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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

A129310

v.

**(Contra Costa County
Super. Ct. No. 05-090769-1)**

RUBEN ANTHONY CARNERO,

Defendant and Appellant.

_____ /

Ruben Anthony Carnero appeals from a judgment entered after a jury convicted him on five counts of committing a lewd act on a child under the age of 14. (Pen. Code, § 288, subd. (a).)¹ He contends his conviction must be reversed because (1) the trial court erred when it admitted evidence that he had committed a prior uncharged act of sexual misconduct, (2) the Evidence Code section that authorizes the admission of prior uncharged acts of sexual misconduct is unconstitutional, and (3) the court erred when it denied his request to present surrebuttal evidence. We conclude the court did not commit any prejudicial errors and will affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was convicted of molesting two of his nieces. The facts of his crimes are as follows.

¹ Unless otherwise indicated, all further section references are to the Penal Code.

Appellant comes from a large family. His mother Elizabeth had four children. Appellant was the oldest followed two years later by a sister named Sabrina. Two other siblings, Marcus and Veronika were about 15 years younger than appellant.

Appellant's sister Sabrina also had a large family. She had four children with her former husband Bryce: Jane Doe 3 born in 1988, Michael born in 1990, Jane Doe 1 born in 1993, and Jane Doe 2 born in 1994. Sabrina and Bryce separated and after they divorced, Sabrina entered into a relationship with another man with whom she had two more children.

After Sabrina and Bryce separated, their children often stayed at their grandmother Elizabeth's house. During this period, Elizabeth moved frequently and other relatives including appellant and Sabrina also stayed with her.

In June 2008, Sabrina allowed appellant to move into her home. The experience was difficult because appellant often was drunk and unruly. Sabrina's daughter Doe 1 was upset when she learned appellant would be moving in. She responded by moving in with her father. When Doe 1 would encounter appellant during visits to her mother's home, she would make nasty remarks to him calling him a "loser" and saying she wished he would die.

The possible cause for Doe 1's anger became apparent a few months after appellant moved in. Sabrina, Doe 1, and Doe 3 were driving home when their car broke down. Sabrina called her brother Marcus to pick them up and as they waited, Doe 1 complained about appellant's presence in the family home. An argument followed and during the argument, Doe 1 stated that appellant had raped her. Doe 3 immediately said appellant had done the same thing to her.

The next morning, Sabrina ordered appellant to leave her home, but Doe 1 and Doe 3 did not go to the police immediately because they did not want to cause turmoil in the family. That changed in March 2009 when Doe 1 told her father what appellant had done. He took Doe 1 to the police where she disclosed that appellant had raped her. Doe 3 also spoke to a police officer and said appellant had raped her too.

In July 2009, an information was filed charging appellant with eight counts of committing a lewd act on a child under the age of 14. (§ 288, subd. (a).) The information alleged appellant molested not just Doe 1 and Doe 3, but Doe 2 as well. Counts 1 through 4 were alleged to have been committed against Doe 1, count 5 was alleged to have been committed against Doe 2, and counts 6 through 8 were alleged to have been committed against Doe 3. As is relevant here, the information also alleged appellant committed his crimes against multiple victims within the meaning of section 667.61, subdivision (c), that appellant had two prior strikes within the meaning of the three strikes law (§ 667, subd. (b)), and that appellant had two prior serious felony convictions within the meaning of section 667, subdivision (a).

The case proceeded to trial where Does 1, 2, and 3 all testified.

Doe 1 said the first incident of abuse occurred in the living room of her grandmother's house. Appellant was sleeping on the floor. Doe 1 and her brother Michael were sleeping on separate couches that were arranged in the shape of an L. After falling asleep, Doe 1 awoke to find appellant touching her chest under her clothes. Doe 1 asked appellant what he was doing. Appellant said "[n]othing." Appellant then pulled Doe 1 to the floor, removed her underwear, and sodomized her. Michael continued to sleep just a few feet away.

