Filed 9/13/02 Reposted to correct data corruption

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM RAYMOND DANCY,

Defendant and Appellant.

H021990

(Santa Clara County
Superior Court
No. C9802094)

In re WILLIAM RAYMOND DANCY,

On Habeas Corpus.

H022703

Defendant was convicted by jury trial of two counts of rape of an unconscious person (Pen. Code, § 261, subd. (a)(4)), one count of inflicting corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)) and one count of battery with serious bodily injury (Pen. Code, §§ 242, 243, subd. (d)). The jury found true an allegation that he had personally inflicted great bodily injury (Pen. Code, § 12022.7, subd. (d)) in the commission of the inflicting corporal injury and battery counts. The court found true allegations that defendant had suffered two prior serious felony convictions (Pen.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for partial publication. The portions not to be published are sections IIB, IIC, IID, IIE and IIF.

Code, §§ 667, subds. (a), (b)-(i), 1170.12) and served prison terms for three prior felony convictions (Pen. Code, § 667.5, subd. (b)). Defendant was committed to state prison to serve an indeterminate term of 75 years to life consecutive to a determinate term of 14 years.

On appeal, he claims that the trial court prejudicially erred in (1) failing to instruct on consent in relation to the intent element of rape of an unconscious person, (2) permitting the prosecution to introduce evidence under Evidence Code section 1108 and giving a defective limiting instruction on the Evidence Code section 1108 evidence, (3) admitting a tape recording of a phone conversation between the prosecutor's investigator and a victim of defendant's 1985 assault conviction and (4) giving CALJIC 17.41.1. Defendant also claims, both in his appeal and in an accompanying petition for a writ of habeas corpus, that his trial counsel was prejudicially deficient in failing to object to the admission of letters written by the victim of his current offenses. In the published portion of our opinion, we reject defendant's challenge to the instructions on the elements of and defenses to rape of an unconscious person. We reject his other contentions, affirm the judgment and summarily deny his petition.

I. Factual and Procedural Background

Defendant was released from prison on parole on January 1, 1997. He had been serving time for a narcotics conviction.[1] Ilka A. met defendant in January 1997. Ilka was working for the Emergency Housing Consortium (EHC) at its downtown San Jose homeless shelter, and defendant was first living and then volunteering there. Defendant told Ilka that he had been incarcerated for a drug offense, but he did not tell

---

[1] He had been initially parolled in October 1996, but his parole was almost immediately revoked and he was returned to custody.

her that he had been convicted of any sex offenses. Although defendant was at least a decade younger than her (Ilka was in her mid-50s), Ilka fell in love with defendant, and they began having sex together. In mid-February 1997, defendant moved into Ilka's residence. They apparently agreed that it was okay for defendant to have sexual relations with other women so long as he was discreet. Ilka frequently awakened in the morning to find defendant having sex with her, and she found this acceptable though they never discussed the matter.

A month or two after defendant moved in with Ilka, they both stopped working for EHC, and Ilka went to work at Home Depot. Their relationship was troubled and marked by frequent arguments, but the only physical violence occurred during one incident when defendant bit Ilka's cheek and spit in her face during an argument. In May 1997, defendant briefly moved out and then moved back in again. In July 1997, defendant again left Ilka's residence. After he left, Ilka contacted defendant's parole agent, James Clem, because she suspected that defendant was using drugs and thought Clem could help him. She told Clem where she believed defendant could be found. Clem found defendant and confirmed that he was using drugs. Defendant was arrested and returned to prison for violating his parole by using drugs. Defendant was released from prison in early September 1997, and he moved back in with Ilka. Their sexual relationship resumed. In late November 1997, EHC opened a new San Jose facility, and both Ilka and defendant went to work there. Ilka consistently worked a graveyard shift at the EHC facility that started at midnight, while defendant worked various shifts there as a "floating" shift supervisor. They worked the same shift about twice a week. Ilka kept her Home Depot job until late December. Ilka and defendant had bought a car, and she was angry at times that he gave other people rides to and from work but did not always drive her to and from work.

In early December 1997, defendant asked Ilka to marry him, and she accepted his proposal. However, at about the same time, Ilka noticed that defendant had begun

to have "a lot of mood swings." He refused to talk about his irritability, and he became verbally abusive. Their arguments became even more frequent, and defendant started calling her "a bitch."[2] Ilka suspected that defendant was "sneaking out" while she was asleep. One night Ilka spent the night in a motel because she did not want to deal with defendant. In mid-December 1997, defendant told their boss that he and Ilka were having a relationship and "they were not getting along." Their boss told defendant that there was a company policy that "significant others" were not allowed to supervise each other. The matter was apparently not further pursued. At about the same time, Ilka told her supervisor that she and defendant had been arguing a lot and that defendant was a "jerk."

On Sunday, December 28, both defendant and Ilka were working the graveyard shift. Usually three or four EHC employees worked a night shift. One duty performed by EHC employees was nighttime perimeter checks, and these checks were usually performed by male employees. At about 1:20 a.m., defendant contacted Ilka by radio and asked her to go out with him to do a perimeter check. Another employee came to relieve her from her post, and she went outside with defendant. Once they were outside, defendant offered her a cigarette, and she took one. The last thing she remembered that night was waiting for defendant to light her cigarette.

When she regained consciousness, she was in her residence in "agonizing pain." It appeared to be mid-morning. One of her eyes was swollen shut, and the other eye was "like a little slit." She could barely see. Her head and mouth hurt, her gums were bleeding and her lips were swollen. She had difficulty speaking or swallowing. Her inability to speak was due in part to the absence of her dentures. Defendant was with her, and she asked him what had happened. He told her that she

---

[2] Defendant testified at trial that he had been jealous because he believed that Ilka was seeing other men.

had slipped, fallen and hit some cement stairs. Defendant said he had thought she was dead. He claimed that he had gotten someone to assist him with her, and he had told their boss about the incident. This was a lie as he had not told their boss or anyone else anything about the incident. Instead, defendant had told Ilka's supervisor that Ilka had quit.

Defendant gave Ilka some Nyquil[3] and some Tylenol, and he told her that the Nyquil would help her. Ilka lost consciousness or fell asleep. She was vaguely aware of being placed in a car. When she awoke again, she was naked in a bed alone in a cold motel room with the television on.[4] She lost consciousness or fell asleep again. The next time she woke up defendant was with her. He fed her some soup and some water. Ilka drifted in and out of consciousness. Each time she awoke, defendant gave her another swallow of Nyquil.[5] He also fed her more soup and water. Ilka asked defendant to take her to the hospital, but he did not do so. At one point, she woke up and defendant told her it was New Year's Eve. He gave her some champagne, and they wished each other a happy new year. At another point she woke up to find defendant putting ice bags on her face.

Twice during her stay in the motel room, she woke up to find defendant having sexual intercourse with her. He was on top of her with his penis in her vagina, and his movements were causing her pain even though he was not being rough. She repeatedly tried to tell him to "stop" because she "didn't want sex," but defendant did

---

[3] Nyquil contains both alcohol and an antihistamine. An entire bottle of Nyquil contains approximately the alcohol in one drink. However, the amount of antihistamine in a bottle of Nyquil is potentially toxic and could induce a coma.

[4] As the motel's records indicated that defendant checked in on December 31, 1997, Ilka apparently spent two days at her residence (December 29 and 30) before defendant brought her to the motel room.

