreclosed by *People v. Falsetta*, *supra*, 21 Cal.4th at. p. 907. We agree. (See *Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.)

E. The Trial Court Was Not Required To Instruct On The Lesser Included Offense Of Attempted Rape

Medina claims the trial court was required to instruct on the lesser included offense of attempted rape with regard to the two rape counts involving Medina's sexual assault on the victim on the church steps.

"[A]ttempted rape . . . is a lesser included offense of rape . . . ." (*People v. Atkins*, (2001) 25 Cal.4th 76, 88.) In *People v. Mendoza* (2000) 24 Cal.4th 130, the California Supreme Court reviewed when a trial court must give a lesser included offense instruction:

> "An instruction on a lesser included offense must be given only when the evidence warrants such an instruction. [Citation.] To warrant such an instruction, there must be substantial evidence of the lesser included offense, that is, 'evidence from which a rational trier of fact could find beyond a reasonable doubt' that the defendant committed the lesser offense. [Citation.] Speculation is insufficient to require the giving of an instruction on a lesser included offense. [Citations.] In addition, a lesser included instruction need not be given when there is no evidence that the offense is less than that charged. [Citation.]" (*People v. Mendoza*, *supra*, 24 Cal.4th at p. 174.)

Medina argues that the following constitutes substantial evidence upon which a jury could have concluded he had committed only attempted rape, rather than rape, on the church steps: (1) the victim testified in response to the question whether Medina had

penetrated her vaginal lips with the purportedly equivocal response, "I believe so;" (2) he did not fully penetrate the victim; (3) his penis was not fully erect during this portion of the sexual assault; (4) cars were going by the church; and (5) he continued the sexual assault on the side of the church in an attempt to complete his purpose. Medina cites the following testimony from the victim's direct examination in support of this argument:

> "Q. You describe the fact he then tried to penetrate you?
> "A. Correct.
> "Q. Did he have an erection at that point?
> "A. I don't recall.
> "Q. Can you tell us when he attempted to penetrate you, what exactly did he do?
> "A. He wasn't very successful.
> "Q. What do you mean?
> "A. I don't believe—I guess he was not fully erect, and he could not penetrate very easily.
> "Q. I'm sorry to ask, but did he penetrate your external vaginal lips?
> "A. I believe so.
> "Q. Did he go further than that?
> "A. No, at that point I don't believe so.
> "Q. Were you scared at that point?
> "A. Yes.
> "Q. Were you terrified?
> "A. Yes.
> "Q. He attempted to penetrate you once on your external vaginal lips; correct?
> "A. Correct.
> "Q. Did he try to again?
> "A. I believe so.
> "Q. Same way or different way than the previous time?
> "A. I believe the same way.
> "Q. Was he successful in fully penetrating you?
> "A. No.
> "Q. De [sic.] he penetrate the external lips of your vaginal area on that occasion?
> "A. I believe so."

None of the facts upon which Medina relies, either alone or in combination, constitute substantial evidence that he attempted to rape, but did not actually rape, the victim. The fact that Medina continued his assault on the side of the church does not suggest that he did not rape the victim on the church steps. The fact that cars were going by during the sexual assault is not evidence that Medina did not rape the victim on the church steps. A fully erect penis is not necessary to achieve penetration of a woman's external vaginal lips. The fact that the victim testified Medina did not *fully* penetrate her does not suggest that he did not penetrate her at all. On the contrary, it implies Medina did penetrate her to some extent.[9] Finally the victim's testimony was unequivocal as to whether her vaginal lips were penetrated. She stated Medina had not penetrated her very easily, that he had not fully penetrated her, and that she believed she had been penetrated. Given that testimony, and no contrary evidence, there is no basis for rejecting the victim's testimony in part and concluding that Medina attempted, but failed, to penetrate her.

Medina places great emphasis on the fact that, with regard to the rape that occurred on the side of the church, when the victim was asked whether Medina had penetrated her external lips, she responded with an unequivocal "yes." Medina claims this unequivocal answer stands in contrast to the victim's "arguably equivocal" answer with regard to the sexual assault that took place on the church steps. However, Medina

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9 Medina does not dispute that penetration of the external vaginal lips, however slight, completes a rape. (§ 263.)

omits the following testimony from the victim's direct examination regarding the assault on the church steps:

> "Q. I believe that you described that on the steps when you were located there the man penetrated your external vaginal lips two times; correct?
> "A. Correct."

