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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT C. TURNER,

Defendant and Appellant.

A137069

**(Solano County
Super. Ct. No. VCR211424)**

A Solano County jury convicted Robert C. Turner of three counts of lewd acts upon a child. (Pen. Code, § 288, subd. (a).) Turner now appeals, arguing the trial court erred in exercising its discretion under Evidence Code section 1108¹ to admit evidence that he had previously been convicted of commission of lewd acts with a minor by force or fear. (Pen. Code, § 288, subd. (b).) He contends this violated his right to due process under the Fourteenth Amendment. He also asserts he was deprived of due process and the right to confront the witnesses against him when the trial court permitted a police officer to testify to out-of-court conversations he had had with a nurse experienced in the examination of sexual assault victims.

We find no error in the admission of the evidence of Turner’s prior conviction. The People concede the admission of the police officer’s hearsay testimony was error but argue it was harmless. We agree and accordingly affirm.

¹ All further undesignated statutory references are to the Evidence Code.

FACTUAL AND PROCEDURAL BACKGROUND

The victim, D.A., was born in 1999.² Until she was 11 years old, she would visit her grandmother's house in Vallejo. Turner was her grandmother's boyfriend, and D.A. called him Papa.

When D.A. was nine years old, Turner touched her inappropriately while she was at her grandmother's house. She did not remember the first or last time it happened, but it happened more than once. At one point, Turner took her to the basement and rubbed her body, including her buttocks, with his hands. She ran upstairs, and although she thought what had happened was wrong, she did not tell her mother.

Turner touched D.A. between her legs, and while she did not remember how many times he touched her in that area, she testified it happened more than once and perhaps more than four times. When she was about 10 years old, Turner was alone with her in the kitchen of her grandmother's house, and he touched her waist and buttocks, squeezed her "boobs," and touched her between her legs. There were also times when appellant took her clothes off and touched her "with no clothing in between." On at least two occasions, Turner put his finger inside what she called her "private."³ He may have done this more than 10 times.

D.A. knew the touching was wrong but did not call out and did not tell anyone because she was scared of Turner. In the sixth grade, she had a sex education class at school, and after that she told the teacher and her school principal about the touching because she was tired of hiding it. D.A. then told her mother, but was afraid of what her grandmother would say. She talked to a police officer about the touching and told him the truth. She was also taken to the Multi-Disciplinary Interview Center, where she spoke to forensics interviewer Nancy DiGiovanni. At trial, a DVD of that interview was played for the jury. D.A. was 11 years old at the time of the interview.

² At the time of trial in June 2012, D.A. was 12 years old.

³ In response to the prosecutor's questioning, D.A. explained she used the word "private" to describe "the part between her legs[.]"

D.A. testified that she tried to forget the incidents. At trial she was nervous, upset, and scared. When testifying, she found the incidents hard to remember and discuss, but she said she was being as honest as she could.

D.A.'s mother, R.L., testified that she used to take her kids to her mother's house in Vallejo. Her mother was living with Turner, who was R.L.'s stepfather. D.A. was eleven years old when her mother learned about the incidents from an assistant principal at D.A.'s school. R.L. had never before seen D.A. crying like she was when R.L. went to the school to bring her home on May 13, 2011. D.A. never told her mother what happened before the assistant principal phoned her. R.L. knew Turner had issues with the law, but she was unaware of his prior conviction for touching children until after D.A. went to the police department.

On May 17, 2011, R.L. brought D.A. to the police station in Vallejo, where they spoke to Officer Robert Herndon. D.A. told Herndon that about one and a half years ago her grandfather, Papa, had called her into the bedroom where she sat on the bed and he touched her breasts and her crotch area over her clothing. It happened about 10 more times and progressed to skin-to-skin contact and digital penetration of the girl's vagina after Turner pulled down her panties. D.A. was crying, and it was hard for her to tell what happened. She told the officer it had taken her a long time to report the incidents because she was scared. D.A. said she had recently taken a class in sex education and learned the importance of reporting sexual assaults. Officer Herndon forwarded the initial report to the Investigations Unit, to a team that deals with sexual assaults against children.

Officer John Garcia was assigned to the case after Officer Herndon took the initial report. On cross-examination at trial, Officer Garcia testified he had made the decision not to have a Sexual Assault Response Team (SART) nurse perform an examination of D.A. The prosecution objected when defense counsel began asking about the breaking of the hymen, because Officer Garcia was not a qualified expert on the subject. The trial court sustained the objection, and defense counsel continued questioning Officer Garcia on his decision not to request a SART examination. Garcia explained that he did not

request a SART examination because such examinations are worthwhile only if performed 48 to 72 hours after the occurrence. He was asked whether a female's hymen could be broken in sexual assaults and whether the pain D.A. had reported could be due to obliteration of her hymen. Garcia testified that he believed the hymen could be damaged not just by digital penetration but also by diving or swimming, although he admitted he was not an expert on the hymen.