[5] Most people would not be "knocked out" by a dose of Nyquil.

not stop and said something like “you can handle it” or “you can hang” and “[i]t will be all right.” On both occasions, he continued his activities until he had ejaculated.

On Saturday, January 3, 1998, defendant told her that he was going to work.[6] Ilka woke up the next morning and felt a little better. She wanted to leave the motel, go home and see a doctor. She tried to telephone someone to help her go home, but she could not remember her son’s telephone number. She telephoned the EHC facility where she and defendant worked, but defendant was not there. Ilka left the motel room and managed to find her way home even though she was wearing neither shoes nor socks and was about a mile and a half to two miles from her home. On her way home, she saw defendant’s car parked near her residence.

She reached her residence and found it locked. Ilka heard voices inside and knocked, but no one answered the door. Because she desperately needed to use the bathroom, she broke one of the windows and crawled into her residence. The bathroom door was closed, and a female voice responded to her attempts to open the door by refusing to let her in. Suddenly the bathroom door opened and a fellow EHC employee named Carolyn Valentine, with whom Ilka was barely acquainted, came out. Ilka used the bathroom. When she came out, Valentine was still there. Ilka became very upset, called Valentine “a few names” and “told her to get the hell away from my place.” She thought defendant and Valentine had been having sex together. Ilka continued to yell at Valentine as Valentine left the residence and walked out of sight. Ilka then found defendant in the kitchen and began yelling at him. Ilka’s microwave oven was missing from the kitchen. Still furious, she found Valentine’s coat on the floor and tried to damage it. Defendant took the coat and left.

Defendant picked up Valentine and drove her to the motel room. On the way, Valentine asked defendant how Ilka had been injured, and defendant said she had hit

[6] He did not actually go to work, and he was terminated for failing to show up.

her head on the dashboard of the car when he made a sudden stop. Valentine did not believe him because his explanation seemed to her to be inconsistent with Ilka's injuries and the car was not damaged. After they arrived at the motel room, defendant left for a while and then returned.

Ilka went to the grocery store to get some aspirin. She left her door unlocked. When she returned, the door was locked. She crawled back in through the window and found no one inside. However, her microwave oven was now in the middle of the living room floor. Ilka looked in the mirror and was shocked. She did not believe that her injuries could have been from a fall and suspected she had been assaulted. Ilka called 911, and the police responded. At this point, it was 1:30 p.m. on January 4. The police accompanied her back to the motel. When the police officers knocked on the motel room door and announced themselves, defendant climbed out the bathroom window and fled.

Ilka asked the police officers to take her to the hospital. It was determined by the doctors at the hospital that Ilka had a "closed-head" injury, multiple severe facial fractures and injuries to her neck that appeared to have resulted from manual strangulation.[7] She still had difficulty speaking and swallowing. When a police officer asked her if she had had sex with defendant, she said "Honey, I hurt so much all over, I couldn't even begin to tell you." Ilka was hospitalized for three or four days. After her release from the hospital, she was very fearful and suffered from panic attacks. At times Ilka thought that defendant had tried to kill her. She stayed at a shelter for battered women for about a month before she was ready to go home. Ilka told a shelter employee that her boyfriend had beaten her up. A couple of days after she went to stay at the shelter, she spoke by telephone to Sergeant Steve Papenfuhs, the detective assigned to the case. This conversation was tape-recorded. Papenfuhs

[7] There was no alcohol in her blood at 3:15 p.m. on January 4.

was the first person she told about the incidents of sexual intercourse in the motel room. Papenfuhs informed Ilka that defendant had been "in trouble" twice before including both a prior sex offense and a prior violent offense. Ilka was initially anxious for defendant to be found by the police both because she was fearful and because she wanted "some explanation."

In early 1998, Ilka sent several letters to Papenfuhs suggesting where defendant might be found and intimating that defendant had been having affairs with other EHC employees. Ilka never asked Papenfuhs to drop the case. In May 1998, Ilka notified Papenfuhs that a man named Larry Wilson had indicated that he had witnessed defendant assaulting Ilka. Ilka had told Wilson that she would "reward" anyone who had witnessed the incident and came forward. Wilson later admitted that he had fabricated his story because he felt sorry for Ilka, "loved her" and "wanted her."

Defendant was arrested in Arizona in October 1998. He was charged by information with three counts of rape of an unconscious person (Pen. Code, § 261, subd. (a)(4)), three counts of rape of an intoxicated person (Pen. Code, § 261, subd. (a)(3)), one count of inflicting corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)) and one count of battery with serious bodily injury (Pen. Code, §§ 242, 243, subd. (d)). It was further alleged that he had personally inflicted great bodily injury (Pen. Code, § 12022.7, subd. (d)) in the commission of the inflicting corporal injury and battery counts and that he had suffered two prior serious felony convictions (Pen. Code, §§ 667, subds. (a), (b)-(i), 1170.12) and served prison terms for three prior felony convictions (Pen. Code, § 667.5, subd. (b)).[8]

Defendant wrote a letter to Ilka from jail, and in October 1999, shortly before the preliminary examination, she began visiting him twice a week in jail despite the

[8] The prior conviction and prison prior allegations were bifurcated at defendant's request, and defendant subsequently waived his right to a jury trial on those allegations.

fact that defendant had been ordered to have no contact with her. Ilka tried to convince the prosecutor to drop the charges against defendant. She did not want to be in court, wanted to get on with her life and could not "remember exactly a hundred percent what had happened."[9] She was also irritated that some police officers had come to her residence looking for defendant prior to his arrest. Ilka had concluded that defendant had not raped her in the motel room because the sex acts were consistent with their habitual practices, and she believed defendant could not understand her attempts to tell him to stop. "I would have never said no, had it not been for the pain in my head. . . . I like to have sex with him. I would have never said no, but my head was killing me, and I truly believe he might not have understood my speech at that time. I really didn't have much of any kind of speech." She also felt that defendant had not assaulted her because he would not "put me in any harm's way."

Ilka testified at trial that she loved defendant and did not believe that he had assaulted her or raped her. A tape of Ilka's initial conversation with Papenfuhs was played for the jury over defense objections. Expert testimony established that Ilka's injuries were inconsistent with a fall or a car accident because the areas of her face that were most prominent, such as her nose, were not injured. The absence of skin trauma reflected that a soft object such as a fist had caused the injuries. The marks on her neck were indicative of manual strangulation. The nature of the injuries demonstrated that they had been inflicted by another person. Both of her cheekbones were fractured indicating that there had been blows to both sides of her face. An expert testified that amnesia was common after a blow to the head, and frequently the recipient of such a blow could not remember the event that led to the injury. Evidence was received at trial under Evidence Code section 1108 that defendant had committed attempted rape

[9] Yet at the same time Ilka filed a lawsuit against EHC and sought worker's compensation benefits for the injuries she suffered on December 29, 1997 at the EHC facility.

in 1978 and a sexually motivated assault in 1985. The victim of the 1978 attempted rape testified, and a transcript of the former testimony of the victim of the 1985 assault was read to the jury. A tape of a February 2000 conversation between the victim of the 1985 assault and the prosecutor's investigator that mentioned a 1984 sodomy offense was also played for the jury, though it was not admitted for its truth.