The second incident of abuse again occurred when Doe 1 was staying with her grandmother, but in a different house. Doe 1, Doe 2, and their brother Michael were lying on their grandmother's bed watching a movie. Appellant entered the room and sat next to Doe 1. Doe 1 fell asleep and later awoke to find that appellant had removed her underwear and was sodomizing her. Doe 1 tried to scream, but "nothing came out." Neither Doe 2 nor Michael woke up even though the bed was moving.

The following morning Doe 1 told her grandmother Elizabeth what appellant had done. Elizabeth told Doe 1 "not to worry about it" and that something similar had happened to her when she was a child. Doe 1 felt betrayed because the person she trusted most seemed to consider the abuse unimportant.

The third incident occurred one night after Doe 1 reported appellant to her grandmother. Doe 1 was on the living room floor and appellant and Michael were on two couches. At one point appellant got off his couch, and began to touch Doe 1's vagina over and under her underwear. Appellant told Doe 1 she was "pretty like [her] mother" and asked if she liked it when he touched her. Doe 1 said no and appellant stopped. Michael remained asleep during the incident.

Doe 2 described a similar pattern of abuse. She testified that appellant gave her a "creepy vibe" and that he commented on the size of her "boobs." Once in October 2008 when Doe 2 was 13, she was watching television with appellant and his children. Doe 2 fell asleep and she awoke to find appellant had pulled up her shirt and was rubbing his finger on her inner thigh a couple of inches from her "private part." Doe 2 could not recall whether appellant's children were awake or asleep during the incident.

Doe 3 testified that when she was between the ages of 6 and 11, appellant abused her sexually including at least six acts of vaginal intercourse and one act of anal intercourse. Appellant also touched Doe 3 inappropriately. On one occasion, he placed a back massager on Doe 3's private parts. On other occasions, appellant gave her "lingering, weird hugs." Doe 3 estimated that appellant said or did something that was sexually inappropriate approximately 100 times.

The allegations made by Does 1, 2 and 3 were supported by testimony from their mother Sabrina, who stated appellant had abused her sexually when she was approximately 12 years old.

Appellant testified in his own defense and he denied raping, sodomizing or touching any of his nieces in a sexual way. He also denied abusing his sister Sabrina and denied he ever told Doe 1 that she was "pretty like her mother." Appellant's supported his denial with testimony from his girlfriend's 15-year-old daughter who testified that appellant never acted inappropriately with her, from his sister Veronika, who stated appellant never touched her sexually, and with testimony from his mother Elizabeth, who said appellant could not have molested Does 1, 2, or 3 because none of the girls ever

spent the night at her house. Elizabeth admitted she never told this to police who were investigating the crime.

The jurors considering this evidence convicted appellant on counts 1 through 5 but could not reach a verdict on counts 6 through 8. In addition, the jurors found the multiple victim allegation to be true. In a court trial that followed, the court found one of the strike allegations, and one of the prior serious felony conviction allegations to be true.

Subsequently, the court sentenced appellant to 125 years to life in state prison.

II. DISCUSSION

A. Prior Uncharged Misconduct

Prior to trial, the prosecutor filed motions asking permission to introduce evidence that appellant abused his sister Sabrina when she was about 12 years old and he was about 14. According to the motions, appellant entered Sabrina's bedroom while she was sleeping and inserted a carrot into her vagina.

The prosecutor argued the evidence was admissible under Evidence Code section 1108 to show appellant had a propensity to commit sex crimes, and under Evidence Code section 1101, subdivision (b) to prove appellant's motive, intent, and common plan. As for the latter ground, the prosecutor stated Doe 1 would testify that while appellant was molesting her, he said she was "pretty like her mom." The prosecutor argued this comment provided a "glimpse" into appellant's thought process in selecting victims who "remind him of his sister when she was the same age." The prosecutor also observed that one of the charged incidents, touching Doe 2's inner thigh, arguably was ambiguous and that the prior molestation of Sabrina would shed light on appellant's motive and intent.

Defense counsel argued Sabrina's testimony should be excluded pursuant to Evidence Code section 352 because it was more prejudicial than probative. Specifically, counsel argued the conduct at issue (1) was remote having been committed 26 years prior to the charged crimes; (2) was cumulative of other evidence, (3) would consume too much trial time, and (4) would confuse the jurors and inflame them against appellant. Defense counsel also argued there was no evidence any of the victims looked like Sabrina

and therefore it was not reasonable to infer that appellant acted out of a common plan to molest girls that reminded him of Sabrina.

