Filed 1/8/10

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JERMAINE MERRELL HOLLIE, Defendant and Appellant.	A121545 (San Mateo County Super. Ct. No. SC060467A)

Defendant was convicted following a jury trial of rape (Pen. Code, § 261, subd. (a)(2)), and sexual penetration with a foreign object (Pen. Code, § 289, subd. (a)(1)), and sentenced to a term of 10 years in state prison.[1] In this appeal he argues that the statute of limitations for the offenses lapsed before the prosecution was commenced. He also challenges evidentiary rulings by the trial court: the admission of evidence of the uncharged sex offense; the exclusion of defense impeachment evidence; and the admission of evidence of his involuntary statement made to the police. Finally, he claims that prosecutorial misconduct was committed. We conclude that the 10-year statute of limitations did not expire, the trial court's evidentiary rulings were not erroneous, and no prejudicial prosecutorial misconduct was committed. We therefore affirm the judgment.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts III, IV, and V of the Discussion.

1 All further statutory references are to the Penal Code unless otherwise indicated.

STATEMENT OF FACTS

The Charged Offenses.

Athena,[2] the victim of the charged sex offenses, testified that after drinking "about a six pack" on the evening of September 20, 1996, she had an argument with her husband and left their apartment in Daly City. She was barefoot and carrying a kitten her husband had thrown out of the apartment.

Athena was attempting to make her way to a friend's house when a "Black man" she positively identified at trial as defendant approached her in a car and asked if she needed a ride. Athena "got in the car," with the kitten on her lap in the front passenger seat. She asked defendant to give her a ride to her friend's house in South City, and he agreed. As they drove, the two engaged in conversation about the "issues" Athena had with her "husband and his drinking and his abuse." Defendant seemed friendly to Athena; she had no "suspicions or concerns" about him.

While they were in a residential area in Daly City defendant opened the door and Athena's kitten escaped from the car and ran up a hill. Athena got out of the car and followed the kitten, as did defendant. While they were on the hill pursuing the kitten defendant grabbed Athena on the wrist and attempted to pull her towards him. She screamed loudly and yelled, "What are you doing?" Defendant seemed shocked, and released Athena. He profusely apologized and said "he wouldn't try it again." He also helped Athena find the kitten, after which they returned to the car.

Defendant suggested that they get a beer before he drove Athena to her friend's house, and she reluctantly agreed. They stopped at a 7-Eleven store, where defendant purchased some beer. He then drove back to where they had parked before, and they drank beer, smoked some marijuana defendant provided, and talked. The "vehicle door was opened" and Athena's kitten "got loose again."

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[2] For the sake of confidentiality, we will refer to the victims of the charged and uncharged sex offenses by their first names only, as the parties have done.

Athena left the car to retrieve her kitten and go to the bathroom in the trees. After she finished, defendant "rushed" up to her and pushed her to the ground, on her back. Defendant put his left hand on her mouth and used his right hand to unbutton her pants. Athena testified that she was "crying hysterically" and trying to push defendant away from her, so he pressed his hand down so hard on her mouth that he cut her lip and she could "barely breathe." Defendant pulled off her shorts and underwear. Athena was still "struggling to breathe" as she felt defendant touch her vagina with "his fingers or his penis." She testified that she is not certain if defendant "was able to fully penetrate" her with his penis.

When another car "rolled up" to the wooded area defendant "just got up and left." Athena retrieved her shorts but could not find her underwear. She then jumped over a fence into someone's backyard. An occupant of the house thought she "was a burglar" and called the police.

Daly City Police Officer Joseph Collins responded to the report of a prowler at 110 – 3rd Avenue. He opened the rear sliding door of the residence and discovered Athena standing outside. She had a cut on her lip, and scratches on her knees and feet. She was also was inebriated, "in shock and distraught." Athena told Officer Collins that she "had been raped." Athena gave the officer a brief description of the man who raped her: a "Black male about six foot one," wearing white tennis shoes, driving a dark four-door car. No one was found in the area that matched the description.

Athena was taken to the Daly City police station where she was interviewed by Officer Collins. She was still "very upset," "intoxicated," and crying during the interview. Athena stated that she was at home when her husband threw the kitten out of the house and told her, "You can't come back with the cat." She left the house and was walking on Mission Street when a "car pulled up next to her" and a "Black male" offered her a ride. Defendant drove her to an area in Daly City with a hill and some bleachers, where he grabbed her and pulled her pants down. Athena screamed "and he stopped." They "drove to another location" and "got out of the car again." As they were "walking in a field" defendant "grabbed her, threw her on the ground and pulled her pants off and

her panties and raped her."[3] Athena admitted she was "playing with fire" when she "got into the car with the guy." She told the officer "it was her fault." She also told Officer Collins that the "Black male" gave her the name "Michael."

At the conclusion of the interview Athena was taken to the hospital for a sexual assault examination. Officer Collins later booked the medical kit given him by the hospital into evidence at the police station. After Athena's physical examination Officer Collins drove her home. Athena told her husband "what happened" to her.

The next day Athena directed Officer Collins to the field next to the house where she was found in the backyard the night before. During a search of the area Athena recovered her underwear. A second interview was also conducted at the police station. Athena gave a statement that was consistent with "what she said" the night before, but added "more details" about the assault.

The results of the sexual assault examination indicated that Athena suffered scratches on her back, upper chest, above the knees, upper left thigh, left buttock, and on both feet. She also had a laceration and swelling on her upper lip. No trauma to the vagina was observed, which is "not unusual" in forcible rape cases. Vaginal swabs were taken from the victim and sent to the crime lab.

The case investigation proceeded but eventually fell into "suspended status" due to lack of identification evidence. Not until October of 2001 were DNA profiles created for Athena and the samples obtained from the vaginal swabs. In March of 2005, a detective with the sexual assault unit of the Daly City Police Department received a communication from the Sacramento County Sheriff's Department that defendant may be a suspect in connection with the rape of Athena. Defendant was interviewed, and a DNA sample was obtained from him. In the interview, defendant denied any knowledge of Athena or contact with her. A subsequent comparison of DNA profiles taken from defendant and the vaginal swap indicated an exact match. Expert opinion testimony was

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[3] The recorded interview was played for the jury at trial.

offered that with "the highest degree of medical certainty" defendant "is the source of the semen from the vaginal swab."

The Uncharged Offenses.

The prosecution also offered evidence that defendant committed an uncharged sexual assault. The victim of the uncharged acts was Sarah, who was 15 years old in September of 1998, when she was approached by two African-American men in a light-colored SUV while she was walking on Arden Way in Sacramento. After she repeatedly declined offers of a ride from the men, the passenger left the vehicle and grabbed her by the arm. The man declared that she was "getting in here," and shoved her into the back seat. Sarah testified that the man who forced her into the SUV had "two silver front teeth," and identified him at trial as defendant.[4]

Sarah was driven to a duplex a few minutes away. She was then taken by defendant into a bedroom in the residence while the driver remained in the vehicle and drove away. Defendant ordered Sarah to lie on the bed while he "started taking his clothes off." Sarah tried to leave, but defendant grabbed her by the arm as she walked down the hallway, then pulled her back into the bedroom and pushed her onto the bed. She was frightened, crying, and "saying 'No,' " but did not further attempt to physically resist defendant as he removed her clothes. Defendant put on a condom, forced his fingers in her vagina, then "started penetrating" her with his penis. After 10 or 15 minutes defendant told Sarah to put her "clothes back on." Defendant gave Sarah his pager number, and asked her to meet him later that night at Jack-in-the-Box. He also told her his name was "Andre." The SUV later returned to the duplex and Sarah was taken to an ice cream store near her house; from there she "ran home." Sarah told her roommates she had been raped, and "they called the cops."