Defendant testified on his own behalf at trial. He denied that he had made any physical contact with Ilka at the time she suffered her injuries. He testified that he had lit his cigarette, and the next thing he knew she was rolling around on the ground choking or gagging. He claimed that he took her dentures out because she seemed to be choking on them. Defendant testified that Ilka was conscious and refused to let him call an ambulance. She insisted on being taken home, and he took her home even though he could tell she was seriously injured. Defendant testified that he asked another shift supervisor to cover for him, and he signed himself and Ilka out on their time sheets before they left the EHC facility. At home, he put her to bed, and then he returned to the EHC facility. He later gave Ilka Nyquil and Tylenol in hopes of relieving her pain. Defendant testified that he had no difficulty understanding what Ilka said after she was injured. He testified that he had not raped Ilka, and he professed no actual memory of whether they had had sex in the motel room. Defendant testified that he "probably" had sex with Ilka in the motel room "I guess," but he insisted that he could not remember. He confirmed Ilka's testimony about their habit of him waking her up by having sex with her.

Defendant admitted that he had been in prison three times and that the victim of his 1978 offense had testified truthfully. His only explanation for the 1978 offense was that he "was young and stupid" and "[i]t was [an] impulse thing." Defendant disclaimed any improprieties with the victim of the 1985 assault. He asserted that he had believed that she had consented to have anal sex with him in 1984. Defendant accused the victim of the 1985 offense of trying to blackmail him into paying her

money in exchange for her retraction of her claim that he had sodomized her in 1984. Nevertheless, defendant claimed that he had continued his sexual relationship with her after the 1984 incident until he was arrested for the 1985 incident. He testified that her injuries in 1985 had been caused by her accidentally falling from a bed. Defendant contended that she had lied both about the 1984 anal sex and the 1985 assault. Defendant admitted his prior convictions and conceded that he had lied about them when he applied for the EHC job by stating that he had never been convicted of a felony.[10]

The prosecutor argued to the jury that Ilka had "minimized the events" in her testimony because she "loves the guy" and could not "accept" that he had done these things to her. She asked the jury to "reject" Ilka's testimony and "look at her prior statements . . . ." Defendant's trial counsel argued to the jury that Ilka's prior statements should be disbelieved because they were made when she was "very, very angry" with defendant and jealous because she believed that he had been cheating on her while she was in the motel room recovering from her injuries.

The jury deliberated for about 2 ½ hours before reaching its verdicts. It found defendant guilty of two of the three rape of an unconscious person counts, the inflicting corporal injury count, and the battery count. The jury found true the allegation that defendant had personally inflicted great bodily injury in the commission of the inflicting corporal injury and battery counts. The jury acquitted defendant of the three rape of an intoxicated person counts and of the third rape of an unconscious person count. After a court trial on the prior conviction and prison prior allegations, the court found those allegations true. Defendant was committed to state prison to

---

[10] He also testified that he was a "three-striker, you know." The court admonished him not to volunteer information.

serve an indeterminate term of 75 years to life consecutive to a determinate term of 14 years. He filed a timely notice of appeal.

II. Discussion

A. Instructions on Rape of An Unconscious Person Counts

Defendant claims that the trial court erred in failing to instruct the jury on consent and reasonable belief in consent in connection with the intent element of rape of an unconscious person.

1. Background

The defense requested numerous instructions regarding the rape counts. One requested instruction was CALJIC 10.61.1. This instruction read: "Evidence has been introduced for the purpose of showing that the defendant and alleged victim engaged consensually in sexual intercourse on one or more occasions prior to the charge against the defendant in this case. [¶] If you believe this evidence, you should consider it only for the limited purpose of tending to show that the alleged victim consented to the acts of intercourse charged in this case, or that the defendant had a good faith reasonable belief that the alleged victim consented to the act of sexual intercourse. [¶] You may not consider that evidence for any other purpose." The court refused to give this instruction on the ground that it was not relevant.[11]

Defendant also requested that the jury be instructed pursuant to CALJIC 10.65 on reasonable good faith belief in consent. The court gave a modified version of this instruction that limited it to the rape of an intoxicated person counts. The defense requested an instruction on "advance" consent and reasonable belief in "advance" consent, but the trial court denied the request after the prosecution argued that consent

[11] During in limine motions, the defense filed a motion seeking admission of prior sexual conduct of Ilka under Evidence Code section 782.

was not an element of rape of an unconscious person. The court stated: "[T]here really is no evidence of consent in advance to have sex while a person's all banged up, semiconscious, not conscious at all, head swollen, skull fractured in 12 places and so forth. I don't think there was any evidence that supported a statement or position by the victim that I'm giving you permission to have sex with me in advance, if that happened."

The defense requested a modified version of CALJIC 1.23.1 on consent. The court gave the requested modified instruction except that it limited the instruction to "prosecutions under Penal Code section[] 261(a)(3)" rather than permitting it to be applied also to the rape of an unconscious person counts. Defendant also asked that the jury be instructed that "[i]f, however, you find that the alleged victim [of rape of an unconscious person] would have consented to the sexual act but for her state of unconsciousness or sleep, then you must find the defendant not guilty." The trial court refused to give this instruction. The court also declined defendant's request that the jury be instructed that "[i]f, however, you find that the alleged victim would have consented to the sexual act but for her state of unconsciousness or sleep, then the alleged victim's inability to resist has not been shown to be relevant and you must find the defendant not guilty."

The trial court's actual instructions to the jury included a reading of the information. The rape of an unconscious person counts charged that defendant "did accomplish an act of sexual intercourse with Ilka A[.], a person not the spouse of said defendant, where said person was at the time unconscious of the nature of the act and this was known to the defendant." The court then gave more detailed instructions on these counts. "Every person who engages in an act of sexual intercourse with another person not the spouse of the perpetrator, who is at the time unconscious of the nature of the act, and this condition is known to the accused, is guilty of the crime of rape . . . . [¶] Unconscious of the nature of the act means the alleged victim was

incapable of resisting because she was, A, unconscious or asleep, or B, not aware, knowing, perceiving or cognizant that the act occurred. [¶] In order to prove this crime, each of the following elements must be proved: One, a male and female engaged in the act of sexual intercourse; two, the two persons were not married to each other at the time of the act of sexual intercourse; three, the alleged victim was at the time unconscious of the nature of the act; and four, this unconsciousness was known to the accused."

The prosecutor argued to the jury that these counts were "general-intent crime[s]." "Ignorance of the law is no excuse. No specific intent to rape is required here. The elements are that you engaged in an act of sexual intercourse with your nonspouse. The victim was unconscious of the nature of the act, and that condition was known to the defendant. Force or fear is not required. We don't have a predatory type rape here. Don't have to show that she was fearful or there was force used . . . ." "I have to prove to you . . . that this condition was known to the defendant. Well, that's their common practice and habit. The defense may try to argue that their prior habit are [*sic*] dispositive of this crime, but as you can see, lack of consent in this crime is not an element that the prosecution has to prove, doesn't come into play in this section, nor is proof of consent an affirmative defense. [¶] But even if it were, remember the victim said this happened three times after she was beat up, and each time she asked him to stop. She begged him to stop, . . . but . . . he did it two more times, so the condition was known to him."

Defendant's trial counsel conceded in his argument to the jury that the rape of an unconscious person counts were "the most troublesome count[s] that you're gonna be faced with." He asserted that the phrase "incapable of resisting" in the instruction "assumes that if she had [not] been incapable of resisting, she would have resisted." "And I think the incapable of resisting language here tells you that it's not rape if the person wouldn't have resisted because the language certainly says you can't have sex

with sleeping people, and that's perfectly understandable in some contexts." He claimed that the jury could not convict defendant of these counts unless it found that Ilka "would have resisted" if she had not been unconscious.

