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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CARLOS ARMANDO LOPEZ, Defendant and Appellant.	F050831 (Super. Ct. No. BF113929A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Clarence Westra, Jr., Judge.

Janet J. Gray, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

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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 the Factual and Procedural Summary and parts I., II.B., and III.-V. of the Discussion.

INTRODUCTION

Carlos Armando Lopez was convicted of five separate crimes related to the assault (Pen. Code, § 220, subd. (a))[1] and rape (§ 261, subd. (a)(2)) of his 16-year-old half sister, L. The trial court found true a prior prison term enhancement (§ 667.5, subd. (b)) and imposed a total prison sentence of 20 years.

Lopez argues the trial court erred in admitting (1) his statement to the police in which he admitted the crimes because he did not knowingly, intelligently, and voluntarily give up his constitutional rights; (2) evidence pursuant to Evidence Code section 1108 that he previously had assaulted his cousin; and (3) photographs of the victim's injuries because the prosecution failed to disclose them in a timely manner. He contends the trial court also erred in instructing the jury and in imposing an aggravated sentence, in violation of his Sixth Amendment right to a jury trial. We conclude there was no reversible error and affirm the judgment.

We publish our discussion of one issue, which appears to be an issue of first impression. Lopez argues one reason the trial court erred in admitting the prior act evidence was because the act resulted in conviction for false imprisonment (§ 236), which is not a sexual offense as that term is defined in Evidence Code section 1108. We conclude that if the facts of the offense could constitute a sexual offense, the defendant's conviction of an offense that is not a sexual offense would not bar testimony about the prior act.

FACTUAL AND PROCEDURAL SUMMARY*

Lopez is the half brother of L. and is 10 years older than she. On the morning in question, L. was watching television when Lopez entered the room and asked her to massage his foot. Lopez then offered to give L. a massage. She accepted the offer.

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

***** See footnote, *ante,* page 1.

Lopez began massaging L.'s foot and asked her to remove her pants so he could continue the massage. She refused. Lopez then demanded that she remove her pants. L. was frightened, so she complied. Lopez continued massaging her leg, moving towards her groin. Lopez told L. he used to change her diaper when she was a little girl, so he was familiar with her pubic area. L. became frightened and told him to stop. Lopez complied and L. put on her pants. Lopez received a phone call a few moments later and left the house.

Lopez returned to the house around 9:00 p.m. L. was watching television with her boyfriend and her sister. Lopez joined the group. L.'s boyfriend left about 10:00 p.m. After a while, Lopez told L.'s sister to go to bed. L. continued to watch television. Lopez went into his bedroom shortly thereafter. From his bedroom, he asked L. to put some ointment on a scratch on his back. She complied. At first Lopez would not permit L. to leave the room after she applied the ointment, but eventually he did so.

L. went to bed a short while later wearing jeans, a shirt, and a sweatshirt. Lopez followed her into the bedroom. It appeared Lopez was carrying a glass of wine. Lopez asked if L. was upset with him. L. said she was not upset, that she merely wanted to go to sleep. Lopez lay down on the bed next to L. She asked Lopez to leave the room. Lopez did not leave and began hitting L. in the face and on her arm, body, and legs. L. curled up, but Lopez told her to straighten out. Lopez grabbed her legs and pulled them when she did not comply. Lopez removed L.'s pants and underwear. She fought back, but Lopez told her to be quiet and hit her again. She could not escape because Lopez was holding her feet. Lopez put his fingers inside her vagina. Lopez then pulled down his shorts and raped L.. She asked Lopez to stop and tried to move around, but her efforts were unsuccessful. Lopez ejaculated on the bed. After he was finished, Lopez gave L. a shirt, told her to clean up, and left.

After Lopez left, L. covered herself with her blanket and cried. Lopez returned a short while later to take the cellular phones of L. and her mother. Lopez told her not to

say anything and then left the room. Lopez returned again, this time with a kitchen knife in his hand. Lopez told her that if she said anything, he would kill her.

L.'s mother was not home when the attack occurred. L. heard Lopez talking to her mother when she arrived home. When she could no longer hear Lopez, she went to her mother and lay down with her. She did not tell her mother what had occurred because she was afraid.

The next morning L. left the house with her mother to visit some relatives. After they left, she told her mother Lopez had raped her. She felt safe telling her mother because Lopez was not with them. Initially, she did not want to go to the police because she was afraid of Lopez. Later that day, however, she and her mother reported the incident. L. decided to talk to the police because she was afraid that if she did not, Lopez would rape her again, or might even rape her sister.