The trial court granted the prosecutor's motion ruling the evidence was admissible under Evidence Code section 1108 and that there was no reason to exclude it under Evidence Code section 352. The court explained its ruling as follows:

"So looking at it under 352, I do not find that the evidence of the sex act with the sister, even though it is 26 years old, should be precluded. I don't find it's cumulative because it's a different victim. I don't find it's unduly time-consuming because she'll be testifying anyway, and I don't think it'll take that much time to get out that story.

"The incident is not more inflammatory than the charged offenses. In fact, it's probably less inflammatory. And it's sufficiently similar because all of the alleged individuals are the same age, occurs at night, often when they're sleeping, presumably always at the defendant's mother's house. It is highly probative of intent and motive to molest the daughters and to show a common plan to take advantage of a familial relationship."

The court also ruled the testimony admissible under Evidence Code section 1101, subdivision (b) stating as follows:

"Well, I think it's clear from the cases that it would come in under common plan given the -- again, it's evening, it's in the family home, they're relatives, they're all the same age. The question is under [*People v. Ewoldt* (1994) 7 Cal.4th 380,] can I look at it for intent?

"And I think I can given, as [the prosecutor] said, that the one victim -- there's the touch on the thigh. And intent is so closely related with motive. And even *Ewoldt* notes that the least degree of similarity between the uncharged act and the charged offense is required to prove intent. Here there's a motive, [the prosecutor] can argue, to molest his sister's daughters because he molested the sister.

"So I think given that all three girls are related, the age, the house, all of those things, under all of these circumstances it can come in"

Subsequently, Sabrina described appellant's prior sexual misconduct during her testimony at trial. She stated that one time when she was between 11 and 13 years old, she awoke to find appellant lying next to her in her bed. Appellant was moving something in and out of her vagina. After a few moments, Sabrina determined the object was a carrot. Sabrina pretended to be asleep until a noise in the hall caused appellant to leave. Sabrina removed the carrot from her vagina and threw it to the floor. Appellant entered the room a short time later and asked, "Where is it?" Sabrina told appellant who picked up the carrot and left.

Sabrina never mentioned the incident until many years later, when after a night of drinking, she told appellant that she still remembered.

Appellant now contends the trial court erred when it allowed Sabrina to testify about the prior incident of sexual misconduct.

We turn first to the court's ruling under Evidence Code section 1108.

Evidence Code section 1101, subdivision (a), states the general rule that character evidence is inadmissible to prove a defendant's conduct on a specific occasion. But Evidence Code section 1101 is subject to several exceptions one of which is set forth in Evidence Code section 1108, subdivision (a). As is relevant it states: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Evidence Code section 352, in turn, states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

The pivotal issue here is whether the court violated Evidence Code section 352, when it admitted Sabrina's testimony.

Turning to the first element of Evidence Code section 352, admitting the evidence in question did not necessitate an undue consumption of time. Sabrina's testimony on

this point, including cross-examination, covers about a dozen pages in the reporter's transcript.

As for the second element, in *People v. Falsetta* (1999) 21 Cal.4th 903, our Supreme Court set forth the factors a court should evaluate when deciding whether evidence of a prior sex crime should be admitted. The court explained, "Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]" (*Id.* at p. 917.)

Applying those factors, we note that the nature of the charged offenses and the uncharged offense were similar. Many if not all of the instances of abuse occurred in the family home, all the victims were approximately the same age, all were relatives, in most instances the victims were sleeping when appellant began to molest them, and in all the instances, appellant abused a position of trust to gain access to his victims.

Evidence concerning the uncharged offense was relevant. Appellant denied molesting any of his nieces. Evidence that appellant molested his own sister under similar circumstances was highly probative on whether appellant committed the acts alleged and is precisely the type of evidence contemplated by section 1108.