2. Analysis

Defendant claims that the trial court prejudicially erred "by failing to instruct on consent as it relates to the general intent requirement of rape of an unconscious person, and in refusing to permit the jury to consider the couple's past sexual practices in relation to that offense."

"Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: . . . Where a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this paragraph, 'unconscious of the nature of the act' means incapable of resisting because the victim meets one of the following conditions: [¶] (A) Was unconscious or asleep. [¶] (B) Was not aware, knowing, perceiving, or cognizant that the act occurred. [¶] (C) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact." (Pen. Code, § 261, subd. (a)(4).) Since rape is a general intent crime (*People v. Osband* (1996) 13 Cal.4th 622, 685), the requisite criminal intent is the intent to do the prohibited act. (*People v. Daniels* (1975) 14 Cal.3d 857, 860.) Hence, a person who intentionally has sexual intercourse with an unconscious victim knowing that the victim is unconscious commits rape of an unconscious person.

Although lack of consent is not a statutory element of rape of an unconscious person, defendant asserts that the statutory language necessarily implies the existence of a lack of consent element. Alternatively, he claims that the need for a criminal intent requirement requires the addition of a lack of consent element to prevent the crime from being a strict liability offense. Finally, he argues that the trial court erred

in failing to instruct the jury that consent or a belief in consent negates general criminal intent. We reject his contentions.

Penal Code section 261, subdivision (a) contains numerous subdivisions defining several different types of rape. Some of these subdivisions contain a lack of consent element; others do not. The subdivision describing rape of an unconscious person does not contain a lack of consent element. "When the Legislature has used a term or phrase in one part of a statute but excluded it from another, courts do not imply the missing term or phrase in the part of that statute from which the Legislature has excluded it." (*People v. Gardeley* (1996) 14 Cal.4th 605, 621-622; see also *Zavala v. Board of Trustees* (1993) 16 Cal.App.4th 1755, 1762.) By including a lack of consent element in the subdivisions setting forth the elements of several types of rape but not including a lack of consent element in the subdivision setting forth the elements of rape of an unconscious person, the Legislature obviously made an explicit choice not to require proof of lack of consent where the victim was unconscious at the time of the act of sexual intercourse.

Defendant seizes on the phrase "incapable of resisting" in the description of the "unconscious of the nature of the act" element of rape of an unconscious person and urges that these words suggest a requirement that there be proof that the victim *would have resisted if he or she had been conscious*. He theorizes that the prosecution must prove a hypothetical fact: what the unconscious victim *would have done* if conscious. The words of the statute do not support this strained reasoning. The statute uses the words "incapable of resisting" to describe the victim's *actual* lack of ***awareness*** of the act rather than in reference to the victim's *hypothetical* ***lack of consent*** to the act. Had the Legislature actually intended to require proof of the victim's actual or hypothetical lack of consent as an element of rape of an unconscious person, it would have been simple for the Legislature to include a lack of consent element as it did in other subdivisions of Penal Code section 261. Its failure to do so is indicative of its decision

that sexual intercourse with an unconscious person is a criminal sexual offense regardless of real or hypothetical consent.

We also reject defendant's claim that a lack of consent element must be added to the statutory elements to preclude the crime from being a strict liability offense. "Generally, [t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. In other words, there must be a union of act and wrongful intent, or criminal negligence. So basic is this requirement that it is an invariable element of every crime unless excluded expressly or by necessary implication. In addition, Penal Code section 26 provides that a person is incapable of committing a crime where an act is performed in ignorance or mistake of fact negating criminal intent; a crime cannot be committed by mere misfortune or accident." (*People v. Coria* (1999) 21 Cal.4th 868, 876, citations and quotation marks omitted.) "Generally speaking, a strict liability offense is one which dispenses with a mens rea, scienter, or wrongful intent element." (*People v. Sargent* (1999) 19 Cal.4th 1206, 1223.) "Strict liability offenses eliminate the requirement of mens rea; that is, the requirement of a guilty mind with respect to an element of a crime. As such, a defendant may be guilty of a strict liability offense even if he does not know the facts that make his conduct fit the definition of the offense." (*People v. Rubalcava* (2000) 23 Cal.4th 322, 331, internal citation and quotations omitted.)

It is well accepted that rape requires proof of a general criminal intent. (*Osband*, *supra*, 13 Cal.4th at p. 685.) General criminal intent is simply the intent to do the prohibited act. The act prohibited by Penal Code section 261, subdivision (a)(4) is the act of sexual intercourse with an unconscious person. The statute also contains an explicit mental state requirement that precludes conviction without proof that the perpetrator knew of the victim's unconsciousness. The requisite general criminal intent is simply the intent to have sexual intercourse with an unconscious victim.

Defendant argues that criminal intent does not exist if the unconscious victim

consented in advance or the defendant reasonably believed that the victim would have consented or would not have resisted if conscious. In defendant's view, a defendant who did not intend to prevent his unconscious victim from resisting "but to engage in a mutually consensual sexual practice" lacks any "wrongful" or "criminal intent" At its core, defendant's contention is that a man who intentionally engages in sexual intercourse with an unconscious woman, knowing that she is unconscious, does not harbor general criminal intent—a *wrongful* intent— if he reasonably believes that the woman has consented in advance or would have consented if she had been conscious.[12] His argument assumes that a perpetrator's intent to have sex with an unconscious person is not in and of itself wrongful regardless of the perpetrator's belief that the unconscious person has given "advance consent" or would have consented if conscious. This assumption is erroneous.

Unlike a man who engages in an act of sexual intercourse with a conscious woman under the reasonable but mistaken impression that the woman consents (*People v. Mayberry* (1975) 15 Cal.3d 143) or a man who engages in sex with a conscious minor under the reasonable but mistaken impression that the minor is an adult (*People v. Hernandez* (1964) 61 Cal.2d 529), a man who intentionally engages in sexual intercourse with a woman he knows to be unconscious is clearly aware that he is wrongfully depriving the woman of her right to withhold her consent to the act at the time of penetration. Since a woman may withdraw her consent to a sex act even after the initiation of sexual intercourse[13] (*People v. Roundtree* (2000) 77 Cal.App.4th 846,

---

[12] We recognize that the statute applies equally to both male and female perpetrators and male and female victims, and we do not mean to imply that our analysis is not equally applicable to both genders. However, we have yet to encounter any cases in which a female perpetrator has had sexual intercourse with an unconscious male victim.

[13] The issue of whether the crime of rape occurs when a woman withdraws consent during a sex act but the man completes the act after the withdrawal of consent is

851), neither a woman's actual "advance consent" nor a man's belief in "advance consent" could possibly eliminate the wrongfulness of the man's conduct in knowingly depriving the woman of her freedom of choice both at the initiation of and during sexual intercourse. Consequently, a person who commits the prohibited act necessarily acts with a "wrongful" intent. Thus, rape of an unconscious person is not a strict liability offense because it has not just one but two separate mens rea requirements. A defendant may be convicted of rape of an unconscious person only if he had both knowledge of the person's unconsciousness and the wrongful intent to engage in an act of sexual intercourse with an unconscious person.