This testimony was unequivocal. No reasonable jury could conclude on the basis of such testimony that Medina attempted to, but did not, rape the victim on the church steps. Because there was no evidence that the offense that occurred was less than that charged, the trial court was not required to instruct the jury on the lesser included offense of attempted rape.

F. Medina's Claims Regarding The Trial Court's Imposition of Sentence Are Waived

Medina contends the trial court erred in sentencing him by: (1) subjectively determining to sentence him to the maximum term possible and then working backward to support its subjective intention; (2) failing to state its reasons for its various sentencing choices; and (3) improperly imposing the upper term for each count and also imposing full consecutive terms based on the same factors.

Medina did not raise any of these objections at the sentencing hearing. In *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), the California Supreme Court held:

> "[T]he waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it *double-counted a particular sentencing factor*, misweighed the various factors, or *failed to state any reasons or give a sufficient number of valid reasons*.

> "Our reasoning is practical and straightforward. Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention. As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them." (*Id*. at p. 353, italics added.)

Medina's claims that the trial court gave subjective and insufficient reasons for its sentencing choices and double-counted a sentencing factor are waived. (*Ibid*.)

We also reject Medina's request that we exercise our discretion under *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6 (*Williams*), to consider these claims, notwithstanding his waiver. *Williams* presented unusual circumstances not present in this case. In *Williams*, the People claimed in their appeal that the trial court's vacating a previous serious felony conviction in sentencing the defendant was unlawful. (*Id*. at p. 157.) A purportedly unlawful sentence may be raised on appeal even if no objection was made in the trial court. (*Scott*, *supra*, 9 Cal.4th at p. 354.) After the trial court's imposition of sentence in *Williams*, but before he had appealed, the California Supreme Court issued an opinion in a different case that clarified that the trial court's sentence in *Williams* was not unlawful. The Supreme Court's opinion also indicated that the sentence could be reviewed for an abuse of discretion. (*People v. Williams*, *supra*, 17 Cal.4th at pp. 156, 158-159.) It was under these unusual circumstances that the California Supreme Court noted that the Court of Appeal had exercised its discretion to consider the People's appeal in *Williams*. (*People v. Williams*, *supra*, 17 Cal.4th at pp. 161-162, fn. 6.)

In contrast, Medina's claims are the type of claims *Scott* expressly holds must be raised in the trial court. (*Scott*, *supra*, 9 Cal.4th at pp. 353-354.) The trial court's purported errors are precisely the kind that *Scott* holds are "easily prevented and corrected if called to the court's attention." (*Id*. at p. 353.) We see no reason to exercise our discretion under *Williams* to review Medina's waived claims.

G. The Parole Revocation Fine Must Be Stricken

Medina claims that the trial court violated the ex post facto clause of the United States Constitution by imposing a parole revocation fine of $10,000 pursuant to section 1202.45, because that section was enacted after the conduct underlying the convictions in this case. The People concede that imposition of the fine violated the ex post facto clause. We agree. (*See People v. Callejas* (2000) 85 Cal.App.4th 667, 678 [concluding imposition of a parole revocation fine pursuant to section 1202.45 based on conduct committed prior to enactment of the statute constituted an ex post facto violation].) Accordingly, the parole revocation fine is stricken.

IV.

CONCLUSION

Medina's contentions that the offense stemming from the Arizona incident is not within the scope of the offenses made admissible by Evidence Code section 1108 and that the trial court abused its discretion in failing to consider this issue, are waived. In addition, Evidence Code section 1108 allows for the admission of evidence of an uncharged sexual offense that occurred after the charged offense. Further, the trial court properly instructed the jury with CALJIC No. 2.50.01 regarding the probative value of

the uncharged sexual offense evidence. We also conclude that Evidence Code section 1108 is constitutional.

With regard to Medina's other claims, the trial court was not required to instruct on the lesser included offense of attempted rape. Additionally, Medina's claims regarding the trial court's imposition of sentence are waived. Finally, the parole revocation fine must be stricken because its imposition violates the ex post facto clause of the federal constitution.

V.

DISPOSITION

The judgment is modified by striking the parole revocation fine under section 1202.45. As so modified, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

AARON, J.

WE CONCUR:

NARES, Acting P. J.

McINTYRE, J.