When a police officer arrived Sarah gave him a description of the incident and was then taken to a hospital for a sexual assault examination. The report of the examination

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[4] Sarah made an unequivocal identification of defendant, and when further questioned by the court said he "looks very like the person that did it." Defendant has two gold caps on his teeth.

specified "no physical findings and the exam was consistent with the history" provided by the victim. The parties stipulated that semen found on the underwear worn by Sarah at the time of the assault was "conclusively determined through DNA profile and comparison" to belong to defendant; examination of the vaginal swabs taken during the sexual assault examination "did not reveal the presence of any DNA belonging to the defendant."

DISCUSSION

I. The Statute of Limitations Defense.

We first confront defendant's claim that the statute of limitations lapsed before the present action was initiated with the filing of the indictment on February 15, 2006. Defendant demurred to the pleading and moved to dismiss the indictment (§ 995) in the trial court on the ground that the action was barred by the expiration of the six-year statute of limitations for an offense punishable by imprisonment in the state prison for eight years or more (§ 800).[5] The trial court accepted the prosecution's argument that the statute of limitations was tolled in the present case by section 803, subdivision (g), which specifies that, "Notwithstanding any other limitation of time described in this chapter, *a criminal complaint* may be filed within one year of the date on which the identity of the suspect is conclusively established by DNA testing," if the crime is "one that is described in subdivision (c) of Section 290" and the DNA analysis occurred no later than January 1, 2004. (Italics added.) The jury also found that the case against defendant had been filed within the period of limitations, as tolled by section 803, subdivision (g). Defendant claims that according to the plain language of the statute, section 803, subdivision (g), applies only if a prosecution is initiated by a *complaint* filed after a preliminary hearing, whereas the present case was initiated by an *indictment*. He therefore argues that the six-

[5] Section 800 reads: "Except as provided in Section 799, prosecution for an offense punishable by imprisonment in the state prison for eight years or more shall be commenced within six years after commission of the offense." The charged offenses were committed on September 20, 1996.

year statute of limitations was not tolled by the discovery of DNA evidence and expired long before the proceedings began in February of 2006.

For the first time on appeal the Attorney General presents the contention that the case is governed by the 10-year statute of limitations specified in section 801.1, subdivision (b), rather than the six-year statute of limitations stated in section 800. Section 801.1, subdivision (b), provides: "Notwithstanding any other limitation of time described in this chapter, if subdivision (a) does not apply, prosecution for a felony offense described in subdivision (c) of Section 290 shall be commenced within 10 years after commission of the offense." The Attorney General points out that defendant was charged with and convicted of offenses listed in section 290, subdivision (c), so the specific 10-year limitations applies, and the action was timely filed – that is, before September 20, 2006. Defendant replies that the prosecution "relied solely on section 803(g)(1)" at trial both in the charging document and presentation of the statute of limitations issue to the jury, and cannot seek to change the theory of the case on appeal.

We find that the Attorney General is not precluded from relying on section 801.1, subdivision (b), on appeal to support the finding in the trial court that the statute of limitations did not run, although the court did not base its ruling on the 10-year statute of limitations theory at trial. (See *People v. Smithey* (1999) 20 Cal.4th 936, 972 [86 Cal.Rptr.2d 243, 978 P.2d 1171]; *People v. Zapien* (1993) 4 Cal.4th 929, 976 [17 Cal.Rptr.2d 122, 846 P.2d 704].) The issue of expiration of the statute of limitations is not forfeited by lack of an objection in the trial court, and may be raised at any stage of the proceedings, even for the first time on appeal. (*People v. Williams* (1999) 21 Cal.4th 335, 341 [87 Cal.Rptr.2d 412, 981 P.2d 42]; *People v. Thomas* (2007) 146 Cal.App.4th 1278, 1288 [53 Cal.Rptr.3d 473]; *People v. Le* (2000) 82 Cal.App.4th 1352, 1361–1362 [98 Cal.Rptr.2d 874].)[6] When a charging document "indicates on its face that the action

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[6] "In California the statute of limitations constitutes a substantive right. [Citation.] The prosecution bears the burden of pleading and proving the charged offense was committed within the applicable period of limitations. [Citation.] Where the pleadings do not show as a matter of law the prosecution is time-barred, the statute of limitations becomes an issue for the jury (trier

is time-barred, a person convicted of a charged offense may raise the statute of limitations at any time. If the court cannot determine from the available record whether the action is barred, it should hold a hearing or, if it is an appellate court, it should remand for a hearing." (*People v. Williams*, *supra*, at p. 341; see also *People v. Terry* (2005) 127 Cal.App.4th 750, 774 [26 Cal.Rptr.3d 71].) Where, as here, the evidence is not in dispute and we need not make any factual determinations on the record before us, we may independently resolve the statute of limitations issue on appeal. (*In re White* (2008) 163 Cal.App.4th 1576, 1582–1583 [79 Cal.Rptr.3d 195]; *People v. Price* (2007) 155 Cal.App.4th 987, 998 [66 Cal.Rptr.3d 595].) "[W]hen the trial court determines that certain counts are not time-barred, defendant's convictions as to those charged offenses will stand if the reviewing court can determine from the available record, including both the trial record and the preliminary hearing transcript, that the action is not time-barred despite the prosecution's error in filing an information in which those counts appeared to be time-barred." (*People v. Smith* (2002) 98 Cal.App.4th 1182, 1189 [120 Cal.Rptr.2d 185].)

Nor do we find any due process impediment to consideration of the 10-year statute of limitations issue on appeal. "Due process requires that a criminal defendant be given fair notice of the charges to provide an opportunity to prepare a defense and to avoid unfair surprise at trial." (*People v. Tardy* (2003) 112 Cal.App.4th 783, 786 [6 Cal.Rptr.3d 24].) Defendant had notice of the statute of limitations issue in the trial court and the issue was thoroughly litigated. The record before us permits review and resolution of the issue as a matter of law based on undisputed facts. (*In re White*, *supra*, 163 Cal.App.4th 1576, 1582–1583.)

That the trial court relied upon another statutory basis to find no lapse of the statute of limitations – that is, the tolling provision of section 803, subdivision (g) – is of no consequence to our consideration of the Attorney General's claim that the applicable

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of fact) if disputed by the defendant." (*People v. Linder* (2006) 139 Cal.App.4th 75, 84 [42 Cal.Rptr.3d 496].)

10-year statute of limitations did not run. "[W]e review the ruling, not the court's reasoning and, if the ruling was correct on any ground, we affirm. ' " ' No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for the wrong reason. If right upon any theory of law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' " ' [Citation.]" (*People v. Geier* (2007) 41 Cal.4th 555, 582 [61 Cal.Rptr.3d 580, 161 P.3d 104]; see also *People v. Smith* (2005) 135 Cal.App.4th 914, 923 [38 Cal.Rptr.3d 1].) We proceed to determine if the 10-year statute of limitations of section 801.1, subdivision (b), applies in this case; if so, the prosecution was not time-barred.