Defendant also argues that the trial court erred in failing to instruct the jury that the general intent to commit the prohibited act may be negated by the victim's "advance consent" or the perpetrator's belief that the victim has consented in advance to the prohibited act. The court did not err. The concept of an "advance consent" to unconscious sexual intercourse is based on a fallacy. A decision to engage in sexual intercourse is necessarily an ad hoc decision made at a particular time with respect to a particular act. While a woman may expressly or impliedly consent to *conscious* sexual intercourse in advance, she remains free to withdraw that consent, and ordinarily has the ability to do so since she is conscious. Even if a woman expressly or impliedly indicates in advance that she is willing to engage in *unconscious* sexual intercourse, a man who thereafter has sexual intercourse with her while she is unconscious necessarily deprives her of the opportunity to indicate her lack of consent. The inherent risk that a man may misinterpret a woman's prior statements or conduct weighs strongly against recognizing "advance consent" as a defense to rape of an unconscious person since the woman's lack of consciousness absolutely precludes her

---

currently pending before the California Supreme Court in *In re John Z.* (2001) 94 Cal.App.4th 33, review granted 2/20/02.

from making her lack of consent known at the time of the act. It follows that a man who intentionally engages in sexual intercourse with a woman he knows to be unconscious harbors a "wrongful" intent regardless of whether he believes that she has (or she actually has) consented in advance to the act. The trial court did not err in failing to instruct the jury that it was a defense to rape of an unconscious person that defendant believed that Ilka had consented in advance, would have consented if conscious or would not have resisted if conscious.

B. Evidence Code section 1108

Defendant argues that the trial court prejudicially erred in admitting evidence of defendant's prior offenses under Evidence Code section 1108 and giving a limiting instruction with regard to that evidence that permitted the jury to utilize that evidence as proof of defendant's propensity to commit sexual offenses.

1. Background

In 1978 defendant assaulted and attempted to rape a 14-year-old girl with whom he was acquainted. He pleaded guilty to attempted rape, and he was committed to Arizona state prison for a term of eight to ten years. He was released from prison in 1983. In 1985, defendant assaulted and inflicted serious physical injury on his former girlfriend Jill M. He was committed to state prison for a term of 7 ½ years. He was released from prison in April 1991.

Both the prosecution and the defense sought an in limine ruling on the admissibility under Evidence Code section 1108 of evidence of defendant's 1978 attempted rape offense, 1985 aggravated assault offense (characterized by the prosecutor as an attempted rape) and an uncharged 1984 sodomy offense also against

Jill M.[14] The defense interposed an Evidence Code section 352 objection to the admission of this evidence. Defendant's trial counsel noted that the defense at trial would be consent or reasonable belief in consent.

After weighing the potential for prejudice under Evidence Code section 352, the court decided to admit evidence of the 1978 and 1985 offenses under Evidence Code section 1108 because these offenses were similar to the charged offense particularly because both of the prior offenses and the current charges involved "strangulation or choking." "I think there's sufficient evidence with respect to the '85 case that the jury can make a reasonable inference that it was sexual in nature . . . ." The court concluded that the 1978 and 1985 offenses were "not more inflammatory" than the charged offenses. The court declined to permit the introduction of evidence of the 1984 sodomy offense under Evidence Code section 1108 because "there were no sex charges and there was no evidence and more importantly no evidence of strangulation, that similarity, weighing it under 352, the Court will not allow that."[15] During trial,

---

[14] The prosecution also sought an in limine ruling on the admissibility under Evidence Code section 1109 of evidence of the 1984 and 1985 offenses since the victim of those offenses was defendant's former cohabitant. The prosecutor noted that the charged offenses involved both sexual acts and domestic violence, and she argued that the prior offenses would also be admissible under Evidence Code section 1101, subdivision (b) to show "intent and knowledge." Defendant's trial counsel noted that Evidence Code section 1109 excluded offenses that were more than 10 years old unless the court found that the interests of justice merited admission of such offenses, and he argued against admission of any of the proffered evidence under Evidence Code section 1109.

The court did not initially rule on the prosecutor's request that evidence be admitted under Evidence Code section 1109 since it appeared to be moot based on the court's Evidence Code section 1108 ruling. The prosecutor subsequently asked the court to consider admitting evidence of the 1985 offense also under Evidence Code section 1109 so that it could be considered on the charged domestic violence counts. The court declined to admit that evidence under Evidence Code section 1109.

[15] The court ruled during in limine motions that defendant's prior convictions for attempted rape in 1979, aggravated assault in 1985, selling heroin in 1993 and possessing marijuana for sale in 1994 would be admissible to impeach him if he

defendant's trial counsel reiterated his objection to the admission of evidence of the prior offenses under Evidence Code section 1108.

The defense requested that the jury be given a limiting instruction when the Evidence Code section 1108 evidence was introduced that restricted the jury's use of that evidence to the rape charges. Defendant's trial counsel indicated that "the new CALJIC" instruction "looked fairly appropriate." The court agreed to give a limiting instruction and suggested that it would be best to require proof of the prior offenses beyond a reasonable doubt rather than merely by a preponderance. The defense thereafter submitted a proposed limiting instruction to be given when the Evidence Code section 1108 evidence was admitted. The proposed instruction read: "Evidence is being introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in the case. This evidence has been admitted solely for the purpose of showing that the defendant had a propensity for committing sexual offenses. [¶] This evidence is not being admitted and is not relevant on the issue of whether the defendant had a propensity for committing domestic violence or battery as charged in counts 7 and 8 of the Information and you are not to use this evidence for that purpose, nor refer to it for those purposes in your deliberations."

The victim of defendant's 1978 attempted rape testified at trial that she and her siblings had grown up with defendant and were friends with him in 1978, but she had no romantic or sexual relationship with defendant. Defendant came over to her house on the pretext of coming to see her brother, who was not at home. Defendant entered the house and attacked her. He wrapped his shirt around her neck and tightened it until she lost consciousness. When she regained consciousness, she was lying on a

---

testified at trial. Evidence of these convictions was admitted to impeach defendant's trial testimony.

bed with her panties pulled down and ripped. The blood vessels in her eyes were ruptured, her mouth was cut, and it was hard for her to swallow.

After this testimony, the court gave the following instruction to the jury. "The evidence presented by her is being introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in this case. This evidence has been admitted solely for the purpose of showing that the defendant had a propensity for committing sexual offenses. With respect to Counts 1 through 6 only, that is the sex counts. This evidence is not being admitted and is not relevant regarding the offenses charged in Counts 7 and 8. Count 7 is corporal injury on cohabitant, and Count 8 is battery with serious bodily injury." Defendant's trial counsel explicitly acknowledged on the record that he was satisfied with this limiting instruction.

Jill M.'s former testimony about the 1985 offense was read to the jury at trial. Jill had testified that she and defendant had been "boyfriend and girlfriend" and lived together for more than a year beginning in 1983.[16] Defendant had asked Jill to marry him, but she had declined because she did not feel that they knew each other well enough. They "had a lot of problems getting along sexually," so she ended the relationship in October 1984. In early 1985, she and defendant got together a few times for coffee or a drink, but they did not resume their sexual relationship.