Deborah Lorraine McDowell, a trained sexual assault nurse, examined L. During the examination, McDowell noted bruises on L.'s ribs, eye, arm, back, thigh, and pelvic regions. McDowell identified photographs of L.'s injuries, which were admitted into evidence. The injuries observed by McDowell were consistent with the history provided by L.

The People also introduced into evidence Lopez's interview with the investigating officer. During the interview, Lopez admitted hitting and having intercourse with L.

Finally, the People introduced evidence of another attack committed by Lopez. This evidence will be discussed in detail in the discussion portion of this opinion.

A jury convicted Lopez of (1) rape by force or fear (§ 261, subd. (a)(2)), (2) sexual penetration by a foreign object by force or fear (§ 289, subd. (a)(1)), (3) assault with the intent to commit rape (§ 220, subd. (a)), (4) willfully causing a child to suffer great bodily injury (§ 273a, subd. (a)), and (5) making a criminal threat (§ 422). The trial court, after Lopez waived his right to a jury, found he had served a prior prison term within the meaning of section 667.5, subdivision (b).

The trial court sentenced Lopez to a total of 20 years in prison comprised of (1) an aggravated term of eight years for the rape conviction, (2) a consecutive, aggravated term of eight years for the sexual penetration conviction, (3) a consecutive, aggravated term of three years for the criminal threat conviction, and (4) a consecutive year for the prior prison term enhancement. The trial court imposed aggravated sentences on the remaining counts, but stayed those sentences pursuant to section 654.

DISCUSSION

I. Lopez's Statement to the Police*

A portion of Lopez's interview with the investigating officer was played for the jury.[2] In the interview, Lopez admitted hitting L. six times, admitted pulling down L.'s pants and putting his penis insider her vagina, and admitted holding a knife while telling L. that if she "ratted" on him he would kill her.

Lopez contends the trial court erred in admitting this statement into evidence for two reasons. First, he argues, in essence, that his poor command of the English language prevented him from knowingly, intelligently, and voluntarily waiving his constitutional rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. Second, he claims he never effectively waived his rights.

Our review of this issue was explained in *People v. Whitson* (1998) 17 Cal.4th 229. "'[W]e accept the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence. [Citation.] Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained [citation], we "'give great weight to the considered conclusions' of a lower court that has previously reviewed

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* See footnote, *ante*, page 1.

[2] Once the trial court determined the recording of the interview was admissible, the parties agreed to which parts of the interview would be played to the jury.

the same evidence." [Citations.] Because the crimes in this case occurred after the addition of section 28, subdivision (d) to article I of the California Constitution, the voluntariness of defendant's waiver and confession must be established by a preponderance of the evidence. [Citation.]' [Citations.]" (*Id*. at p. 248.)

The facts are undisputed. A hearing was held pursuant to Evidence Code section 402 after Lopez moved the trial court to exclude the interview. The basis for the motion was the same as is asserted in this court. The only witness to testify at the hearing was Deputy Sheriff Danny Edgerle, who interviewed Lopez after he was arrested. The recorded interview was conducted in English.

Edgerle testified that he advised Lopez of his rights pursuant to *Miranda*. After advising him of each right, Edgerle asked Lopez if he understood the right. Lopez responded affirmatively to each question in English. Edgerle then asked Lopez if he wished to speak with him. Lopez responded by stating he ran away when the officers approached because he was on parole. Lopez did not state affirmatively he was willing to waive his rights. Edgerle continued the interview, obtaining several incriminating statements. Lopez never told Edgerle he did not want to continue the interview.

At one point during the interview, Edgerle asked Lopez if he would rather be interviewed in Spanish. Lopez said he did not want to speak Spanish, and the interview continued in English. At times the parties had difficulty understanding each other. On those occasions Edgerle would clarify Lopez's responses with additional questions. Lopez answered questions appropriately. Lopez did not tell Edgerle that he did not understand what was being said.

Also present during the initial part of the interview was Deputy Sheriff Martin Barron, who was certified by the sheriff's department to translate from Spanish to English. Lopez, however, asked that Barron leave during the interview.

A. Lopez understood his rights

Lopez's first argument is that there was no evidence that he understood the admonishment given to him by Edgerle. Instead, according to Lopez, there was evidence that he did not understand his rights.

First, as we shall explain, some of Lopez's arguments have been forfeited. The only witness to testify at the Evidence Code section 402 hearing was Edgerle. *The transcript of the interview was not introduced into evidence*. Therefore, the only evidence on which the trial court could base its decision was Edgerle's testimony.