The following morning, outside the presence of the jury, the prosecution indicated its intention to call a SART expert in rebuttal to respond to defense counsel's questions regarding the effect of digital penetration on the hymen and Officer Garcia's decision not to request a SART examination. After defense counsel said he would object to the proposed expert testimony, the trial court decided the rebuttal witness would not be allowed to testify. The prosecutor then asked to recall Officer Garcia so he could correct his earlier testimony concerning how the hymen could be obliterated based upon research the officer had performed the night before. Defense counsel objected that the research was hearsay, but the trial court allowed the testimony subject to a hearsay and confrontation clause objection.

Officer Garcia was recalled to testify in the prosecution's rebuttal case. He stated that after his testimony the previous day, he had consulted a very well-known SART nurse about whether the hymen could be obliterated by diving. She explained to him that the hymen is a membrane that partially covers the opening of the vagina and it cannot be obliterated. The nurse told Garcia that if an 11-year-old girl's vagina were digitally penetrated, there was a very slim likelihood of injury to her hymen unless there was bleeding; without bleeding, the injury would probably be minimal. Garcia testified he had told the nurse that at least a month had elapsed between the last alleged act of digital penetration and D.A.'s report, and the nurse responded that in such a case there would be only about a 10 percent chance of finding an injury to the hymen because it would repair itself very quickly. Even in the 10 percent of examinations where there was evidence of injury, it would not prove that a sexual assault occurred. The nurse indicated, however, that despite this she would recommend a SART examination in every single case.

The parties stipulated that on August 26, 1993, Turner was convicted of a violation of Penal Code section 288, subdivision (b), for lewd acts with a minor by force or fear.

On June 20, 2012, the jury found Turner guilty of three counts of lewd acts upon a child in violation of Penal Code section 288, subdivision (a). Turner waived jury trial on the prior conviction allegation, and the court found it true. Turner was sentenced on September 27, 2012, and he filed a notice of appeal on November 6, 2012.

DISCUSSION

Turner challenges his conviction on three grounds. First, he contends the admission of his prior conviction violated his due process rights under the Fourteenth Amendment. Second, he argues the trial court abused its discretion in admitting evidence of the prior conviction because it was too remote in time, and the information given to the jury did not show sufficient similarity between the prior offense and the charged offenses to balance out that remoteness. Third, he asserts that the admission of Officer Garcia's hearsay testimony violated his right to due process and to confront the witnesses against him. Finally, he claims that these cumulative errors require reversal.

I. *Binding California Supreme Court Authority Holds That Admission of Turner's Prior Conviction Does Not Violate Due Process.*

Turner first argues the admission of his prior conviction under Penal Code section 288, subdivision (b) to prove his disposition to commit the charged offense violated his right to due process of law under the Fourteenth Amendment. As Turner acknowledges, however, the California Supreme Court rejected this argument in *People v. Falsetta* (1999) 21 Cal.4th 903, 922 (*Falsetta*). Despite this acknowledgement, Turner notes the United States Supreme Court has not ruled on this issue, and he contends several decisions of that court suggest it would bar admission of prior crimes to prove a defendant's disposition to commit the charged offense on due process grounds.

We reject Turner's argument for two reasons. First, as an inferior court, we are not at liberty to disregard our high court's decision in *Falsetta*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Second, every case Turner cites in support

of his argument predates *Falsetta*, and thus Turner cannot argue that these authorities have somehow undermined the decision in that case. To the contrary, the California Supreme Court has expressly declined to reconsider it. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1288-1289 (*Lewis*) [“We decline defendant’s invitation to reconsider our decision in *Falsetta* . . . and to hold that the admission of evidence under . . . section 1108 to establish a defendant’s propensity to commit a sexual offense violates his or her due process rights.”].) In light of this unequivocal case law, Turner’s argument necessarily fails.

II. *The Trial Court Did Not Abuse its Discretion in Admitting Turner’s Prior Conviction.*

Turner also argues the trial court abused its discretion in admitting his 1993 conviction. His argument appears to be twofold. First, he contends the prior offense was too remote in time to be properly admissible in this case. Second, he asserts that the remoteness of the prior offense was not balanced out by its similarity to the charged offense, since the jury was not given sufficient information about the circumstances underlying the prior conviction. We disagree and find no abuse of discretion.

A. *Governing Law and Standard of Review*

“[T]he Legislature enacted section 1108 to expand the admissibility of disposition or propensity evidence in sex offense cases.” (*Falsetta, supra*, 21 Cal.4th at p. 911.) Subdivision (a) of that section provides: “In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.” Under section 352, “[t]he 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.” (§ 352.) These provisions entrust the determination of the admissibility of uncharged sexual misconduct “ ‘to the sound discretion of the trial judge who is in the best position to evaluate the evidence.’ ” (*Falsetta, supra*, 21 Cal.4th at pp. 917-918.) We may reverse

the trial court's ruling only if it is "arbitrary, capricious, or patently absurd[.]" (*Lewis, supra*, 46 Cal.4th at p. 1286.)