On the date of the commission of the offenses, pursuant to section 800 the period of limitations then in effect was "six years after commission of the offense." (Added by Stats. 1984, ch. 1270, § 2.) Subsequently, however, a series of statutory amendments beginning in 2001 extended the period of limitations from six to 10 years for the offenses of which defendant was convicted. (See *In re White, supra*, 163 Cal.App.4th 1576, 1580.) Ultimately, section 801.1 was enacted, as effective January 1, 2005, which continued to provide for a 10-year time limit for prosecution of felony offenses described in subparagraph (A) of paragraph (2) of subdivision (a) of former section 290. (See also *In re White*, *supra*, at pp. 1580–1581.)[7] Concurrently, section 803.6 was added in 2004, which states: "(a) If more than one time period described in this chapter applies, the time for commencing an action shall be governed by that period that expires the latest in time. [¶] (b) Any change in the time period for the commencement of prosecution described in this chapter applies to any crime if prosecution for the crime was not barred on the effective date of the change by the statute of limitations in effect immediately prior to the

[7] Section 801.1 was then amended in 2005, without substantive changes. (See Stats. 2005, ch. 479, § 2.) The most recent statutory amendment to section 801.1 became effective on October 13, 2007, again without substantive changes to the 10-year period of limitations. (Stats. 2007, ch. 579, § 40.)

effective date of the change. [¶] (c) This section is declaratory of existing law." (Added by Stats. 2004, ch. 368, § 3.)

Although the six-year period of limitations was applicable when the offenses were committed, the extension of the limitations period to 10 years governs the present case without violation of the prohibition against ex post facto laws. "The critical question for purposes of ex post facto analysis" is whether the provisions of the 10-year statute of limitations "became effective as to the charged offenses before expiration of the standard limitations period." (*People v. Terry, supra,* 127 Cal.App.4th 750, 775.) While a "law enacted after expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution," " 'where a right to acquittal has not been absolutely acquired by the completion of the period of limitation, that period is subject to enlargement or repeal without being obnoxious to the constitutional prohibition against *ex post facto* laws.' " (*Stogner v. California* (2003) 539 U.S. 607, 632–633, 618–619 [156 L.Ed.2d 544, 123 S.Ct. 2446], citation omitted; see also *People v. Superior Court* (*German*) (2004) 116 Cal.App.4th 1192, 1196 [10 Cal.Rptr.3d 893].) As a result of the sequence of revisions in the law, the six-year statute of limitations in section 800 had not expired when the 10-year statute of limitations became effective January 1, 2001, and was continuously in effect thereafter. (*In re White, supra*, 163 Cal.App.4th 1576, 1583.) Thus, the prosecution of defendant for the offenses listed in section 290 "was never time-barred, so constitutional ex post facto clause protection against prosecution with a statute of limitations enacted *after* a previous statute of limitations period expired is inapplicable. [Citations.] Here, the Legislature did not revive an expired statute of limitations period but simply extended one *before* expiration. That is constitutionally permissible." (*White, supra,* at p. 1583.) We therefore conclude that the 10-year statute of limitations for the offenses of rape and

sexual penetration with a foreign object did not expire, and the prosecution of defendant was timely.[8]

II. The Admission of Evidence of the Uncharged Offenses.

We proceed to defendant's claims that the trial court committed errors in its evidentiary rulings, the first of which is that the evidence of the uncharged offenses committed against Sarah was improperly admitted. He complains that the court "failed to properly weigh" the probative value of the evidence "against the probability that its admission would create substantial danger of undue prejudice" to him under Evidence Code section 352. He further maintains that due to the "dissimilarities between the two offenses" the probative value of the uncharged acts evidence "was substantially outweighed" by the risk of "undue prejudice." Defendant therefore contends that the admission of the evidence "was an abuse of discretion that resulted in a fundamentally unfair trial."

Despite the general prohibition against admission of uncharged criminal acts to prove disposition to commit charged crimes (Evid. Code, § 1101, subd. (a)), the evidence of the uncharged sexual assault on Sarah "was properly admitted under Evidence Code section 1108." (*People v. Frazier* (2001) 89 Cal.App.4th 30, 39 [107 Cal.Rptr.2d 100]; see also *People v. Branch* (2001) 91 Cal.App.4th 274, 280 [109 Cal.App.2d 870]; *People v. McFarland* (2000) 78 Cal.App.4th 489, 494 [92 Cal.Rptr.2d 884].) "Evidence Code section 1108 authorizes the admission of evidence of a prior sexual offense to establish the defendant's propensity to commit a sexual offense, subject to exclusion under Evidence Code section 352." (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286 [96 Cal.Rptr.3d 512, 210 P.3d 1119]; see also *People v. Walker* (2006) 139 Cal.App.4th 782, 796–797 [43 Cal.Rptr.3d 257].) "By removing the restriction on character evidence in section 1101, section 1108 now 'permit[s] the jury in sex offense . . . cases to consider evidence of prior offenses *for any relevant purpose*' [citation], subject only to the

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8 In light of our conclusion we need not determine if the period of limitations was tolled pursuant to section 803, subdivision (g).

prejudicial effect versus probative value weighing process required by section 352." (*People v. Britt* (2002) 104 Cal.App.4th 500, 505 [128 Cal.Rptr.2d 290].)

We turn the focus of our inquiry to whether the evidence still was subject to exclusion under Evidence Code section 352, as defendant claims. To be admissible under section 1108, "the probative value of the evidence of uncharged crimes 'must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury.' [Citations.]" (*People v. Walker*, *supra*, 139 Cal.App.4th 782, 796.) "The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense. Other factors affecting the probative value include the extent to which the source of the evidence is independent of the charged offense, and the amount of time between the uncharged acts and the charged offense. The factors affecting the prejudicial effect of uncharged acts include whether the uncharged acts resulted in criminal convictions and whether the evidence of uncharged acts is stronger or more inflammatory than the evidence of the charged offenses." (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1211 [105 Cal.Rptr.2d 187].) "The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314 [97 Cal.Rptr.2d 727].)

We will only disturb the trial court's exercise of discretion under section 352 "when the prejudicial effect of the evidence clearly outweighed its probative value." (*People v. Brown* (1993) 17 Cal.App.4th 1389, 1396 [22 Cal.Rptr.2d 14].) A trial court abuses its discretion when its ruling "falls outside the bounds of reason." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226 [9 Cal.Rptr.2d 628, 831 P.2d 1210].)

We first reject defendant's claim that the trial court failed to undertake the requisite balancing of probative value and prejudice associated with admission of the evidence. "The record of a ruling based on Evidence Code section 352 ' "must affirmatively show that the trial judge did in fact weigh prejudice against probative value . . . ." [Citations.]' [Citation.]" (*People v. Zapien*, *supra*, 4 Cal.4th 929, 960; see also

People v. Carter (2005) 36 Cal.4th 1114, 1170 [32 Cal.Rptr.3d 759, 117 P.3d 476]; *People v. Green* (1980) 27 Cal.3d 1, 25 [164 Cal.Rptr. 1, 609 P.2d 468], overruled on another ground in *People v. Guiton* (1993) 4 Cal.4th 1116, 1128–1129 [17 Cal.Rptr.2d 365, 847 P.2d 45].) "[A]lthough the record must affirmatively show that the trial court weighed prejudice against probative value in admitting evidence of prior bad acts [citations], the trial judge 'need not expressly weigh prejudice against probative value – or even expressly state that he has done so [citation].' [Citations.] Thus, as the cases reflect, we are willing to infer an implicit weighing by the trial court on the basis of record indications well short of an express statement." (*People v. Padilla* (1995) 11 Cal.4th 891, 924 [47 Cal.Rptr.2d 426, 906 P.2d 388].) "[T]he necessary showing can be inferred from the record despite the absence of an express statement by the trial court." (*People v. Prince* (2007) 40 Cal.4th 1179, 1237 [57 Cal.Rptr.3d 543, 156 P.3d 1015].) But without an express statement by the trial court that it has weighed prejudice against probative value, the record must at least "affirmatively demonstrate that the court did so." (*People v. Corella* (2004) 122 Cal.App.4th 461, 471 [18 Cal.Rptr.3d 770].)