Lopez now argues that portions of the transcript about which there was no testimony establish he did not understand the admonishments. We conclude, however, that Lopez may not rely on these portions of the transcript. (*People v. Partida* (2005) 37 Cal.4th 428, 433-436.) This forfeiture rule, codified in Evidence Code section 353, is designed to ensure "that the objection fairly inform[s] the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling." (*Partida*, at p. 435.)

The purpose of this rule cannot be served by recognizing objections that rely on evidence that neither the trial court nor the opposing party knew was deemed significant by Lopez. The trial court did not have an opportunity to evaluate the evidence, and the prosecutor did not have an opportunity to respond to any argument based on this evidence. It is too late for Lopez now to rely upon such evidence.

We turn, therefore, to the relevant portions of Edgerle's testimony. He stated that he read the *Miranda* admonishments to Lopez in English. Lopez replied in English that he understood his rights. During cross-examination Lopez established that Edgerle told Lopez he was arrested because he ran away when approached by sheriff's deputies, that there were portions of the interview when Edgerle did not understand Lopez but that Edgerle then would clarify any misunderstanding, and that Edgerle did not provide a

direct response when Lopez asked on one occasion what would occur if he did not answer Edgerle's questions. During redirect examination, the prosecutor established that Edgerle told Lopez that it was his choice whether to talk with him and no one was going to force him to answer any questions.

Edgerle's testimony provided direct evidence that Lopez understood the admonishments. Edgerle also testified that he was able to communicate in English with Lopez, that he clarified any comments he had difficulty understanding, and that Lopez rejected the use of an interpreter. Therefore, we reject Lopez's claim that there was no evidence that he understood the admonishments.

Lopez argues the transcript supports inferences that he could not speak English well enough to understand his rights, and that he was mistreated when he was arrested. As explained above, these arguments have been forfeited because they were not made in the trial court, and the evidence on which Lopez now relies was not introduced at the Evidence Code section 402 hearing.

Moreover, we do not read the transcript as supporting either inference. Our review of the transcript establishes that the interview was consistent with Edgerle's testimony. Lopez appeared to respond appropriately to most questions and, when there was some difficulty in communicating, Edgerle sought to clarify Lopez's comments, usually successfully. Most of these situations appear to have occurred when Edgerle could not understand what Lopez said, oftentimes because Lopez was speaking softly. There does not appear to us to be any situations when Lopez did not understand what Edgerle was saying to him. Nor is there any indication that Lopez was mistreated. While it is clear English is Lopez's second language, we cannot infer from the transcript that he did not understand his rights.

Nor do we find *U.S. v. Garibay* (9th Cir. 1998) 143 F.3d 534, the case on which Lopez primarily relies, persuasive. Like Lopez, Garibay's first language was Spanish. Like Lopez, Garibay was informed of his constitutional rights in English, and the

interview was conducted in English. Finally, like Lopez, Garibay argued that his statement to the authorities was not voluntary because he did not understand his constitutional rights. This is where the similarity between the two cases ends.

The evidence relied on by the appellate court to reverse the trial court's conclusion that Garibay did not knowingly and intelligently waive his constitutional rights included (1) Garibay was not offered the opportunity to be read his rights in Spanish; (2) the investigating officer did not offer to have a translator present for the interview to assist Garibay; (3) the record indicated that Garibay understood only a few words of English; (4) Garibay attended high school in this country, but he did not graduate, and received grades of D+ in his English classes, which were taught in Spanish; (5) several independent sources who knew Garibay believed he could speak only a few words of English; (6) several witnesses testified that Garibay always requested they communicate with him only in Spanish; (7) Garibay's former high school football coach testified that when under stress and in the presence of authority figures, Garibay habitually stated he could understand English and gave the appearance of being able to do so when he could not; (8) expert witnesses testified that Garibay's IQ was "borderline retarded"; (9) expert witnesses confirmed that Garibay had difficulty following oral instructions; (10) Garibay was not given a written waiver of rights form to sign in either English or Spanish; and (11) Garibay had no previous involvement with the police. (*U.S. States v. Garibay, supra,* 143 F.3d at pp. 537-539.) With one exception,[3] there is no evidence that any of these factors apply to Lopez. The evidence in the two cases is so dissimilar as to render *Garibay* inapposite.

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[3] Lopez was not given a written waiver of rights form to sign.

B. Lopez waived his rights

The next issue is whether Lopez effectively waived his constitutional rights. While Lopez did not do so explicitly, this fact does not end our inquiry. "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." (*North Carolina v. Butler* (1979) 441 U.S. 369, 373.) "[T]he question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' [Citations.]" (*Id*. at pp. 374-375.)