The prior uncharged misconduct was relatively remote. It occurred a full 25 years before the offenses at issue. On the other hand, "[n]o specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible. [Citation.]" (*People v. Branch* (2001) 91 Cal.App.4th 274, 284.) For example, the court in *People v. Harris* (1998) 60 Cal.App.4th 727, 739, observed that a 23-year gap was "a long time." By contrast, the court in *People v. Branch, supra*, 91 Cal.App.4th at pages 284-285, ruled that uncharged offenses that occurred approximately

30 years before the charged offenses were not too remote given the similarities between the charged and uncharged offenses. On balance we find this factor to be neutral.

The particular circumstances of this case support the conclusion that the prior abuse allegation was true. Appellant's sister Sabrina was no ordinary witness. Appellant and Sabrina were very close and she testified that she always loved and cared for him. Appellant testified similarly stating that he and Sabrina talked frequently, that she supported him with money and housing, and that he could always count on her when he needed help. Evidence that a familial relationship exists commonly is used to demonstrate that a witness is biased *in favor* of a defendant. (See, e.g., *People v. Pierce* (1969) 269 Cal.App.2d 193, 200.) In our view, the fact that Sabrina was making allegations *against* a person she loved and cared for tended to support the conclusion that the allegations were true.

There was no danger of confusion here. At the time of trial, the three victims were either in their late teens or early 20s. Sabrina, by contrast was a fully grown woman.

The specific type of abuse Sabrina described is unusual, and could possibly have made some of the jurors uncomfortable. On the other hand, as the trial court recognized, the charged offenses were very serious and included allegations of vaginal and anal rape by a full grown man against two female relatives under the age of 14. On balance, we conclude there was no possibility of undue prejudice.

Appellant would not be put to an undue burden in order to defend against the uncharged offense. Sabrina's testimony was brief, as was appellant's denial.

Finally, because Sabrina's testimony was so brief and limited there was no need for the court to consider limiting it in a significant way.

We conclude the trial court could reasonably conclude that evidence of appellant's prior sex crime should be admitted. The court did not abuse its discretion. (*People v. Branch, supra*, 91 Cal.App.4th at p. 282.)

None of the arguments appellant advances convinces us the trial court erred. First, appellant relies on *People v. Harris, supra*, 60 Cal.App.4th at page 740, where the court stated the fact that both the prior offense and the charged offenses were committed

against Caucasian women in their 20s and 30s was not sufficiently distinctive to make the prior incident admissible. Here by contrast, we are not dealing solely with similarities in age and race. Here, all the victims were approximately the same age, all were relatives, in most instances the victims were sleeping when appellant began to molest them, most if not all of the offenses were committed in the family home, and in all the instances, appellant abused a position of trust to gain access to his victims. *Harris* is not controlling under the very different facts that are presented here.

Appellant also argues Sabrina's testimony should not have been admitted because she disclosed that appellant had abused her only after she learned that appellant had molested her daughters. He relies on *People v. Ewoldt, supra*, 7 Cal.4th at page 404, where our Supreme Court stated that "if a witness to the uncharged offense provided a detailed report of that incident without being aware of the circumstances of the charged offense, the risk that the witness's account may have been influenced by knowledge of the charged offense would be eliminated and the probative value of the evidence would be enhanced." But there is no hard and fast rule that mandates the exclusion of evidence that comes to light after a witness learns of the charged offense. Indeed, the court in *Ewoldt* ruled the trial court *did not* abuse its discretion when it admitted evidence of the uncharged misconduct even though those allegations had been made *after* the victim learned of the abuse. (*Id.* at p. 405.)

We conclude the court did not err when it admitted Sabrina's testimony under Evidence Code section 1108.²

B. Whether Evidence Code Section 1108 is Constitutional

Appellant contends Evidence Code section 1108 and the CALCRIM instruction that articulates that statute violated his due process rights because they allowed the jury to consider his prior crime against Sabrina as propensity evidence. But appellant concedes our Supreme Court reached a different conclusion in *People v. Falsetta, supra*, 21 Cal.4th

² Having reached this conclusion, we need not decide whether any possible error was prejudicial. We also need not decide whether the evidence was also admissible under Evidence Code section 1101, subdivision (b).

at pages 910-922. We are obligated to follow *Falsetta*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

C. Whether the Court Erred by Denying Appellant's Request to Present Surrebuttal Evidence

As we have noted, Doe 1 testified that the first incident of abuse occurred in the living room of her grandmother's house where Doe 1 and her brother Michael were sleeping on two couches that were arranged in the shape of an L.

