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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK GARCIA,

Defendant and Appellant.

B229842

(Los Angeles County
Super. Ct. No. TA109163)

APPEAL from a judgment of the Superior Court of Los Angeles County. Paul A. Baciagalupo, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Jaime L. Fuster and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Mark Garcia was convicted of the aggravated sexual assault of a child (Pen. Code,¹ § 269, subd. (a)(1)) and of lewd acts upon a child (§ 288, subd. (a)). He contends on appeal that sentencing him under the One Strike Law (§ 667.61) violated the ex post facto clauses of the California and United States Constitutions; that the admission of evidence of his prior sexual crimes against a child violated his rights to due process and equal protection; and that evidence of his prior sexual crimes was more prejudicial than probative and should have been excluded under Evidence Code section 352. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Garcia was alleged to have sexually assaulted his eight-year-old stepdaughter Amanda T. in 2002. Prior to trial, the prosecutor moved pursuant to Evidence Code section 1108 to introduce the testimony of Mia F., the victim of sexual offenses Garcia had committed in 1990. Garcia had sexually assaulted Mia F. on five occasions over a period of weeks when she was a child, and the assaults included violent pushing, forcible clothing removal, and threats to harm her if she disclosed the abuse. Garcia argued that the testimony would be highly inflammatory, that the incident was remote in time, and that the similarities between the cases would cause the jury to seek to punish him in the instant case for his prior crimes. The prosecutor observed that although 12 years had passed between the conviction for the abuse of Mia F. and the alleged offenses here, Garcia had been in prison for much of that time. The trial court ruled that the evidence of Garcia's prior sexual offenses was "relevant, it's probative, competent," and "relevant to motive."

The court proceeded to consider admission of the evidence under Evidence Code section 352, and inquired whether the testimony could be sanitized in some manner. Defense counsel maintained that any admission of the evidence would incite the jury to anger and would deprive Garcia of a fair trial, but suggested that the evidence come in by

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

means of a police officer reading the police report of the crimes rather than the victim's testimony, or that the testimony be limited to fewer incidents. The prosecutor opposed both suggestions and refused to entertain limitations on the presentation of the evidence unless compelled by the court. The court concluded that although the prior incidents were not recent, the fact of Garcia's incarceration for much of the intervening time undermined his assertion that they were remote in time. Ultimately, the court concluded, "I think the most prejudicial would be looking at comparative inflammatory facts. That's the biggest factor weighing on the defendant's side in terms of what the prejudice is; however, to the extent that [Evidence Code section] 1108 has strong legislative history to it, I do not find that in balancing the incidents as represented, so far from what I understand, that the undue prejudice does outweigh the probative value, so the court will allow the one victim to testify on those topics."

Amanda T. testified at trial that she was eight years old in October 2002. She lived with her mother, brother, grandparents, and stepfather Garcia. One day, Garcia drove her to a trailer he said belonged to his aunt. He made her a sandwich, which she ate while she sat on the couch in the living room. When she finished, she placed the plate on the coffee table; this angered Garcia, because he felt she should have put it in the trash. Amanda T. got up and put the paper plate in the trash. When she returned, Garcia grabbed her arms, pushed her backwards, and laid her over the arm of the couch. He pulled off Amanda T.'s pants and underwear as she struggled to push him away and told him to get off of her. Garcia removed Amanda T.'s shirt and his own pants. He partially penetrated her vagina with his penis.

Because people were walking by outside the living room, Garcia dragged Amanda T. to the bedroom, picked her up, and put her on the bed. She continued to fight back, and Garcia slapped her face and stuffed a sock in her mouth. Garcia again penetrated her vagina with his penis.

Garcia heard a noise outside and left the room to find out what it was. Amanda T. grabbed her clothes from the living room and then locked herself in the bathroom. Upon his return, Garcia told her he was leaving to go get her mother and threatened that if she

disclosed what had happened, he would hurt her mother. Amanda T. remained in the bathroom, cleaned herself up, and did not call 911 or tell her mother what had happened because she was scared that Garcia would kill or hurt her mother.

Garcia's prior victim Mia F. testified at trial, identifying Garcia as her former stepfather. When she was 11 or 12 years old, Garcia began molesting her. In the first incident Mia F. described, Garcia instructed the babysitter to leave the house with Mia F.'s brother so that they were alone. He followed Mia F. to her room, pinned her down, and placed his penis in her vagina despite her struggles. Garcia told her she was a burden to her mother and that her mother would never believe her if she told her what happened. In another incident, Garcia forced her to orally copulate him by pinching her nose so that she had to open her mouth to breathe, then forcing his penis into her mouth. She vomited after he ejaculated into her mouth. Garcia repeated the nose-pinching tactic on another occasion to force Mia F. to orally copulate him again.

Mia F. also testified about an incident in which she fled from Garcia into her room, wedging furniture under the doorknob to try to keep him out. Garcia pushed the furniture aside and pulled Mia F. back into the room as she attempted to climb out the window. Garcia then threw Mia F. on the bed, hit her head on the headboard, and penetrated her vagina with his penis. On another occasion, Mia F. reached into her closet, grabbed a roller blade, and hit Garcia in the head with it as he tried to force himself on her on the bedroom floor. Garcia slapped her across the face and called her a "bitch." Garcia threatened that he would harm Mia F., her mother, and her brother if she disclosed the abuse.