The People argue that Lopez impliedly waived his constitutional rights by answering all of Edgerle's questions without indicating he did not want to do so or that he wanted to consult with an attorney. Lopez argues that no waiver can be inferred because Edgerle did not directly answer his inquiry about the consequences of refusing to answer questions.

To put the argument in perspective, we quote the two relevant portions of the hearing. After informing Lopez of his rights and confirming that he understood each right, Edgerle stated: "And having those rights in mind, do you want to talk to us?

About our investigation?" Lopez replied: "I just [ran] because I am on parole."[4] Edgerle continued asking questions without ever obtaining an explicit waiver of Lopez's rights. Shortly thereafter, when it appears Edgerle was becoming frustrated with Lopez's evasive answers, the following exchange occurred:

> "EDGERLE: I'm a pretty easy person to get along [with].… [B]ut I don't want to play any games. It's too early in the morning. I asked you a question. Do you know why you're here?
>
> "LOPEZ: I guess.
>
> "EDGERLE: Why? You gonna answer my question?
>
> "LOPEZ: If I don't answer, what?
>
> "EDGERLE: What?
>
> "LOPEZ: (unintelligible)
>
> "EDGERLE: It's up to you. Nobody's forcing you to do anything here. Carlos, there comes a time in every man's life that he has to know when he's made a mistake and done something wrong and owns up to it. And again, there's always two sides to a story. I've only got one. Nobody's trying to intimidate you. Nobody's up in your face. Only reason you've been treated the way you've been treated so far is because you ran."[5]

Lopez focuses on his inquiry about the consequences of not answering questions and Edgerle's response. He wants us to interpret this comment as an invocation of his right to remain silent.

It would take a leap in logic to conclude from Lopez's question and Edgerle's response that Lopez was invoking his right to remain silent. Instead, a fair reading of the transcript, and Edgerle's testimony, establishes that Lopez most likely was weighing his

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4 Edgerle asked Lopez to repeat his answer because he either could not hear or understand him the first time. We discuss only the relevant portions of the exchange.

5 These two exchanges were covered during Edgerle's testimony and are therefore relevant to our inquiry.

options. Undoubtedly, based on his subsequent statement, Lopez knew he was in serious trouble. Lopez was faced with the dilemma of trying to discover the course of conduct that would provide him with the most benefit. Edgerle's response was an attempt to persuade Lopez to answer the questions posed to him. Edgerle could have told Lopez that if he chose not to answer questions, he would be charged based on the information known to Edgerle. Other responses also could have been given to the question. A recitation of his constitutional rights, as Lopez suggests, however, would not have been an appropriate or necessary response.

Based on the totality of the circumstances, including Lopez's decision to continue answering Edgerle's questions and the complete absence of an attempt by Lopez to invoke his right to remain silent, we conclude Lopez impliedly waived his constitutional rights. The trial court, therefore, did not err in denying Lopez's motion to exclude the statement.

II. Prior Sexual Offense

Evidence Code section 1108 allows propensity evidence to be used in cases involving sexual offenses. Specifically, the statute provides that if the defendant is charged with committing a sexual offense, then evidence that the defendant committed other sexual offenses in the past is admissible, unless the trial court determines it should be excluded pursuant to the weighing provisions of Evidence Code section 352. (*Id.*, § 1108, subd. (a).) This rule directly opposes the traditional view that propensity evidence should not be admitted when determining a defendant's guilt. (See *id.*, § 1101, subd. (a); *People v. Falsetta* (1999) 21 Cal.4th 903, 913-914.)

Evidence Code section 1108 defines a sexual offense by referring to statutes that make criminal various sexual offenses. (*Id.*, subd. (d)(1)(A), (B).) A sexual offense also is defined to include (1) a crime that involves nonconsensual contact between any part of the defendant's body and the genitals or anus of another person; (2) a crime that involves

nonconsensual contact between any part of another person's body and the genitals or anus of the defendant; and (3) a crime that involves deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person. (*Id.*, subd. (d)(1)(C)-(E).) Any attempt to commit any of the above offenses is included in the definition of a sexual offense. (§ 1108, subd. (d)(1)(F).)

The trial court permitted the prosecution to introduce evidence of a prior offense committed by Lopez pursuant to Evidence Code section 1108. Two witnesses testified about the prior act.