During the defense case, Elizabeth and her daughter Veronika both testified that the house in question never had couches in its living room. Appellant testified similarly stating that he never saw couches in that house when he was living there. The defense supported this testimony with photographs that showed no couches in the living room.

The prosecutor's rebuttal witness, Sabrina's former husband Bryce, testified that he had been to the house in question many times and that there were always couches in the living room. At the conclusion of Bryce's testimony, the prosecutor rested.

Later that same day, the prosecutor told the court that Sabrina found some photographs showing appellant and Elizabeth sitting on couches in the living room of the house in question. The prosecutor asked permission to reopen his case. The court allowed the prosecutor to reopen noting that the absence of the couches had "become a focal point" of the trial.

During the ensuing testimony, Sabrina described three photographs, all of which showed couches in the living room of the house in question.

Following Sabrina's testimony, the defense asked to recall Veronika on surrebuttal. According to counsel's proffer, Veronika would testify that there was a long stretch of time during which there were no couches in the house in question. Veronika would also testify about additional photographs taken during a party that showed no couches in the living room. The court declined to allow the surrebuttal evidence ruling that information "could have been brought out in the defense case in chief and really adds nothing to the evidence here."

Appellant now contends the trial court erred when it denied his request to present surrebuttal evidence.

The trial court is granted broad discretion to admit or reject surrebuttal evidence. (*People v. Marshall* (1996) 13 Cal.4th 799, 836.) In exercising that discretion, a court may evaluate several factors including whether the evidence “should have been covered in the original case” (*People v. Lamb* (2006) 136 Cal.App.4th 575, 582), and the significance of the proposed evidence. (*People v. Marshall, supra*, 13 Cal.4th at p. 836.) On appeal we will reverse the trial court’s ruling only where it abused its discretion. (*Ibid.*)

We find no abuse here. The presence or absence of couches in the living room only became important when Elizabeth, Veronika, and appellant testified during the defense case that there were no couches and that Doe 1’s description of the molestation could not have been true. As the People argue persuasively, “If this testimony required any additional support or qualification, it could and should have been offered during the defense case.”

Furthermore, and importantly, the proposed testimony was not particularly probative. The fact that couches were not always present in the house and allegedly were not present during some party would have done little to undermine Doe 1’s statement that they were present when she was molested.

Appellant argues the court should have admitted the proffered surrebuttal because it would have “provided a cogent explanation” for why Veronika, Elizabeth, and appellant testified that there were no couches in the living room: i.e., they were confused. But defense counsel did not state she wanted to present the surrebuttal evidence to show Veronika, Elizabeth and appellant were confused. She stated the evidence would be presented to show there were times when couches were not present. Appellant’s argument on this point simply is unsupported.

The primary case upon which appellant relies, *People v. Cuccia* (2002) 97 Cal.App.4th 785, also does not convince us the trial court erred. In *Cuccia*, the trial court reopened evidence during the prosecutor’s closing argument to permit the prosecution to

offer into evidence a declaration previously signed by the defendant that the court characterized as “extremely probative.” (*Id.* at p. 793.) The trial court then refused to give defense counsel a short continuance to consult with his client to determine the circumstances under which the declaration was executed, thereby denying counsel the opportunity to determine whether to offer rebuttal testimony. (*Ibid.*) The *Cuccia* court found this denial to be error. (*Id.* at p. 794.) No comparable unfairness occurred here. The prosecutor was not allowed to reopen during his closing argument and the proposed surrebuttal evidence was not particularly probative. *Cuccia* is not controlling under the very different facts presented here.

We conclude the court did not abuse its discretion when it denied appellant’s request to present surrebuttal evidence.

D. Cumulative Error

Appellant argues that even if none of the errors he has alleged is prejudicial individually, cumulatively they mandate a reversal of his conviction. Because we have found the court did not commit any errors, there is no error to cumulate.

III. DISPOSITION

The judgment is affirmed.

Jones, P.J.

We concur:

Needham, J.

Bruiniers, J.