We find in the present record ample indication that the trial court engaged in the requisite section 352 analysis. First, defendant made a specific section 352 objection to the uncharged acts evidence, both in his written opposition and at the hearing. The court expressly responded to the section 352 objection and devoted careful consideration and discretion to the issue of "prejudice versus probative value" of the evidence. (See *People v. Prince, supra,* 40 Cal.4th 1179, 1237; *People v. Zapien, supra,* 4 Cal.4th 929, 960; *People v. Triplett* (1993) 16 Cal.App.4th 624, 628–629 [20 Cal.Rptr.2d 225].) Thus, the record is more than adequate for us to undertake a meaningful appellate review of the trial court's decision. (*People v. Clair* (1992) 2 Cal.4th 629, 660–661 [7 Cal.Rptr.2d 564, 828 P.2d 705].) "The record reflects that the court performed its duty to balance the probative value of this evidence against its prejudicial effect." (*People v. Lewis, supra,* 46 Cal.4th 1255, 1285; *People v. Crittenden* (1994) 9 Cal.4th 83, 135–136 [36 Cal.Rptr.2d 474, 885 P.2d 887].)

We find that the sexual assault of Sarah was quite probative evidence in the present case. The crucial issue at trial was whether the sex acts with Athena were consensual. The resolution of the consent issue was primarily dependent upon the jury's assessment of the credibility of the victim. The defense admitted that "they had sex," but forcefully attacked Athena's credibility and claimed that the sex acts were "all consensual." The defense case not only challenged the accuracy of the victim's perception or recollection of events, but also asserted that her version of the incident was entirely concocted to avoid the shame and embarrassment of "having unprotected consensual sex" with a stranger. Evidence of the uncharged sexual assault committed by defendant was vital to the jury's effort to evaluate the credibility of the victim and determine if her account of a forcible sexual assault was accurate. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 912 [89 Cal.Rptr.2d 847, 986 P.2d 182]; *People v. Walker, supra,* 139 Cal.App.4th 782, 797.)

We agree with defendant that the two incidents were dissimilar in some respects: Athena voluntarily entered defendant's vehicle, while Sarah was forcibly grabbed from the street by defendant while another man drove the vehicle; Athena stayed with defendant for eight to nine hours, whereas Sarah testified that she was directly taken to the residence, then promptly released after the sex acts occurred. Significantly, defendant declines to assess in his brief the many similarities shared by the offenses, however. Both victims were very young women – one 18, the other 15 – who were fortuitously contacted by defendant in a vehicle while they were alone on the street. They both attempted to resist – Athena by pushing defendant away, Sarah by running out of the bedroom – but were physically restrained by defendant. They were both thrown on their backs and penetrated with defendant's fingers and his penis. Defendant gave false names to both of the victims after the sexual acts. The victims also gave similar descriptions of the perpetrator. The source of the uncharged acts evidence was also entirely unrelated to the charged offenses, which increased the probative value of the evidence. (*People v. Lewis, supra,* 46 Cal.4th 1255, 1287; *People v. Wesson* (2006) 138 Cal.App.4th 959, 970 [41 Cal.Rptr.3d 883].) Finally, the two incidents are not remote in time from each other;

one occurred in September of 1996, the other in September of 1998. We find that the uncharged acts are similar enough to the charged offenses to have considerable probative value on the issue of lack of consent.

Against the appreciable probative value of the evidence we balance its prejudicial effect upon the defense. "In general, 'the probative value of the evidence must be balanced against four factors: (1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses.' [Citation.]" (*People v. Daniels* (2009) 176 Cal.App.4th 304, 316 [97 Cal.Rptr.3d 659].)

The evidence of defendant's inclination to commit forcible sexual assaults was of course damaging to his defense that he did not intend to sexually assault Athena, but was not prejudicial in the sense contemplated by section 352. " 'In applying section 352, "prejudicial" is not synonymous with "damaging." ' [Citations.]" (*People v. Callahan* (1999) 74 Cal.App.4th 356, 371 [87 Cal.Rptr.2d 838].) " 'Undue prejudice' refers not to evidence that proves guilt, but to evidence that prompts an emotional reaction against the defendant and tends to cause the trier of fact to decide the case on an improper basis: 'The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. "[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.' " ' [Citations.]" (*People v. Walker, supra,* 139 Cal.App.4th 782, 806; see also *People v. Garceau* (1993) 6 Cal.4th 140, 178 [24 Cal.Rptr.2d 664, 862 P.2d 664]; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 650–651 [126 Cal.Rptr.2d 876].) Here, the prior sexual offense evidence was, as we have delineated, quite probative to a critical issue in the case, and thus did not carry with it the *undue* prejudice section 352 seeks to avoid. "A trial court should not exclude highly probative evidence unless the undue prejudice is unusually great." (*People v. Walker*, *supra,* at p. 806.)

Looking at other factors pertinent to the assessment of the prejudicial effect of the evidence, we find the evidence of uncharged sexual assault of Sarah was not more inflammatory than the victim's account of charged offenses. We recognize that defendant was not convicted of the uncharged assaults, which presented the risk of consideration of the evidence by the jury to inflict punishment for uncharged offenses in this proceeding. Although the jury was never directly advised that the sexual assault upon Sarah has not resulted in criminal convictions, questions asked by the prosecutor may have carried the implication that defendant was not tried for the assault upon Sarah.[9] Upon review of the arguments of counsel and the jury instructions, we are persuaded that the jury was not inclined to improperly punish defendant for the uncharged acts. The jury was given an effective instruction by the trial court to consider the evidence only for proper limited purposes, and we must presume the jury adhered to the admonitions. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1023 [80 Cal.Rptr.2d 676].) Upon consideration of both the probative value of the evidence and its prejudicial effect we find that the trial court did not abuse its discretion by admitting the uncharged acts evidence under section 1108. (*People v. Lewis, supra,* 46 Cal.4th 1255, 1288; *People v. Roldan* (2005) 35 Cal.4th 646, 707 [27 Cal.Rptr.3d 360, 110 P.3d 289].)

III. The Exclusion of Defense Impeachment Evidence.

Next, defendant argues that he was improperly denied the opportunity to impeach the victim Athena with evidence that she committed "several bad acts . . . against an elderly man, Mr. Sell." Defendant moved in limine to present impeachment evidence of the victim's "prior bad acts," among them the following accusations: that in 2005 Daly City police believed Athena "coached her children" to make "false allegations of child sexual abuse" against Sell; that she was "investigated by Daly City police in 2005 for grand theft and possible elder abuse" of Sell; and that she was "investigated as a suspect

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9 For instance, the prosecutor asked Sarah if she wondered since the assault occurred "where is this person that did [this] to you," and if she realized if this was her "opportunity to be able to actually tell the truth and explain what happened to you back in 1998?"

for child endangerment, elder abuse, . . . check fraud, theft and embezzlement in 2007." The trial court ruled that the defense could ask Athena about an investigation conducted by the Daly City Police Department in 2005 – which ultimately was not prosecuted – that she stole cash and a car from Sell, but excluded the remainder of the proffered impeachment evidence unless the defense produced witnesses to substantiate the hearsay allegations. Defendant complains that the trial court's exclusion of the "hearsay evidence" of the victim's "prior bad acts" deprived him of "his constitutional right to present evidence in his defense."