On May 14, 2003, Y., who was 13 years old at the time, lived with her mother, father, and brother. Her cousin, Lopez, lived in the apartment next to the apartment in which she lived. Y. was in her bedroom when Lopez came over to use the shower in her apartment. After he finished his shower, Lopez went into Y.'s bedroom and closed the door. Y. became nervous and scared because she felt Lopez was looking at her in a strange manner. Y. asked Lopez if her mother and brother were home. Lopez replied that they were not home. She attempted to leave the bedroom, but Lopez pushed her back onto the bed. Lopez unsuccessfully tried to pull off Y.'s shirt. Y. began screaming. Lopez struggled with her while she continued to scream. Y.'s mother and brother, who were home, came to the bedroom door and tried to enter the room. Lopez fought to keep the door closed. Eventually the bedroom door was forced open and Y. was able to leave the room. Lopez was fully dressed during the confrontation and did not touch any of Y.'s "intimate part[s]." After the confrontation was over, Lopez told Y.'s parents that he was going to rape Y. Y. did not suffer any bruises or other injuries.

Y.'s mother, M., testified consistently with Y.'s testimony. She confirmed that she was home when Lopez came to the apartment to use the shower and that she heard Y. scream a short while later. M. and her son ran to the bedroom when she heard the scream. M. and her son tried to open the door, but Lopez fought to keep it closed. When M. opened the door, she saw that Y. was scared and crying. Lopez pushed her out of the

way and left the room. M. asked Lopez what he was attempting to do, and Lopez said he wanted to "abuse her," which meant he wanted to have sex with her.

The People's moving papers asserted, without objection, that as a result of this incident, Lopez was convicted of false imprisonment. (§ 236.) We assume this assertion is true.

Lopez contends the evidence should have been excluded for two reasons. First, he asserts that the confrontation resulted in a conviction for false imprisonment and, since false imprisonment is not a sex offense, the trial court erred in admitting the disputed evidence. Second, he argues the evidence should have been excluded pursuant to the provisions of Evidence Code section 352.

A. The prior act was a sex offense

Lopez's first argument asks us to look at only the conviction and to ignore the conduct that led to the conviction. The People, on the other hand, rely on the conduct that led to the conviction, arguing that because the testimony could have supported a conviction for a sexual offense, the evidence was admissible.

Both parties cite the same two cases to support their positions. In *People v. Pierce* (2002) 104 Cal.App.4th 893, Pierce was charged with assault with the intent to commit rape. (§ 220.) At the time the crime was committed, Evidence Code section 1108 did not include assault with the intent to commit rape in the definition of "sexual offense."[6] (*Pierce*, at p. 898.) The appellate court concluded that assault with the intent to commit rape was an aggravated form of attempted rape because it is a combination of the elements of attempted rape and assault. (*Ibid*.) As such, it met the statutory definition of a sexual offense, not only as a listed offense but also because Pierce committed the

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6 Evidence Code section 1108 was amended in 2002 to include assault with the attempt to commit rape as a sexual offense. (Stats. 2002, ch. 194, § 1, pp. 682-683; see now Evidence Code, § 1108, subd. (d)(1)(B)).

assault to derive sexual pleasure or gratification from the infliction of bodily injury or physical pain, referring to subdivision (d)(1)(E) of section 1108. (*Pierce*, at p. 898.)

In *People v. Walker* (2006) 139 Cal.App.4th 782, Walker was convicted of the murder of a prostitute. He previously had raped and assaulted two other women, one of whom was a prostitute, and assaulted a second prostitute after she consented to have intercourse with him. The prosecution convinced the trial court to permit introduction of evidence of the previous crimes pursuant to Evidence Code sections 1101 and 1108. The appellate court concluded the trial court erred in relying on section 1108. "Although murder, standing alone … is not one of the offenses enumerated in section 1108, subdivision (d)(1), there can be no question certain murder charges would qualify as 'sexual offenses' within the meaning of that provision—for example, a charge of first degree murder alleging special circumstances … (murder committed while the defendant was engaged in … or attempting to commit rape …). In such a case the defendant is accused of a crime that involves conduct proscribed by section 1108, subdivision (d)(1)(A). [Citation.]" (*Walker*, at p. 798.)

After analysis, the appellate court concluded a charged crime, not listed in the statute, could meet Evidence Code section 1108's definition of a sexual offense only if it is limited "to crimes in which deriving sexual pleasure or gratification through inflicting physical pain is an element of the charge (or applicable enhancement or aggravating factor) and not simply a circumstance of the crime's commission. Section 1108, subdivision (a) limits the statute's scope to criminal actions in which the defendant is 'accused of a sexual offense'; and subdivision (d)(1) defines 'sexual offense' to mean a 'crime … that involve[s]' certain categories and enumerated types of sexual misconduct. In ordinary usage these terms mean that the requisite sexual transgression must be an element or component of the crime itself without regard to the evidence establishing a specific violation. [Citations.]" (*People v. Walker, supra,* 139 Cal.App.4th at p. 800.)