Garcia was convicted of the aggravated sexual assault of a child and lewd acts upon a child. The court sentenced Garcia under the One Strike Law to an aggregate sentence of 82 years to life in prison. Garcia appeals.

DISCUSSION

I. Ex Post Facto Clause

Garcia was sentenced on count 3 to a term of 25 years to life in prison under the One Strike Law, Penal Code section 667.61, because he was convicted of lewd conduct on a child under section 288, subdivision (a) in the instant case and also had previously been convicted of lewd conduct in 1991. Garcia contends that sentencing him under the One Strike Law violated the ex post facto clauses of the California and United States Constitutions because his prior conviction, from 1991, occurred before the enactment of the One Strike Law. We reject this argument based on *People v. Alvarez* (2002) 100 Cal.App.4th 1170. It is irrelevant that the prior conviction occurred before the effective date of the One Strike Law, because the law does not require the crimes against the other victim to have been subject to the One Strike Law when they were committed. (*Id.* at p. 1179.) Because the instant crime against Amanda T. was committed after the effective date of the One Strike Law, that law was not applied to conduct occurring before its adoption, and there was no ex post facto clause violation here. (See *ibid.*)

II. Constitutional Challenges to Evidence Code Section 1108

Garcia contends that the trial court erred in allowing the prosecutor to introduce evidence of his prior sexual crimes under Evidence Code section 1108. He acknowledges that in *People v. Falsetta* (1999) 21 Cal.4th 903, 910-922 (*Falsetta*), our Supreme Court rejected federal due process challenges to Evidence Code section 1108 and that this court is obligated to follow the rulings of the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) In *Falsetta*, our Supreme Court found that the introduction of evidence of a defendant's commission of a prior sexual offense in a current prosecution does not violate due process because strict limitations are placed on

the introduction of such evidence, including the trial court's balancing of its probative value and prejudice. (*Falsetta*, at pp. 917-920.)

The *Falsetta* court cited with approval *People v. Fitch* (1997) 55 Cal.App.4th 172, 184 (*Fitch*), which rejected an equal protection challenge to Evidence Code section 1108 on the basis that it treats those accused of sex offenses differently from those accused of other crimes. The *Fitch* court held that Evidence Code section 1108, which creates two classifications of accused or convicted defendants, is subject to rational basis scrutiny. (*Ibid.*) The court concluded that Evidence Code section 1108 is supported by a rational basis because “[t]he Legislature determined that the nature of sex offenses, both their seriousness and their secretive commission which results in trials that are primarily credibility contests, justified the admission of relevant evidence of a defendant’s commission of other sex offenses.” (*Ibid.*) While the *Falsetta* court announced no specific ruling concerning equal protection, the court noted that the *Fitch* court had rejected an equal protection challenge to the statute and quoted language from the *Fitch* decision’s equal protection analysis. (*Falsetta*, *supra*, 21 Cal.4th at p. 918.)

We follow *Falsetta* and *Fitch* and reject Garcia’s constitutional challenges to Evidence Code section 1108.

III. Evidence Code Section 352

Garcia contends that the trial court abused its discretion under Evidence Code section 352 in permitting evidence of Garcia’s prior sexual crimes against Mia F. to be admitted. The evidence was properly admitted.

Pursuant to Evidence Code section 352, “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.” “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." (*Falsetta, supra*, 21 Cal.4th at p. 917.) The trial court has broad discretion in making its determination. (*Id.* at p. 919.)

Garcia argues that the testimony of Mia F. should have been excluded because it was "highly inflammatory" and much less "sedate" than the sexual abuse of a minor that was charged here. We disagree. Mia F.'s testimony, like all testimony recounting sexual crimes against children, was upsetting and disturbing. It was also highly probative, showing a similar course of conduct in Garcia's past crime and the present allegations: targeting the daughter of a romantic partner; isolating the child; pinning the child down and raping her; slapping her; and threatening harm to her family if she told what Garcia had done.

Mia F.'s testimony was not significantly stronger or more inflammatory than the evidence of the offenses against Amanda T. While Mia F. testified to more instances of abuse than did Amanda T., her testimony was quite brief, setting forth five incidents in only 13 pages of the reporter's transcript. Amanda T.'s description of Garcia's one attack upon her, in contrast, consumed 15 pages of the transcript on direct examination, and her testimony overall ran to 62 pages. Mia F.'s testimony also appears to have been far less emotional than Amanda T.'s: while the testimony of Amanda T. contains multiple references to Amanda T. crying while testifying and questions about whether she needed a break, no such statements were made on the record during Mia F.'s testimony. Mia F. was an adult recounting events that had occurred nearly 20 years earlier, while Amanda T. was still a teenager describing far more recent events. We are not convinced that Mia F.'s testimony was significantly more inflammatory than Amanda T.'s testimony, and we conclude that the trial court did not abuse its discretion in concluding that the strong probative value of the evidence, considered with the lack of remoteness, the absence of

any likelihood of confusing the jury, and the relative brevity of the testimony, outweighed its prejudicial nature.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.