We begin our analysis of the trial court's exclusion of proffered defense with recognition of a fundamental constitutional premise relied upon by defendant: " '[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, . . . to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 538 [3 Cal.Rptr.3d 145, 73 P.3d 1137].) Further, a defendant in a criminal case must have an opportunity to present a complete defense to the charges against him. (*People v. Adams* (2004) 115 Cal.App.4th 243, 254 [9 Cal.Rptr.3d 170]; *People* v. *Sixto* (1993) 17 Cal.App.4th 374, 398–399 [21 Cal.Rptr.2d 264].) " 'Few rights are more fundamental than that of an accused to present witnesses in his own defense. [Citations.] [But i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 269 [96 Cal.Rptr.2d 682, 1 P.3d 3].)

" 'Evidence showing a witness's bias or prejudice or which goes to his credibility, veracity or motive may be elicited during cross-examination.' [Citation.]" (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1054 [90 Cal.Rptr.2d 607, 988 P.2d 531].) " '[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a

prototypical form of bias on the part of the witness, and thereby, "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." ' [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 946 [77 Cal.Rptr.2d 25, 959 P.2d 183].) Confrontation clause questions arise where restrictions imposed by the trial court effectively " 'emasculate the right of cross-examination itself.' " (*Delaware v. Fensterer* (1985) 474 U.S. 15, 19 [88 L.Ed.2d 15, 106 S.Ct. 292] quoting *Smith v. Illinois* (1968) 390 U.S. 129, 131 [19 L.Ed.2d 956, 88 S.Ct. 748].) " 'It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. . . .' [Citations.]" (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1139–1140 [99 Cal.Rptr.2d 149, 5 P.3d 203].)

"The right of confrontation is not absolute, however [citations], 'and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' [Citation.]" (*Alvarado v. Superior Court, supra*, 23 Cal.4th 1121, 1138–1139; see also *People v. Stritzinger* (1983) 34 Cal.3d 505, 515 [194 Cal.Rptr. 431, 668 P.2d 738]; *People v. Harris* (1985) 165 Cal.App.3d 1246, 1257 [212 Cal.Rptr. 216].) "Trial judges retain 'wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.' [Citations.] A trial court's ruling to admit or exclude evidence offered for impeachment is reviewed for abuse of discretion and will be upheld unless the trial court 'exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 705 [47 Cal.Rptr.3d 326, 140 P.3d 657]; see also *People v. Cooper* (1991) 53 Cal.3d 771, 817 [281 Cal.Rptr. 90, 809 P.2d 865]; *People v. Harris* (1989) 47 Cal.3d 1047, 1091 [255 Cal.Rptr. 352, 767 P.2d 619]; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 350 [68 Cal.Rptr.2d 61].) " ' "[T]he latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking

wars of attrition over collateral credibility issues." [Citation.]' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 374–375 [110 Cal.Rptr.2d 272, 28 P.3d 34].) We find error only if the trial court's decision exceeded the bounds of reason. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1519 [28 Cal.Rptr.2d 758].)

We find no abuse of discretion in the present case. The probative value of the excluded impeachment evidence of the victim's misconduct was comparatively minimal, based as it was on hearsay accusations from various unidentified sources. (See *People v. Hawthorne* (1992) 4 Cal.4th 43, 58 [14 Cal.Rptr.2d 133, 841 P.2d 118].) The facts stated in the police reports on collateral matters had little, if any, tendency in reason to prove that the victim testified untruthfully in the present case, and thus would not have impugned her credibility, particularly without corroboration or substantiation. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 10 [82 Cal.Rptr.2d 413, 971 P.2d 618]; *People v. Hawthorne, supra,* at p. 58.) Defendant was given the opportunity to substantiate the proffered evidence, but did not do so. While due process violations have been found when the excluded evidence was highly probative of the defendant's innocence, "if the exculpatory value of the excluded evidence is tangential, or cumulative of other evidence admitted at trial, exclusion of the evidence does not deny the accused due process of law." (*People v. Smithey, supra,* 20 Cal.4th 936, 996.) Further, proper application of the statutory rules of evidence ordinarily does not impermissibly infringe upon a defendant's due process rights. (See *People v. Lucas* (1995) 12 Cal.4th 415, 464 [48 Cal.Rptr.2d 525, 907 P.2d 373]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102–1103 [31 Cal.Rptr.2d 321, 875 P.2d 36]; *People v. Hawthorne, supra,* at p. 58.) The value of the evidence to impeach the witness also depended upon proof that the prior charges against her were true, which in effect would have forced the parties to consume considerable time and divert the attention of the jury from the case at hand by presenting evidence of long-past incidents which never reached the point of formal charges and were premised on unsubstantiated hearsay allegations. (See *People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1458 [78 Cal.Rptr.3d 474].) The exclusion of the evidence did not result in a denial of defendant's due process rights. (*Ibid.*)

IV. The Admission of Defendant's Statements to the Police.

Defendant also complains of the admission of his "involuntary" statement to the police while he was in custody at the Antelope Camp of the Susanville Correctional Facility. Defendant maintains that the statements "were involuntary because they were induced by lies," in the nature of false assurances "that he was not under arrest and not being charged with anything."

A statement cannot be used against a defendant unless the prosecution establishes a voluntary waiver of rights. (*People v. Jimenez* (1978) 21 Cal.3d 595, 602 [147 Cal.Rptr. 172, 580 P.2d 672].) "A valid waiver may be express or implied." (*People v. Cortes* (1999) 71 Cal.App.4th 62, 69 [83 Cal.Rptr.2d 519].) "What the Constitution permits to be admitted in evidence is 'the product of an essentially free and unconstrained choice . . .' to confess. [Citations.]" (*People v. Memro* (1995) 11 Cal.4th 786, 827 [47 Cal.Rptr.2d 219, 905 P.2d 1305]; see also *People v. Ochoa* (1998) 19 Cal.4th 353, 403 [79 Cal.Rptr.2d 408, 966 P.2d 442].) "The litmus test of a valid waiver or confession is voluntariness." (*People v. Kelly* (1990) 51 Cal.3d 931, 950 [275 Cal.Rptr. 160, 800 P.2d 516]; see also *People v. Bradford* (1997) 14 Cal.4th 1005, 1041 [60 Cal.Rptr.2d 225, 929 P.2d 544]; *People v. Memro, supra,* at p. 827.) "The inquiry has two distinct dimensions. [Citations.] First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (*Moran v. Burbine* (1986) 475 U.S. 412, 421 [89 L.Ed.2d 410, 106 S.Ct. 1135].)

"A confession is involuntary if an individual's will was overborne." (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 208 [24 Cal.Rptr.2d 395].) The terms " 'coerced' " and " 'involuntary' " are used "interchangeably to refer to confessions obtained by physical or psychological coercion, by promises of leniency or benefit, or when the 'totality of

circumstances' indicates the confession was not a product of the defendant's 'free and rational choice.' [Citations.]" (*People v. Cahill* (1993) 5 Cal.4th 478, 482, fn. 1 [20 Cal.Rptr.2d 582, 853 P.2d 1037].) A confession is "involuntary and excludible as a denial of due process" when it was extracted " ' " 'by the exertion of any improper influence.' " ' " (*People v. Hall* (2000) 78 Cal.App.4th 232, 239 [92 Cal.Rptr.2d 687], quoting *Hutto v. Ross* (1976) 429 U.S. 28, 30 [50 L.Ed.2d 194, 97 S.Ct. 202].)