Both *Pierce* and *Walker* involved questions about whether the crime with which the defendant was charged was a sexual offense. We are not faced with that situation here. Lopez was charged with rape (§ 261), which is listed as a sexual offense in Evidence Code section 1108, subdivision (d)(1)(A).

Nor are we faced with the question of whether the prior conduct was a sexual offense. The testimony provided substantial evidence that, if believed, established that Lopez assaulted Y. with the intent to commit rape (§ 220, subd. (a)). Evidence Code section 1108, subdivision (d)(1)(B) includes assault with the intent to commit rape in the definition of a sexual offense. Thus, *Pierce* and *Walker* are inapposite.

Instead, the question presented in this case is whether the People are permitted to argue in a subsequent prosecution that the prior conduct was a sexual offense when that conduct resulted in a conviction for a crime that is not a sexual offense. The parties have not cited, and our research has not found, any case that is on point. We conclude the evidence was admissible for a variety of reasons.

First, we begin with the language of the statute. Evidence Code section 1108, subdivision (a) makes admissible "evidence of the defendant's commission of another sexual offense." "Evidence" is defined as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." (Evid. Code, § 140.) Thus, while *People v. Wesson* (2006) 138 Cal.App.4th 959, 967-968, citing Evidence Code section 452.5, held that documentary evidence of prior convictions may be used to prove the defendant committed a prior sexual offense, Evidence Code section 1108 also permits testimony about prior sexual offenses.

Second, the rule proposed by Lopez would create an untenable situation. The premise of Lopez's argument is that because he was not convicted of a sexual offense, his attack on Y. is not admissible under Evidence Code section 1108. Uncharged sexual offenses, however, are admissible under section 1108. (*People v. Britt* (2002) 104 Cal.App.4th 500, 505-506.) Had Lopez not been charged with a crime for his attack on

Y., the prior act would be admissible. Under Lopez's proposal, the identical prior act evidence should be inadmissible *because he was convicted of a crime*. We do not believe that the Legislature intended such an absurd result.

Third, there are a variety of reasons why a defendant who commits a sexual offense may not be convicted of a sexual offense. We cannot discern any reason why the discretion exercised by the prosecutor when charging or accepting a plea to a charge in the first prosecution should become a bar to the use of evidence of the prior act in a subsequent prosecution. The issue is, and should be, whether the prior act is a sexual offense.

Fourth, we must distinguish the two circumstances because of the differing burdens of proof. When prosecuting a defendant for any crime, the prosecution must prove each element of the crime utilizing the familiar beyond-a-reasonable-doubt standard. (*United States v. Booker* (2005) 543 U.S. 220, 230.) When attempting to prove that the defendant committed a prior sexual offense as propensity evidence in a subsequent prosecution, the prosecution is required to prove each element of the prior crime utilizing the more lenient preponderance of the evidence standard. (*People v. Carpenter* (1997) 15 Cal.4th 312, 380-382.) A defendant may avoid conviction of a sexual offense because of the more stringent burden of proof, either because the prosecutor may not feel he or she can meet the burden, or because the jury concluded the prosecution failed to meet the burden. When the evidence is introduced at a subsequent trial as evidence of a prior sex offense, however, the jury may conclude the same evidence meets the preponderance of the evidence standard and utilize the evidence as permitted by law.

Lopez has not provided any authority for his assertion that a prior act may not be introduced pursuant to Evidence Code section 1108 if, as a result of that act, the defendant was convicted of a crime that is not a sexual offense. We cannot conceive of

any reason for so concluding. For each of the above stated reasons, we conclude that evidence of the prior act is admissible under these circumstances.

B. Exclusion pursuant to Evidence Code section 352*

Evidence Code section 352 provides the trial court with discretion to exclude evidence if it determines the probative value of the evidence is substantially outweighed by the probability that its admission will (1) necessitate undue consumption of time, (2) create substantial danger of undue prejudice, (3) create substantial danger of confusing the issues, or (4) create substantial danger of misleading the jury.

Evidence Code section 1108, subdivision (a) provides that propensity evidence is admissible only if it "is not inadmissible pursuant to [Evidence Code] Section 352." In *Falsetta*, the Supreme Court held the trial court's discretion to exclude propensity evidence pursuant to Evidence Code section 352 prevented Evidence Code section 1108 from violating a defendant's right to due process. (*People v. Falsetta, supra,* 21 Cal.4th at pp. 917-918.)