B. *The Prior Offense Was Sufficiently Similar to the Present Offenses to Balance Out Any Remoteness in Time.*

Turner contends his 1993 conviction was remote in time, and the remoteness of the prior offense was not balanced out by similarities between the crimes. As he concedes, however, "[n]o specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible." (*People v. Branch* (2001) 91 Cal.App.4th 274, 284 (*Branch*)). Indeed, "[n]umerous cases have upheld admission pursuant to . . . section 1108 of prior sexual crimes that occurred decades before the current offenses." (*People v. Robertson* (2012) 208 Cal.App.4th 965, 992 (*Robertson*) [citing cases].) Thus, as Turner recognizes, the issue is whether two offenses are sufficiently similar to balance out the remoteness of the earlier one. (See *Branch, supra*, 91 Cal.App.4th at p. 285.)

Turner's argument on this point is flawed at the outset. He contends that, "*based on the evidence admitted*, the prior offense had little similarity to the charged offense, and thus had no probative value for the jury." (Italics added.) Contrary to Turner's apparent assumption, we review the correctness of the trial court's ruling under section 1108 at the time it was made, and not by reference to the evidence produced later at trial. (See *Robertson, supra*, 208 Cal.App.4th at p. 991.) While Turner is correct that the jury was informed only that in 1993, he had been "convicted of a violation of Penal Code Section 288(b), forcible lewd act on a child," the trial court possessed further information about the prior offense when it ruled on the People's motion in limine regarding this issue. The People's motion explained that the 1993 conviction resulted from Turner's molestation of his then six or seven-year-old daughter. The molestation consisted of Turner "orally copulating his daughter, and her orally copulating him. [Turner] . . . threatened that he would harm his daughter if she told anyone." The prosecutor referred to these facts at the hearing on the motion in limine, and defense counsel explained that they "were taken out

of a police report from 1993,” which defense counsel had received in discovery.⁴ We therefore review the ruling based on these facts, not on what was later presented to the jury.

The trial court found the two offenses similar in that both cases involved girls of “young ages,” and in each case the defendant “sought sexual stimulation from minors under the age of 14.” It acknowledged there was a “difference in the development of children between the ages of six or seven and eleven,” but it considered the ages of the victims relevant “to the question of susceptibility of the target of the offender in this case.” Another similarity was that both offenses occurred in “a family or a semi-family situation.”

On these facts, we cannot say the trial court abused its discretion in finding that the similarities between the offenses outweighed the remoteness of the prior offense. There were differences in the ages of the victims, but that did not render the prior offense wholly irrelevant. (*People v. Escudero* (2010) 183 Cal.App.4th 302, 311 [age difference between two prior victims, who were both adults, and present young minor victim “do not make the prior offenses wholly irrelevant”].) “Moreover, ‘[t]he charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under . . . section 1101, otherwise . . . section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in section 1108.’ [Citation.]” (*Ibid.*) Any dissimilarities between the offenses “relate only to the weight of the evidence, not its admissibility.” (*People v. Hernandez* (2011) 200 Cal.App.4th 953, 967.)

Turner contends the trial court erred “[i]n admitting the prior conviction based on circumstances of that crime that the court knew the jury would never learn[.]” This argument is puzzling, since the manner in which the prior conviction was put before the jury appears to have been the product of a stipulation between the prosecutor and defense counsel. It also seems Turner’s objection is that he was prejudiced because the jury was

⁴ This police report does not appear to be part of the record before us.

not told *enough* about the circumstances of the prior crime. As the People argue, however, the manner in which the prior conviction was presented at trial prevented the jury from learning Turner’s prior conviction involved the forcible molestation of his daughter. We agree with the People that because the evidence of Turner’s prior conviction was “carefully sanitized,” he likely benefitted from the implication of remoteness in time without having the jury learn that potentially damaging fact.

We need not delve further into this question, however, since it is sufficient for us to hold the trial court did not abuse its discretion in weighing the probative value of this evidence against its prejudicial effect. The probative value of such evidence is high. (See *Falsetta*, *supra*, 21 Cal.4th at p. 915 [evidence of prior sex offenses is thought objectionable “ ‘not because it has no appreciable probative value, *but because it has too much*” ’].) In this case the prior conviction was presented quickly and thus did not unduly consume trial time. (§ 352, subd. (a).) Moreover, Turner has not shown there was “substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”⁵ (§ 352, subd. (b).)