" ' " 'The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were "such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." [Citation.]' [Citation.] In determining whether or not an accused's will was overborne, 'an examination must be made of "all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation." [Citation.]' [Citation.]" [Citation.]' " (*People v. McWhorter* (2009) 47 Cal.4th 318, 346–347 [97 Cal.Rptr.3d 412, 212 P.3d 692], quoting *People v. Maury* (2003) 30 Cal.4th 342, 404 [133 Cal.Rptr.2d 561, 68 P.3d 1].)

The prosecution bears the burden of proving the voluntariness of a confession by a preponderance of the evidence. (*People v. Badgett* (1995) 10 Cal.4th 330, 348 [41 Cal.Rptr.2d 635, 895 P.2d 877]; *People v. Benson* (1990) 52 Cal.3d 754, 779 [276 Cal.Rptr. 827, 802 P.2d 330].) We defer to any factual findings made by the trial court to the extent supported by the record, but independently review the legal issue of the voluntariness of the confession. (*People v. Memro, supra*, 11 Cal.4th 786, 826; *People v. Anderson* (1990) 52 Cal.3d 453, 470 [276 Cal.Rptr. 356, 801 P.2d 1107]; *People v. Hall, supra*, 78 Cal.App.4th 232, 239; *People v. Cahill* (1994) 22 Cal.App.4th 296, 310 [28 Cal.Rptr.2d 1].) " ' "[T]he trial court's ruling on a *Miranda* issue may not be set aside by us unless it is '*palpably erroneous*.' A ruling palpably erroneous is one lacking support of substantial evidence. [Citation.]" ' [Citation.]" (*People v. Nitschmann* (1995) 35 Cal.App.4th 677, 683 [41 Cal.Rptr.2d 325].)

Defendant does not complain that he failed to comprehend the nature of his rights or the consequences of the decision to make a statement. Rather, he challenges the

voluntariness of the waiver as "wrongfully induced" by false information given to him by the investigating officer. The record shows that prior to the interview defendant was told by the officer at least twice that he was "not in trouble," and was given his *Miranda* rights[10] only because he was "here at the correctional facility" already. Defendant stated that he understood his rights, and the interview proceeded. He now claims, as he did in the trial court, that the deception practiced by the investigating officer rendered his statement involuntary and inadmissible.

We agree with defendant that police deception is a factor to be considered in determining the voluntariness of a confession or admission. (*Frazier v. Cupp* (1969) 394 U.S. 731, 737, 739 [22 L.Ed.2d 684, 89 S.Ct. 1420]; *Miller v. Fenton* (3d Cir. 1986) 796 F.2d 598, 607; *People v. Engert* (1987) 193 Cal.App.3d 1518, 1524 [239 Cal.Rptr. 169].) "[C]ourts may consider whether the police lied to the defendant. 'While the use of deception or communication of false information to a suspect does not alone render a resulting statement involuntary [citation], such deception is a factor which weighs against a finding of voluntariness [citation].' [Citation.]" (*In re Shawn D., supra*, 20 Cal.App.4th 200, 209.) "Police trickery that occurs in the process of a criminal interrogation does not, by itself, render a confession involuntary and violate the state or federal due process clause. [Citation.] Why? Because subterfuge is not necessarily coercive in nature. [Citation.] And unless the police engage in conduct which coerces a suspect into confessing, no finding of involuntariness can be made." (*People v. Chutan* (1999) 72 Cal.App.4th 1276, 1280 [85 Cal.Rptr.2d 744].) " 'A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions. . . . .' [Citation.]" (*People v. McWhorter, supra*, 47 Cal.4th 318, 347.) "[I]nvoluntariness requires coercive activity on the part of the state or its agents; and such activity must be, as it were, the 'proximate cause' of the statement in question,

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10 *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602].

and not merely a cause in fact." (*People v. Mickey* (1991) 54 Cal.3d 612, 647 [286 Cal.Rptr. 801, 818 P.2d 84].)

"Lies told by the police to a suspect under questioning can affect the voluntariness of an ensuing confession, but they are not per se sufficient to make it involuntary. [Citation.] [¶] Rather, there must be a *proximate* causal connection between the deception or subterfuge and the confession. 'A confession is "obtained" . . . if and only if inducement and statement are linked, as it were, by "proximate" causation. . . . The requisite causal connection between promise [or deception] and confession must be more than "but for": causation-in-fact is insufficient.' [Citation.]" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1240 [74 Cal.Rptr.2d 212, 954 P.2d 475].)

Upon review of the asserted deception in the present case, along with the remaining pertinent factors, we conclude that the officer did not engage in coercive activity that produced an involuntary confession. First, looking at the totality of the circumstances surrounding the interrogation, we find nothing that suggests an involuntary decision by defendant to speak with the officer. The record indicates that defendant understood the *Miranda* warnings administered to him, and gave no indication of reluctance to discuss the matter. The representation that defendant was "not in any trouble" may have been misleading – although it was more of a statement of opinion rather than fact – but it was not coercive in nature, nor, as we view the record, did it cause defendant to make any false inculpatory statement. The California Supreme Court has repeatedly declared that the use of deceptive statements during an interrogation "does not invalidate a confession unless the deception is ' " 'of a type reasonably likely to procure an untrue statement.' " ' [Citations.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 172 [97 Cal.Rptr.3d 117, 211 P.3d 617]; see also *People v. Cahill, supra,* 22 Cal.App.4th 296, 315.) "So long as a police officer's misrepresentations or omissions are not of a kind likely to produce a *false* confession, confessions prompted by deception are admissible in evidence. [Citations.] Police officers are thus at liberty to utilize deceptive stratagems to

trick a guilty person into confessing." (*People v. Chutan, supra,* 72 Cal.App.4th 1276, 1280.)[11] Given the officer's assurances, defendant may have felt generally more at ease discussing the case, but the record does not indicate that he was inclined to make any admissions because the officer told him he was not in trouble. The context of the officer's remark, as was explicitly and repeatedly disclosed to defendant, was that he had not been charged and the questioning was for the purpose of getting "both sides of the story." The record of the interview reveals that defendant was aware he was at least under police scrutiny and the officer was seeking information from him about the incidents. Any subterfuge used by the officer did not coerce defendant into a confession or induce a false statement. (*People v. Musselwhite, supra,* 17 Cal.4th 1216, 1240–1241; *People v. Engert, supra,* 193 Cal.App.3d 1518, 1524–1525; *People v. Watkins, supra,* 6 Cal.App.3d 119, 124.) The admission of defendant's statement was therefore not error.

V. The Claims of Prosecutorial Misconduct.

Defendant makes numerous claims of prosecutorial misconduct, which we will review serially. " 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally

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11 "The cases from California and federal courts validating such tactics are legion. (See, e.g., *Frazier* v. *Cupp* (1969) 394 U.S. 731, 739 [89 S.Ct. 1420, 1424–1425, 22 L.Ed.2d 684, 693] [officer falsely told the suspect his accomplice had been captured and confessed]; *People* v. *Jones* [(1998)] 17 Cal.4th [279,] 299 [70 Cal.Rptr.2d 793, 949 P.2d 890] [officer implied he could prove more than he actually could]; *People* v. *Thompson* [(1990)] 50 Cal.3d [134,] 167 [266 Cal.Rptr. 309, 785 P.2d 857] [officers repeatedly lied, insisting they had evidence linking the suspect to a homicide]; *In re Walker* (1974) 10 Cal.3d 764, 777 [112 Cal.Rptr. 177, 518 P.2d 1129] [wounded suspect told he might die before he reached the hospital, so he should talk while he still had the chance]; *People* v. *Parrison* [(1982)] 137 Cal.App.3d [529,] 537 [187 Cal.Rptr. 123] [police falsely told suspect a gun residue test produced a positive result]; *People* v. *Watkins* (1970) 6 Cal.App.3d 119, 124–125 [85 Cal.Rptr. 621] [officer told suspect his fingerprints had been found on the getaway car, although no prints had been obtained]; and *Amaya-Ruiz* v. *Stewart* (9th Cir. 1997) 121 F.3d 486, 495 [suspect falsely told he had been identified by an eyewitness].)" (*People v. Chutan, supra,* 72 Cal.App.4th 1276, 1280–1281.)

unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' [Citation.] '[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citation.]" (*People v. Smithey, supra,* 20 Cal.4th 936, 960; see also *People v. Prieto* (2003) 30 Cal.4th 226, 260 [133 Cal.Rptr.2d 18, 66 P.3d 1123].)