Lopez argues the trial court erred in concluding the proffered evidence should not be excluded pursuant to Evidence Code section 352. "We review a trial court's ruling under section 352 for abuse of discretion. [Citation.]" (*People v. Carey* (2007) 41 Cal.4th 109, 128.) "Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, 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. Guerra* (2006) 37 Cal.4th 1067, 1113.)

The thrust of Lopez's argument is that the two acts were so dissimilar that Y.'s testimony should have been excluded. He points out that Y. was not touched in a sexual manner and claims the evidence of his intent, the testimony from Y. and her mother, is suspect.

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* See footnote, *ante*, page 1.

Unlike Lopez, we see many similarities between the two incidents. Both involved young girls who were related to Lopez. Both occurred in the girls' bedrooms. In both situations, Lopez used force to restrain the girls. Lopez admitted his desire to rape Y., and he raped L. The only difference is that Lopez failed in his attempt to rape Y. because her mother and brother intervened. This difference made the prior crime less inflammatory than the charged crimes. The trial court did not act in an arbitrary or capricious manner when conducting the weighing process required by Evidence Code section 352. There was no error.

III. Untimely Discovery*

The prosecution sought to introduce photographs of L.'s injuries at trial. The prosecutor failed to disclose the photographs to Lopez's counsel until one or two days before trial. Lopez objected to the photographs because of the prosecutor's untimely discovery. The trial court refused to exclude the photographs, concluding the lack of a written motion prevented it from sanctioning the prosecution.

Discovery in criminal cases is governed by section 1054.1 et seq. Section 1054.1 requires the prosecution to disclose to the defendant's attorney the names and addresses of any witnesses, any written or recorded statements from those witnesses, any felony convictions of a witness whose credibility is likely to be an issue, all statements made by a defendant, all relevant real evidence, and any exculpatory evidence.[7] This information is required to be disclosed "at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred." (§ 1054.7)

Section 1054.5 provides sanctions for failure to comply with the discovery requirements. This section provides a two-step process before discovery may be compelled. First, a party must make an informal discovery request of the opposing party.

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* See footnote, *ante*, page 1.

[7] Similar requirements are imposed on defense attorneys in section 1054.3.

If, after 15 days, the information is not provided, the party may seek a court order. (*Id.*, subd. (b).) The trial court may order "immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure." (*Ibid.*)

Section 1054.5 does not require a written motion before sanctions may be imposed. *People v. Jackson* (1993) 15 Cal.App.4th 1197 explains why this is so: "[Defendant] unpersuasively contends the prosecutor was obligated to bring a motion to compel discovery before sanctions could be imposed, and that by not bringing a motion to compel it waived its right to the evidence and the protection of sanctions. The plain language of the statute requires informal discovery procedures be complied with before sanctions may be imposed, whereas filing a motion to compel is optional. If filing a motion to compel were mandatory before sanctions could be imposed, nothing would prevent parties from withholding critical evidence despite being requested through informal procedures to disclose the information. A party would have nothing to lose by concealing a key witness until a formal motion to compel is brought, yet opposing counsel would not know to bring a formal motion because he or she would have no way of knowing the informal request was not complied with. Thus, parties would always have to bring formal requests to compel discovery to prevent surprise testimony at the trial. This would result in the very mischief the statute was designed to prevent. Requiring informal discovery, which is intended to save court time from judicial enforcement (§ 1054, subd. (b)), would have little impact if parties were required to bring a formal motion to compel before every trial." (*Id*. at p. 1202.)

The trial court thus erred in denying Lopez's motion because it was not a written motion filed before trial. The error was harmless, however, under any standard of review. First, we note that had the trial court recognized its discretion, it may well have admitted the photographs. The subject of the photographs, bruises inflicted on L. by

Lopez, were also the subject of the testimony of the sexual assault nurse who examined L. Second, the evidence against Lopez was overwhelming. Not only did L. testify about the crimes, Lopez admitted his actions in his interview with the police. Had the photographs been excluded, there is no reasonable possibility that Lopez would have obtained a more favorable result. Accordingly, there was no miscarriage of justice. (Cal. Const., art. VI, § 13.)

IV. Refusal to instruct with CALCRIM[8*]

Lopez requested the trial court utilize the form jury instructions prepared by the Judicial Council and commonly referred to as the CALCRIM instructions. The trial court refused, choosing to rely on the time-tested CALJIC form jury instructions prepared by the Committee on Standard Jury Instructions, Criminal, of the Superior Court of Los Angeles County. Lopez argues the refusal to instruct the jury with the CALCRIM instructions was error. We disagree.