In May 1985, Jill went over to defendant's house to watch a television program with him. She planned to return to her home when the television program ended. When the show ended, Jill began getting ready to leave, but defendant attacked her and told her she "wasn't going anywhere." He tried to choke her by grabbing her around the neck and squeezing and attempted to tear her clothes off. Defendant said "I am

[16] Defendant and Jill met shortly after his release from serving his prison sentence for the 1978 offense.

going to fuck you, bitch." Jill feared that defendant was going to rape her, so she grabbed his genitals. Defendant told her to let go. When she did not do so, he began banging her head into the floor. Jill lost consciousness. When Jill regained consciousness, she found herself soaking wet. She tried to escape out a door, but defendant dragged her back into the house, and she lost consciousness again. The next time Jill regained consciousness, defendant was taking her to his car and saying that they were going to the hospital. He then took her to the emergency room at the hospital. Jill noticed that her underwear was missing. The back of Jill's head was "gouged open" and her lip required numerous stitches. Although Jill believed that defendant was trying to sexually assault her, she was convinced that he had not been successful even while she was unconscious. Jill's former testimony did not mention the 1984 sodomy offense.

After the admission of Jill's former testimony, the court again read a limiting instruction to the jury. "[T]hat evidence was introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in this case. [¶] This evidence has been admitted solely for the purpose of showing that the defendant had a propensity for committing sexual offenses with respect to Counts 1 through 6. [¶] This evidence is not being admitted and is not relevant regarding the offenses charged in Count[s] 7 and 8. Count 7 is corporal injury on cohabitant. Count 8 is battery with serious bodily injury. Counts 1 through 6 were the rape charges." Defendant's trial counsel did not comment on this limiting instruction.

During the instruction conference, defendant's trial counsel requested that the jury be given a final limiting instruction regarding the Evidence Code section 1108 evidence along with the other jury instructions at the conclusion of the trial. The prosecution objected to the inclusion of "beyond a reasonable doubt" language in the proposed instruction. The court overruled the prosecutor's objection and gave the

proposed instruction "solely on the defense request." This instruction read: "If you find beyond a reasonable doubt that the defendant committed a prior sexual offense, you may, but you are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but you are not required to, infer that he was likely to commit the sexual offenses of which he is now accused. [¶] However, if you find beyond a reasonable doubt that the defendant committed prior sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged sexual offenses. The weight and significance of the evidence, if any, are for you to decide. [¶] Unless you are otherwise instructed, you must not consider this evidence for any other purpose."

Defendant's trial counsel reminded the jury of the limiting instruction during his closing argument. He emphasized that this evidence could not be used on Counts 7 and 8.

2. Admission of Evidence

Defendant claims that Evidence Code section 1108 "violates equal protection because it treats those accused of sex offenses differently from those accused of other crimes."[17] He maintains that permitting the admission of evidence to show propensity only for sex offenders is not supported by a compelling state interest. He did not object on this ground below, but he claims that he has not waived this assertion because it is "a pure question of constitutional law relating to the validity of a penal statute." Even if defendant did not waive this contention by failing to object on this basis below, his claim lacks merit. *People v. Fitch* (1997) 55 Cal.App.4th 172 held

[17] Defendant concedes that *Falsetta* rejected due process challenges to Evidence Code section 1108, but he "continues to submit" that the statute violates due process. We must respect the California Supreme Court's ruling in *Falsetta* and reject his due process challenge to the evidence and instructions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

that Evidence Code section 1108 does not violate the U.S. Constitution's guarantee of equal protection. *Fitch* has been cited with approval by the California Supreme Court on this point. (*People v. Falsetta* (1999) 21 Cal.4th 903, 918.) As we agree with *Fitch*'s analysis of this issue, we adopt it and reject defendant's contention.

3. Limiting Instructions

Defendant asserts that the trial court prejudicially erred in giving the limiting instructions because the instructions permitted the jury to infer from the evidence of the prior offenses that he had committed the charged offenses as long as there was some other evidence of the charged offenses. This, he contends, permitted the jury to convict him on "proof less than beyond a reasonable doubt."

The Attorney General argues that defendant is precluded from challenging the limiting instructions on appeal because he requested those instructions below. Defendant suggests that his request for the instructions does not preclude his appellate challenge because, "once the court decided" to give a limiting instruction, it was obligated to give a constitutionally valid instruction. He is wrong. When a defendant's trial counsel makes a "conscious and deliberate tactical choice to request a particular instruction," the invited error doctrine precludes the defendant from challenging the instruction on appeal. (*People v. Wader* (1993) 5 Cal.4th 610, 658.) Defendant's trial counsel submitted specific instructional requests containing precisely the instructional language now challenged by defendant. The invited error doctrine precludes defendant's appellate challenge to the trial court's acquiescence to defendant's trial counsel's requests.

Furthermore, defendant's appellate contentions are not an accurate attack on the instruction that was actually given to the jury below. The jury was instructed that, even if it found *beyond a reasonable doubt* that defendant had a disposition to commit sexual offenses because he committed the prior sexual offenses, this finding was "***not*** sufficient" to prove beyond a reasonable doubt that defendant had committed the

charged offenses. Yet defendant claims that the court erred in instructing the jury so as to permit it to convict him based on little more than an inference from his commission of the prior offenses in the *absence* of proof beyond a reasonable doubt. As the instruction given by the trial court precluded the jury from convicting defendant based solely on an inference from the prior offenses and reiterated the beyond-a-reasonable-doubt standard, it did not remotely suggest that the jury could convict defendant on proof less than beyond a reasonable doubt. Even if defendant had not invited the court's alleged error, we would reject defendant's challenge.

C. Admission of Tape Recording

Defendant contends that the trial court prejudicially erred in admitting into evidence a tape recording of a conversation between Jill M. and the prosecutor's investigator. He claims that this tape recording was highly prejudicial hearsay, and he contends that there was no relevant nonhearsay purpose for its admission.

1. Background

Ilka testified at trial on direct examination that she did not believe that defendant "would put me in any harm's way." On cross-examination, Ilka stated that she was convinced that defendant had not committed any offenses against her. Defendant's trial counsel asked Ilka if anyone had played "tapes" for her related to defendant's prior sex offenses. Ilka responded that she had heard a tape of one woman and she "was in total disbelief at first when I heard it" and "the main reason I didn't believe it" was because of "the way he treated me." She did not "think less well of" defendant after hearing the tape since she "figured he paid his price and was very heavy-duty punished."

On redirect, the prosecutor elicited Ilka's testimony that Ilka had heard the tape in the prosecutor's office a month or two prior to her testimony. The prosecutor had the tape marked as an exhibit and sought permission to play the tape for the jury "since

her state of mind is put at issue." Defendant's trial counsel objected, and the court held a sidebar conference. Defendant's trial counsel interposed a hearsay objection to the tape and also asked the court to exclude the tape under Evidence Code section 352 as "extremely prejudicial." He complained that no limiting instruction could possibly "limit that as not being for the truth [of] the matter." The prosecutor insisted that "we're not offering it for the truth" but only to show Ilka's "state of mind and how unreasonable it is."

The court overruled the defense objections. It suggested that the tape was being admitted "to see whether her state of mind is reasonable or not." The court noted that defendant's trial counsel had elicited Ilka's testimony about the tape to show her state of mind. The court reasoned that the prosecution could respond by playing the tape to show that Ilka's disbelief of it was unreasonable. "[S]ince she based her opinion, her state of mind, the reason why she doesn't think he did it at all, one of the reasons -- even though she had heard the tape, I think the jury's entitled to weigh it." "I weighed it under 352. I think it's important with this person's credibility . . . . And one of your main reasons was that she didn't think he did it, even in light of hearing the victim's tape. And I think that's crucial, very important, knowing this witness, knowing what she's testified to so far for the jury to hear it so they can assess whether her state of mind was [reasonable]."