A. *Defendant's failure to object.*

Defendant acknowledges that nearly all of the instances of misconduct he challenges on appeal were not the subject of any objection at trial. Thus, the issue of forfeiture of the claims is presented. "Generally, ' " 'a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion – and on the same ground – the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' " ' [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 609 [43 Cal.Rptr.3d 1, 133 P.3d 1076].) "[A] reviewing court will not review a claim of misconduct in the absence of an objection and request for admonishment at trial." (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215 [40 Cal.Rptr.2d 456, 892 P.2d 1199]; see also *People v. Scott* (1997) 15 Cal.4th 1188, 1217 [65 Cal.Rptr.2d 240, 939 P.2d 354]; *People v. Davis* (1995) 10 Cal.4th 463, 537 [41 Cal.Rptr.2d 826, 896 P.2d 119].) " 'To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.' " (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130 [113 Cal.Rptr.2d 27, 33 P.3d 450], quoting *People v. Price* (1991) 1 Cal.4th 324, 447 [3 Cal.Rptr.2d 106, 821 P.2d 610]; see also *People v. Arias* (1996) 13 Cal.4th 92, 159 [51 Cal.Rptr.2d 770, 913 P.2d 980].) Nevertheless, to resolve defendant's assertion that any prejudice from the remark could not readily have been cured by the trial court's intervention, and to offset any claim of ineffective assistance of counsel, we reach the merits of the claims of misconduct. (See *People v. Turner* (2004) 34 Cal.4th 406, 431

[20 Cal.Rptr.3d 182, 99 P.3d 505]; *People v. Lucas, supra,* 12 Cal.4th 415, 457; *People v. Hawkins* (1995) 10 Cal.4th 920, 948–949 [42 Cal.Rptr.2d 636, 897 P.2d 574]; *People v. Clark* (1993) 5 Cal.4th 950, 1013 [22 Cal.Rptr.2d 689, 857 P.2d 1099].)

B. The questioning of the complaining witness and the victim of the uncharged acts.

Defendant argues that the prosecutor engaged in "improper questioning" of the witnesses that "disparaged defense counsel" and essentially impugned the defense claim that the alleged sexual acts were consensual. Without detailing each of the many questions to which defendant objects, the categories of claimed improper inquiry by the prosecutor are: asking the witnesses if suggestions that they engaged in various consensual sex acts "would be a lie;" questions that elicited the witnesses' negative feelings about testifying and being subjected to cross-examination by defense counsel; and eliciting the feelings of the witnesses about appearing in court with the man who assaulted them.

None of the questions that inquired as to the truthfulness of the victims' testimony disparaged defense counsel or impugned the defense. The prosecutor did not ask if *other* witnesses were lying, which, depending on the context of the question, may constitute misconduct. (Cf. *People v. Zambrano* (2004) 124 Cal.App.4th 228, 238 [21 Cal.Rptr.3d 160]; *People v. Foster* (2003) 111 Cal.App.4th 379, 385 [3 Cal.Rptr.3d 535].)[12] The

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12 The courts have reached varying conclusions "on whether it is misconduct for a prosecutor to ask a defendant on cross-examination whether another witness was lying," and noted that according to the opinion "in *People v. Foster* (2003) 111 Cal.App.4th 379, 385 [3 Cal.Rptr.3d 535] (*Foster*)," three lines of cases have emerged without any consensus on the issue or definitive resolution by the courts of California. (*People v. Zambrano, supra,* 124 Cal.App.4th 228, 238.) " 'One line of cases holds that asking "were they lying" questions is always misconduct. [Citations.] The courts in these cases explain that these questions infringe on the jury's right to make credibility determinations [citations], or that the questions are misleading because they suggest that the only explanation for the discrepancy between defendant's testimony and the other witness' testimony is that one of them is lying [citations]. Moreover, the questions might be considered misleading or calling for a conclusion in that they suggest that the defendant can know what another witness was thinking.' (*Foster, supra,* at p. 384.) [¶] 'Another line of cases holds that asking "were they lying" questions is not misconduct. [Citations.] The courts in these cases explain that these questions " ' "merely emphasize[] the conflict in the evidence, which it was the jury's duty to resolve." ' " . . . [¶] A third line of cases holds that "were they lying" questions are neither categorically improper nor categorically proper, but are proper under certain limited circumstances.' (*Foster, supra,* 111 Cal.App.4th at pp. 384–385.)

prosecutor also was not improperly expressing a personal belief in the truth of the witnesses' statements or suggesting fabrication of a defense. Although it is misconduct for a prosecutor to impugn the integrity of defense counsel or to suggest defense counsel has fabricated a defense, we accord great latitude to prosecutors to urge whatever conclusions can properly be drawn from the evidence. (*People v. Cash* (2002) 28 Cal.4th 703, 732 [122 Cal.Rptr.2d 545, 50 P.3d 332].) We think the prosecutor's questions were designed and would have been interpreted by the jury to bolster the credibility of the witnesses in light of the obvious defense of consent, not to suggest that defense counsel would seek to deceive the jury. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1302 [18 Cal.Rptr.2d 796, 850 P.2d 1].) The prosecutor was challenging the expected defense *case,* not defense counsel's integrity. (See *People v. Lewis, supra,* 46 Cal.4th 1255, 1305; *People v. Cunningham* (2001) 25 Cal.4th 926, 1003 [108 Cal.Rptr.2d 291, 25 P.3d 519]; *People v. Medina* (1995) 11 Cal.4th 694, 759 [47 Cal.Rptr.2d 165, 906 P.2d 2]; *People v. Thompson* (1988) 45 Cal.3d 86, 112 [246 Cal.Rptr. 245, 753 P.2d 37].) Nor did the prosecutor seek to elicit inadmissible and irrelevant lay opinion testimony on the credibility of witnesses. He merely asked his own witnesses if they were testifying truthfully.

The inquiries into the witnesses' feelings about appearing in court with the defendant and recounting the sexual assaults did not constitute presentation of improper victim impact evidence. The prosecutor was entitled to strengthen the credibility of the witnesses, and the questioning was relevant to help the jury evaluate the sincerity of their emotions and testimony. (*People v. Navarette* (2003) 30 Cal.4th 458, 515 [133 Cal.Rptr.2d 89, 66 P.3d 1182].) The prosecutor's questioning of the witnesses did not constitute misconduct.

In the third line of cases, the questions 'may be appropriate when the only possible explanation for the defendant's inconsistent testimony is that either the defendant or the other witness is lying [citations], or when the defendant has opened the door during direct examination by testifying about the veracity of other witnesses [citations], or when the "were they lying" questions "have a probative value in clarifying a particular line of testimony" [citations].' [Citation.]" (*Zambrano, supra,* at pp. 238–239.)