"'A trial court must instruct on the *law* applicable to the facts of the case. [Citation.] In addition, a defendant has a right to an instruction that pinpoints the *theory* of the defense. [Citation.]'" (*People v. Panah* (2005) 35 Cal.4th 395, 486.) Lopez has not identified any instruction that was incorrect, nor any part of the law on which the jury was incorrectly instructed. Instead, Lopez relies on the applicable rules of court as well as the preface to the CALCRIM instructions.

California Rules of Court, rule 2.1050(a) provides that the jury instructions approved by the Judicial Council, CALCRIM, are the official instructions for use in the state of California. "The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law." (Cal. Rules of Court, rule

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8 Judicial Council California Criminal Jury Instructions

***** See footnote, *ante*, page 1.

2.1050(b).) "Use of the Judicial Council instructions is strongly encouraged." (*Id.*, rule 2.1050 (e).)

While the rules of court encourage the use of CALCRIM instructions, they do not make their use mandatory. California Rules of Court, rule 2.1055 (a)(1)(B) anticipates that special instructions may be used when appropriate.

The preface to the instructions details the efforts to prepare the instructions in an accurate format that will be easy to understand by the lay juror. The task of preparing new instructions was undertaken because the prior form instructions were based on legal concepts, and the language used in the instructions too often reflected legal terms that were unfamiliar to the average juror.

We agree with the sentiments behind the creation of the CALCRIM instructions, and also strongly encourage their use. We are hopeful that with time the hesitancy of trial courts to use the approved instructions will disappear. We, however, will not reverse a conviction in which the jury was properly instructed, even if "better" instructions were refused.

V. Imposition of an Aggravated Term*

The trial court sentenced Lopez to an aggravated term for each count of which he was convicted. The sentences in counts 1, 2, and 5 were imposed consecutively. The sentences in counts 3 and 4 were stayed pursuant to section 654. Lopez argues the trial court violated his Sixth Amendment right to a jury trial by imposing an aggravated term utilizing factors not found true by a jury.

Sentencing schemes throughout the country have faced uncertainty since the United States Supreme Court decided a line of cases, beginning with *Apprendi v. New Jersey* (2000) 530 U.S. 466. *Apprendi* held that any fact, other than a prior conviction,

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* See footnote, *ante*, page 1.

that is used to increase the penalty beyond the statutory maximum must be tried to a jury utilizing the beyond-a-reasonable-doubt standard. (*Id*. at p. 490.)

California's determinate sentencing law (DSL) was the subject in one of *Apprendi's* progeny, *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856]. The Supreme Court held the DSL violated a defendant's right to a jury trial to the extent it permitted imposition of an aggravated term on facts that were not found true by the jury applying the beyond-a-reasonable-doubt standard. (*Id*. at p. ___ [127 S.Ct. at p. 868].)

After *Cunningham*, the DSL was revisited by the California Supreme Court in *People v. Black* (2007) 41 Cal.4th 799. The California Supreme Court, in response to *Cunningham*, held that "as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*Black*, at p. 812.) Shortly thereafter, the Supreme Court reiterated its conclusion: "[S]o long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury." (*Id*. at p. 813.)

Black also recognized that the Sixth Amendment right to a jury trial of factors that may increase a defendant's sentence does not apply to the fact of a prior conviction. (*People v. Black, supra*, 41 Cal.4th at p. 818.) The United States Supreme Court has consistently so stated in its Sixth Amendment jurisprudence on this issue. (*Cunningham v. California, supra*, 549 U.S. at p. ___ [127 S.Ct. at p. 868]; *United States v. Booker*

(2005) 543 U.S. 220, 231; *Blakely v. Washington* (2004) 542 U.S. 296, 301; *Apprendi v. New Jersey, supra*, 530 U.S. at p. 490; *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243.)

The trial court sentenced Lopez to an aggravated term after determining there were no circumstances in mitigation and the following circumstances in aggravation: (1) Lopez was on parole when he committed the crimes; (2) Lopez took advantage of a position of trust in committing the offenses, and (3) Lopez's prior convictions were significant.

Based on the above authority, we conclude the trial court did not err. The trial court found that Lopez had suffered prior convictions. A jury finding on this issue was unnecessary. Once the trial court made this finding, Lopez was eligible for an aggravated term on each count. Pursuant to *Black*, once Lopez was eligible for an aggravated term, the trial court was permitted to rely on other facts not found true by the jury in determining the sentence to be imposed.

DISPOSITION

The judgment is affirmed.

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CORNELL, J.

WE CONCUR:

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VARTABEDIAN, Acting P.J.

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DAWSON, J.