III. *The Admission of Garcia’s Hearsay Testimony Was Harmless Error.*

Turner contends the admission of Officer Garcia’s hearsay testimony regarding his conversation with the SART nurse violated due process and Turner’s right to confrontation of witnesses. The People concede Garcia’s testimony was hearsay not subject to any exception and that the admission of the nurse’s hearsay statements through Garcia’s testimony was error under both state law and the confrontation clause of the federal Constitution.

“ ‘Confrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24.’ [Citation.] We ask whether it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict

⁵ Turner’s opening brief does not specifically address the section 352 factors. Only in his reply brief does he do so. “It is axiomatic that arguments made for the first time in a reply brief will not be entertained because of the unfairness to the other party.” (*People v. Tully* (2012) 54 Cal.4th 952, 1075.)

absent the error. [Citation.]” (*People v. Loy* (2011) 52 Cal.4th 46, 69-70 (*Loy*)). Turner contends the admitted error was prejudicial, while the People argue it was harmless. We agree with the People, for as we explain below, the error was harmless under the *Chapman* test.

The evidence against Turner was strong. As detailed in our statement of facts, the victim testified that Turner had engaged in inappropriate physical contact with her numerous times over a period of years. There was no dispute that the victim frequently visited her grandmother’s house, where Turner was living, and that he therefore had access to her. In addition, Turner’s conviction for a prior sex offense was evidence of his propensity for such behavior.

Turner’s case was built largely on an attack on both the victim’s credibility and the adequacy of the police investigation, as well as on an effort to explain the circumstances leading to his plea to the prior sex offense. (See *People v. Barba* (2013) 215 Cal.App.4th 712, 743 (*Barba*) [looking to defense theory of case in performing harmless error analysis].) In this court, he argues admission of this hearsay testimony was prejudicial because the evidence against him was weak, citing inconsistencies in the victim’s testimony and the lack of other evidence of abuse. We must reject this argument. As our Supreme Court observed in *Falsetta*, “[b]y their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often . . . requires the trier of fact to make difficult credibility determinations.” (*Falsetta, supra*, 21 Cal.4th at p. 915.) Thus, it is unsurprising that the evidence against Turner consisted chiefly of the uncorroborated testimony of a 12-year-old girl, but that fact alone does not render the evidence against Turner weak.

Moreover, when we consider the record as a whole, it is clear the challenged hearsay did not play a major role in the trial. (See *Loy, supra*, 52 Cal.4th at p. 70 [error harmless where improperly admitted testimony “was not particularly important to the prosecution case”].) The prosecutor does not appear to have mentioned the testimony at issue in either his closing or rebuttal argument. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1160 [improper admission of videotape harmless beyond a reasonable doubt where

it was not emphasized to jury]; *Barba, supra*, 215 Cal.App.4th at p. 744 [fact that improperly admitted report was not focus of parties' arguments to jury supported finding error was harmless].) Defense counsel made only one brief allusion to the matter in his lengthy closing, when he argued that Detective Garcia had "called the forensic expert last night after his testimony yesterday to check whether or not he did the right thing in not having an evaluation. It's easy to do an investigation if you don't do anything."

Given this argument, Garcia's testimony that the SART nurse had said she would do an examination in every single case likely actually *helped* the defense, as it supported the defense theory that the investigation had been inadequate.⁶ (See *Loy, supra*, 52 Cal.4th at p. 70 [finding harmless error where portion of improperly admitted testimony actually "aided defendant"].) This argument followed defense counsel's extensive cross-examination of Garcia about the claimed inadequacies in the investigation. (*Ibid.* [impeachment of improperly admitted testimony on cross-examination helped render error harmless].) Thus, the defense had a full opportunity to present this theory to the jury, and it is difficult to see how exclusion of the challenged hearsay could have led to a different result. (Cf. *People v. Cooper* (1991) 53 Cal.3d 771, 818 [where defendant was permitted to present all facts supporting argument that police investigation was incompetent, additional evidence "would not reasonably have produced a significantly different impression of the witnesses' credibility"].)

Finally, although the jury sent two notes to the court asking about other aspects of the case, they asked no questions about this testimony. (*People v. Livingston, supra*, 53 Cal.4th at p. 1160 [improper admission of videotape was harmless where jury asked no questions about it and requested no readback of testimony].) Under these circumstances,

⁶ Turner's trial counsel used this to his advantage by arguing to the jury that Garcia simply "decided, without consulting forensic experts, not to have any testing done to see if there was some physical evidence of a digital penetration"

we conclude it is clear beyond a reasonable doubt that a rational jury would have reached the same result absent the error.⁷ (*Loy, supra*, 52 Cal.4th at pp. 69-70.)

DISPOSITION

The judgment is affirmed.

Jones, P.J.

We concur:

Simons, J.

Needham, J.

⁷ Since we have concluded no prejudicial error occurred, it necessarily follows there was no cumulative error requiring reversal.