Defendant's trial counsel asked the court to redact unspecified portions of the tape. The court refused to do so since Ilka "heard the whole tape." Defendant's trial counsel reiterated his opposition. "I object as strongly as possible, and for the record, I'll move for a mistrial at this point if the tape gets played." He also pointed out that the tape "does include some discussion about this prior sodomy which has been previously [ruled] inadmissible. . . . I think if this is gonna be given to the jury, it needs to be redacted in order to keep the prior sodomy out." The court refused. "I think it's important for the jurors to listen to the tape to make their own assessment as

to this witness's bias and her opinion as to whether this case ought to be dismissed and the defendant is totally innocent. So for those reasons, weighing it under 352, I think the probative value outweighs the prejudicial effect."

The court admitted the tape into evidence. The court gave a limiting instruction to the jury before the tape was played. "[I]t's admitted for a very specific purpose, at least for now. And that purpose is simply for you to determine how much weight, if any, because you are the sole and exclusive judges of the witnesses, the credibility that should be given to the witnesses, the facts in this case, and solely for the victim's state of mind where she says that the case ought to be dismissed, and she heard the tape of another victim, and she totally disbelieved it, and that's why she arrives at the opinion that this case ought to be dismissed. It's that state of mind. It's for that testimony that I'm allowing this tape to be played, not as to whether or not indeed it was true or false. That is what you are going to hear on the tape." The court asked defendant's trial counsel if he desired any further admonition to the jury regarding the tape, and defendant's trial counsel said "we're satisfied."

The prosecutor then played for the jury a 20 to 30-minute tape of a February 1, 2000 telephone conversation between Jill M. and the prosecutor's investigator. Jill states on the tape recording "I'm awfully sorry for the other woman, and I'm sure there are other women along these years that . . . have not come forward because of other circumstances." The investigator responds "I think you're absolutely a hundred percent accurate." Jill says that defendant "wants to be in jail" so that he can "play cards" and "rough people up." "It's an institutional life . . . it's the only place he can exist. And when he is out here, he does something bad, so that he can get enough time so that he can stay comfortable. Because working and living in the world is hard." "And he wants to be there, so why not let him? And he loves these trials, because he's the center of attention for day after day after day." "This is what he wants, give him a

twenty-five to life." The investigator responds "well you know, I think that's what he's looking at."

Jill describes defendant as "very good looking," "very charming," "very hard working" and "very nice," and notes that he "in no way, seems to be a person that would hurt somebody." She explains that he did not drink much or use drugs other than "pot." "[Y]ou wouldn't have known at all, that this person would go berserk on a regular basis." "He knows how to speak just right and not to use expletives, and he knows how to play, I am Black and you are White, and I have respect for you. If you know that game."

Jill mentions that defendant had told her that his "real mother" was an alcoholic, and she recalls that defendant's stepmother "appeared to be drunk" when Jill met her. She also mentions that defendant had had a sister who had drowned when they were little, and she says "I started to think, did they [defendant and his brother] kill her?" Jill states that defendant's brother "gets into all kinds of troubles," "was more involved with drugs and bad stuff" and "he's not a pleasant guy." Jill describes how defendant had pummeled a mouse to death after he caught it in their house. She speculates that "people who will assault might start with animals as a child, work their way up to murder, you know."

The investigator asks Jill for information about "where, when he committed the sodomy," and Jill describes the circumstances of the alleged sodomy. Jill and defendant were lovers and were living together at the time, but they had never had anal sex. She was "quite ill" with "a hundred and one fever at least." She was feeling very achy, and defendant "offered to give me a back rub." As she was lying on her stomach on the bed, he rubbed her back. After a few minutes, he asked her to remove her nightgown, and she did so. At some point, he removed his shorts, and Jill could feel his erect penis. She told him that she was "really sick" and "not in any mood for sex." Defendant said "no, baby," and insisted he was just giving her a back rub. Then, "in

the course of pretending to lean over and smoke his cigarette, he shoved his big fat dick in me 'til I screamed at the top of my lungs like a killed pig." She continued to scream, but defendant did not stop until he had ejaculated. He hugged her and said he loved her, and she spit in his face. Defendant called her "a fuckin' bitch," pushed her away and left. Jill called the police and went to the hospital, but the case was not prosecuted because the prosecutor thought there was "not enough evidence." Jill states that the prosecutor "almost said I was the victim because why was I going around with Black men?"

On the tape, Jill also describes the 1985 assault during which "he beat me into unconsciousness for three hours and tried to rape me." "I wasn't raped, because I hurt him [by grabbing his testicles and penis], and it's probably why I had ten stitches in my lips, because he was trying to stick it in my mouth to get it up again while I was unconscious."

After the tape was played for the jury, Ilka affirmed that this was the tape the prosecutor had played for her a month or two earlier. On recross-examination, Ilka testified that she thought the prosecutor had played the tape for her to "help me understand more of everything" because "people feel that I'm in a state of denial, and I've tried to point out several times that I'm not in a state of denial." Ilka explained that hearing the tape had not changed her opinion about whether defendant was guilty of the current charges. Ilka did not believe Jill M.'s statements on the tape. She felt that Jill was "totally contradictory" because Jill still sounded very emotional about the attack 16 years later. On redirect, Ilka testified that she "didn't want to believe" Papenfuhs when he told her that defendant had been in trouble before, but she checked public records and found that Papenfuhs had accurately represented defendant's criminal history.

In its instructions to the jury at the conclusion of the trial, the court instructed the jury that "[c]ertain evidence was admitted for a limited purpose. And at the time

this evidence was admitted, you were instructed that it could be -- that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted."

In his closing argument, defendant's trial counsel tried to discount the impact of the tape. He emphasized that the tape was not admitted for its truth but only to show Ilka's state of mind, and he criticized the prosecutor's decision to play the tape for Ilka. "The district attorney brought Ilka A[.] into the D.A.'s office and played a tape of Jill M[.] for her in order to convince her. And I can't imagine there's any other reason in order to convince her that her love for William Dancy is misplaced, that he's a bad guy, that he's a victimizer. And if she doesn't testify in the right way, he might go free. [¶] If you can think of another reason why they would play that Jill M[.] tape, I'd like to hear it, but it's certainly what it sounded like to me."

2. Analysis

Defendant's objections below preserved for appellate review his appellate claim that the tape was inadmissible hearsay and his appellate claim that the trial court should have excluded the tape under Evidence Code section 352. However, defendant also claims on appeal that the admission of the tape was federal constitutional error because he was deprived of his confrontation rights. He did not object on this ground below. A hearsay objection below does not preserve for appellate review a claim that the admission of certain evidence violated the defendant's confrontation rights under the U.S. Constitution. (*People v. Alvarez* (1996) 14 Cal.4th 155, 186.) Therefore, our review is restricted to defendant's claims that the trial court prejudicially erred under state law in admitting the tape.[18]

[18] In response to our request for supplemental briefing on the waiver issue, defendant contends that his trial counsel was ineffective in failing to object on constitutional grounds to the admission of the tape. Since we conclude that it was not reasonably

Assuming arguendo that the trial court erred in admitting the tape over defendant's hearsay and Evidence Code section 352 objections, it is not reasonably probable that the jury would have reached a result more favorable to defendant in the absence of the tape. The tape contained a large quantity of potentially prejudicial material, but it was largely immaterial to the issues resolved against defendant by the jury's verdicts.[19]

Although defendant contested the prosecution's claim that there had been *three* rather than *two* incidents of sexual intercourse, defendant raised no other legitimate defense to the rape of an unconscious person counts. He testified at trial that he had "probably" engaged in the acts of intercourse, and he did not challenge Ilka's assertion that she had been unconscious at the time. Nor did he deny knowledge of her unconsciousness. Indeed he confirmed that he had habitually engaged in intercourse with Ilka while she was unconscious. The jury acquitted defendant of the contested third count and convicted him of the two essentially admitted counts. It is not reasonably probable that the absence of the tape would have resulted in any other result.