C. The comments on the failure of the defense to present evidence.

We next consider defendant's objection, made for the first time on appeal, that the prosecutor improperly commented on his "exercise of his Fifth Amendment right to remain silent" in violation of the precepts articulated in *Griffin v. California* (1965) 380 U.S. 609 [14 L.Ed.2d 106, 85 S.Ct. 1229]. The claim of *Griffin* error is based on the prosecutor's comments during closing argument that the defense did not mention the reason defendant gave false names to Athena and Sarah.[13]

"Under the Fifth Amendment of the federal Constitution, a prosecutor is prohibited from commenting directly or indirectly on an accused's invocation of the constitutional right to silence. Directing a jury's attention to a defendant's failure to testify at trial runs the risk of inviting the jury to consider the defendant's silence as evidence of guilt. [*Griffin v. California, supra,* 380 U.S. 609, 614–615 . . . .]" (*People v. Lewis* (2001) 25 Cal.4th 610, 670 [106 Cal.Rptr.2d 629, 22 P.3d 392].) " 'We also have said "it is error for the prosecution to refer to the absence of evidence that only the defendant's testimony could provide." [Citations.] *Griffin's* prohibition against " 'direct or indirect comment upon the failure of the defendant to take the witness stand,' " however, " 'does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses.' " [Citations.]' [Citations.]" (*People v. Carter* (2005) 36 Cal.4th 1215, 1266–1267 [32 Cal.Rptr.3d 838, 117 P.3d 544].) While the failure by a defendant to testify cannot be argued by the prosecution, it is clearly appropriate for a prosecutor to discuss the failure of the defense to present or introduce evidence rebutting or explaining material evidence of the

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13 We observe that the procedural requirement that a "defendant cannot complain on appeal of error by a prosecutor unless he or she made an assignment of error on the same ground in a timely fashion in the trial court and requested the jury be admonished to disregard the impropriety" "has been applied repeatedly to cases involving claims of *Griffin* error." (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1006–1007 [50 Cal.Rptr.3d 875], and cases cited therein.) We also note that counsel cannot be found ineffective on appeal for failing to make an objection. As a tactical reason for the lack of an objection, counsel may well not have wanted the court to emphasize the argument. (*People v. Freeman* (1994) 8 Cal.4th 450, 495 [34 Cal.Rptr.2d 558, 882 P.2d 249].)

government like the use of false names referenced by the complaining witnesses. "By directing the jury's attention to the fact defendant never [rebutted prosecution evidence], the prosecutor did no more than emphasize defendant's failure to present material evidence. He did not capitalize on the fact defendant failed to testify." (*People v. Brown, supra,* 31 Cal.4th 518, 554.)

Here, the prosecutor's comments were directed not at defendant's silence, but instead at the failure of the defense to offer argument or evidence on the issue of the false names given to the victims by defendant. While defendant, if he had testified, may have either explained the reason for giving false names to the witnesses or denied that he did so, "this possibility does not transform the prosecutor's observations into a veiled comment upon defendant's decision not to testify. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1229 [14 Cal.Rptr.2d 702, 842 P.2d 1] [a prosecutor may not claim that evidence is uncontradicted if the defendant is the only person who could refute the evidence, but if others could have contradicted the evidence the prosecutor may comment upon the state of the evidence].)" (*People v. Lewis, supra,* 46 Cal.4th 1255, 1304.) Even without defendant's testimony the defense could have suggested plausible reasons for the false names given by defendant. The comments concerned the dearth of argument or rebuttal evidence presented by the defense to contradict the prosecution's case, a proper subject for argument. (See *People v. Lewis, supra,* 25 Cal.4th 610, 670; *People v. Avena* (1996) 13 Cal.4th 394, 443 [53 Cal.Rptr.2d 301, 916 P.2d 1000]; *People v. Dominguez* (1992) 11 Cal.App.4th 1342, 1351 [15 Cal.Rptr.2d 46].) The prosecutor did not commit *Griffin* error.

D. The comments on the defense argument.

Defendant also argues that the prosecutor misstated the burden of proof, distorted the role of the jury, and again impugned defense counsel by making a series of references during closing argument to defense efforts to distract the jury by presenting speculative arguments. The sequence of comments challenged by defendant was as follows: first, the prosecutor observed that defendant "committed several crimes back on September 20, 1996," but was entitled to a jury trial to determine "the truth of what he did" to the

victim; then, the prosecutor recounted a rather odd tale about people dragging "rotten smelly fish" to distract hounds during fox hunts; this was followed by a comment that the defense had cast out "a lot of these smelly rotten fishes," coupled with an admonition to the jurors to "keep your eyes on the truth, on the evidence that has been proven beyond a reasonable doubt;" the defense efforts to "make this a racial issue," portray the victim as a prowler who concocted the rape as a reason to explain her presence in the backyard, and suggest that the victim's abusive husband caused her cut lip, were all described by the prosecutor as specific examples of "those rotten smelly fish" the defense employed to divert the jury's attention from the evidence; the prosecutor also asserted that the claims raised by the defense were "speculation, conjecture" and "some doozies" in "an effort to try to hide what happened in this case;" and finally, the jury was urged to determine if the questions raised by the defense demonstrated "reasonable," not just "possible doubt."

The prosecutor's statements that defendant committed crimes and that questions raised by the defense must be reasonable were not improper. The prosecutor was entitled to comment upon the state of the evidence by asserting that defendant committed the charged crimes. (*People v. Cook* (2006) 39 Cal.4th 566, 608 [47 Cal.Rptr.3d 22, 139 P.3d 492].) It is of course improper for the prosecutor to misstate the law generally, and in particular to attempt to lower the burden of proof. (*People v. Hill* (1998) 17 Cal.4th 800, 829 [72 Cal.Rptr.2d 656, 952 P.2d 673]; *People v. Williams* (2009) 170 Cal.App.4th 587, 630 [88 Cal.Rptr.3d 401].) But here, the prosecutor expressly acknowledged that the "[c]ase must be proven beyond a reasonable doubt," and the trial court instructed the jury on the reasonable doubt standard. When viewed in their entirety, the prosecutor's statements that the questions raised by the defense must raise reasonable doubt rather than establish possible doubt were not likely to mislead a reasonable juror into believing that defendant bore the burden of establishing a reasonable doubt, and did not constitute misconduct. (*People v. Stewart* (2004) 33 Cal.4th 425, 508 [15 Cal.Rptr.3d 656, 93 P.3d 271]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1239 [56 Cal.Rptr.2d 49, 920 P.2d 1254]; *People v. Jasmin* (2008) 167 Cal.App.4th 98, 116 [84 Cal.Rptr.3d 19].)

The prosecutor's references to the "smelly fish" and mere speculation raised by the defense claims, while rather unorthodox to be sure, also did not constitute misconduct. Similar comments that the defense may use "various 'tricks' and 'moves' " to confuse the jury or engage in speculation have not been considered improper personal attack on defense counsel's integrity. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1166 [113 Cal.Rptr.2d 827, 34 P.3d 937]; see also *People v. Alfaro* (2007) 41 Cal.4th 1277, 1329–1330 [63 Cal.Rptr.3d 433, 163 P.3d 118]; *People v. Medina, supra,* 11 Cal.4th 694, 759.) We conclude that the prosecutor did not commit misconduct.

DISPOSITION

Accordingly, the judgment is affirmed.

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Dondero, J.

We concur:

_____
Marchiano, P. J.

_____
Banke, J.

Trial Court:	San Mateo County Superior Court
Trial Judge:	Hon. Jonathan E. Karesh
Attorney for Defendant and Appellant:	Andrew Parnes, Esq.
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