The only defense proffered at trial to the inflicting corporal injury and battery counts was defendant's trial testimony that Ilka's injuries had been suffered in his presence when she suddenly fell to the ground outside the EHC facility. It was established by unrebutted expert testimony that Ilka's facial injuries could not have been suffered in a fall. Defendant's trial testimony was further weakened by Valentine's testimony that he had told her that Ilka had suffered the injuries when he

---

probable that the admission of the tape influenced the jury's verdict, defendant's trial counsel's alleged deficiency was not prejudicial. There was no reasonable probability that the admission of the tape affected the outcome, and its admission does not undermine our confidence in the jury's verdict.

[19] We have listened to the entire tape.

suddenly stopped the car and Ilka's head hit the dashboard. His trial testimony also provided no explanation for the strangulation marks on Ilka's neck. On this record, it is not reasonably probable that the jury would have reached a different conclusion if only the tape had been excluded since the tape had no substantial relevance to the issues resolved by the jury's verdicts on the battery and infliction of corporal injury counts. These verdicts resolved the conflict between defendant's trial testimony and the expert testimony. While defendant's credibility may have been somewhat damaged by the admission of the tape, he had so little credibility to begin with that it is not reasonably probable that the jury would have credited his testimony even in the absence of the tape.

D. CALJIC 17.41.1

The trial court instructed the jury pursuant to CALJIC 17.41.1, as follows: "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 [c]ourt of the situation."

Defendant contends that CALJIC No. 17.41.1 interfered with his rights to due process and a fair trial. (U.S. Const., 6th & 14th Amends.) He claims the instruction chills free and confidential jury deliberations by informing the jurors that their statements may be reported to the judge. Recently, the California Supreme Court disapproved the use of CALJIC No. 17.41.1 but found that "the giving of the instruction did not constitute constitutional error." (*People v. Engelman* (2002) 28 Cal.4th 436, 444.) We reach the same result here.

E. Ineffective Assistance

Defendant asserts that his trial counsel was prejudicially deficient in failing to object to the admission of numerous letters Ilka had written to Clem, Papenfuhs, the prosecutor and others.

1. Background

Ilka testified on direct examination that she had written "a letter to Mr. Clem." When the prosecutor inquired about the content of the letter, defendant's trial counsel objected on hearsay grounds, and the court sustained his objection. The prosecutor subsequently elicited Ilka's testimony that, prior to October 1998, she wrote letters to both Clem and Papenfuhs. No objection was interposed to this testimony. The prosecutor then had the Clem and Papenfuhs letters marked as exhibits. Ilka testified that she had been truthful in these letters, and the prosecutor used the Clem letter to refresh Ilka's recollection. Ilka conceded that she had written to Papenfuhs that she "knew" that defendant had caused her injuries. Defendant's trial counsel objected to the admission of her statement to Papenfuhs on the ground that it was not inconsistent with her testimony, but the court overruled the objection. A letter from Ilka to "Miss Seeley" was also marked as an exhibit, and Ilka was questioned about its contents.

On redirect, the prosecutor introduced a letter that Ilka had written to the prosecutor in June 1999 and questioned Ilka about its contents. Ilka admitted that she wrote in this letter that "he raped me three times." The prosecutor also mentioned a letter that Ilka had written to the judge in January 2000. In all, nine letters were admitted into evidence: five letters to Papenfuhs, two letters to the prosecutor and the letters to Clem and Seeley. Defendant's trial counsel did not object to the admission of these letters; in fact, some portions of the letters were admitted at the request of the defense and over the prosecutor's objections. The defense and the prosecution agreed to a redaction in one of the letters.

The prosecutor argued to the jury that Ilka's prior statements and letters should be believed and her testimony should be rejected. "Now, the defense was trying to pick apart certain passages from those letters, which are in evidence. You get to read the letters in totality. And he was trying to establish that the letters prove how jealous a woman [Ilka] is" in order to show that she "made false accusations." "I ask that you read all of the letters in evidence in their totality, and there's a lot of letters, you know." Defendant's trial counsel argued to the jury that "the tons of letters" reflected that defendant's relationship with Ilka was not "a physically violent relationship."

2. Analysis

Defendant asserts that his trial counsel was prejudicially deficient in failing to interpose hearsay objections and objections under Evidence Code section 352 to the admission of these letters. He concedes that portions of some of the letters contained inconsistent statements that would have been admissible over hearsay objections, but he argues that the letters were cumulative, and therefore excludable under Evidence Code section 352, as to those statements because the inconsistent statements were discussed during Ilka's trial testimony and also evidenced by the tape of her conversation with Papenfuhs that was separately admitted into evidence.

Even if defendant's trial counsel was deficient in failing to object to the admission of the letters, there is no reasonable probability that the jury's verdicts would have been different. As with the tape, the letters were not pertinent to the issues resolved by the jury's verdicts. It is obvious that the admission of potentially inflammatory evidence did not actually inflame the jury's passions since the jury acquitted defendant on the third rape of an unconscious person count and all three of the rape of an intoxicated person counts. The properly admitted Evidence Code section 1108 evidence was far more likely to influence the jury against defendant than Ilka's statements in her letters. To the extent that her statements were related to the charged offenses, they were either admissible as inconsistent statements or

nonprejudicial repetitions of her trial testimony. Defendant's trial counsel was not prejudicially ineffective in failing to object to the admission of the letters.

F. Petition For Writ of Habeas Corpus

Defendant petitions for a writ of habeas corpus based on the same claim of ineffective assistance of counsel raised in his appeal. His petition includes a declaration by his trial counsel stating that his decision not to object to the admission of the letters was predominantly a tactical decision. As we have already determined that the admission of the letters was not prejudicial, his petition does not state a prima facie case and must be summarily denied.

III. Disposition

The judgment is affirmed. The petition is summarily denied.

____

Mihara, J.

WE CONCUR:

____

Bamattre-Manoukian, Acting P.J.

____

Rushing, J.

Trial Court:	Santa Clara County Superior Court
Trial Judge:	Honorable James H. Chang
Attorney for Appellant:	Janice M. Brickley Under Appointment by the Sixth District Appellate Program
Attorneys for Respondent:	Bill Lockyer Attorney General of the State of California
	Robert R. Anderson Chief Assistant Attorney General
	Ronald A. Bass Senior Assistant Attorney General
	Eric D. Share Deputy Attorney General
	Linda M. Murphy Deputy Attorney General
	Ryan McCarroll Deputy Attorney General
	Lisa Ashley-Ott Deputy Attorney General