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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ODIS JAMES WILLIAMS,

Defendant and Appellant.

C067455

(Super. Ct. No. 09F06004)

Following a jury trial, defendant Odis James Williams was convicted on two counts of substantial sexual conduct with a minor under the age of 14 (Pen. Code, § 288.5, subd. (a)),¹ orally copulating a person under the age of 18 (§ 288a, subd. (b)(1)), and unlawful sexual intercourse with a minor more than three years younger than defendant (§ 261.5, subd. (c)). Sentenced to a term of two years eight months in state prison, plus 30 years to life, defendant appeals his conviction.

¹ Undesignated statutory references are to the Penal Code in effect at the time of defendant's February 18, 2011 sentence.

On appeal, defendant contends the trial court erred in allowing the prosecution to introduce defendant's prior sexual offenses under Evidence Code section 1108 to show defendant's propensity for sexually abusing young girls. Defendant also contends that CALCRIM No. 1191, with which the jury was instructed, wrongly allowed the jury to "use two prior episodes of lewd and lascivious conduct[], proved merely by the preponderance of the evidence, as a direct link in the chain of evidence establishing [defendant's] guilt as to the charged offenses." We find defendant's claims to have no merit and shall affirm the judgment.

FACTUAL BACKGROUND

In August 2009, defendant was charged with substantial sexual conduct with two of his stepdaughters, Cynthia F., a minor under the age of 14, and Erica F., also a minor under the age of 14. Defendant also was charged with orally copulating a friend of his stepdaughters, Briana M., a person under the age of 18, and having unlawful sexual intercourse with Briana M., a person more than three years younger than defendant. Defendant pleaded not guilty to the charges. Jury trial began on December 1, 2010. Each of defendant's victims testified at trial.

Cynthia F.

Cynthia F. was 18 years old when she testified at trial. Her mother, G.W., was married to defendant. Defendant first came to live with Cynthia and her family when Cynthia was about

six or seven years old. Around that same time, defendant began washing Cynthia in the shower.

Defendant began touching Cynthia's breasts when she was eight years old. After Cynthia's mom went to work, defendant had Cynthia get in bed with him and watch people on television having sex. Defendant told Cynthia, "this is what you do to your husband or your boyfriend." Defendant put his hard penis against Cynthia's butt and her leg. While watching pornography with Cynthia, defendant touched her all over, moving his hand on her vagina under her clothes.

Before she was 12, defendant repeatedly forced Cynthia to orally copulate him. Defendant would ejaculate in Cynthia's mouth and on her skin; defendant told her seminal fluid was good for her skin. Then, when Cynthia was 12, defendant raped her—taking her virginity. Cynthia estimated that, over the next several years, defendant made Cynthia have oral and vaginal sex with him between 50 and 70 times. Cynthia never told her mother that defendant was abusing her, and defendant told Cynthia not to tell anybody what he was doing to her.

Cynthia also saw defendant abusing her older sister, Erica. Cynthia saw defendant raping Erica vaginally, ordering Erica to give him oral sex, and defendant performing oral sex on Erica. Oftentimes, defendant would alternate raping the two girls while they were in the same room.

Cynthia believed sex was one of the things fathers were supposed to teach their daughters. When Cynthia was 11 years

old, defendant told her to shave the hair off of her vagina and showed her how to do it.

In early 2009, Cynthia's mother, G.W., walked into the room as defendant was starting to get on top of Cynthia in order to rape her. Cynthia's mother began yelling and hitting defendant, saying things like, "What did I just see?"

Erica F.

Cynthia's older sister, Erica F., was 19 years old when she testified. Defendant began living with their family when Erica was seven years old. While Erica was seven, defendant began touching her by rubbing her breasts, legs, inner thigh, back, and shoulders. Defendant also washed Erica in the shower. While she was still seven, defendant grabbed Erica's hand, put it on his penis, and forced her to masturbate him.

When Erica was eight, defendant raped her in his bedroom; at the conclusion of the assault, defendant ejaculated. Defendant also forced Erica to orally copulate him. Defendant asked Erica to tell him when it hurt, but she remained quiet. Erica estimated that, before she turned 14, defendant raped her over 600 times. Defendant forced Erica to orally copulate him to get his penis erect. During these numerous assaults, defendant ejaculated in Erica's vagina and mouth, and on her stomach and breasts. Defendant told Erica this was all their secret.

Defendant showed Erica pornographic movies and told her she could learn how to do things. At times, Erica's younger sister Cynthia was in the room. On two occasions, before Erica turned 14, defendant forced the sisters to have a "threesome" with him. Defendant touched them both all over in front of each other; he asked them to perform sexual acts with each other, but Erica refused. Erica did see defendant vaginally rape Cynthia and Cynthia orally copulate defendant.

Erica never told her mother about the abuse because she felt sorry for her mother. Erica tried to protect herself by keeping her distance from defendant.

Defendant stopped abusing Erica when she turned 14. Defendant told Cynthia it was because Erica had become "too big." Erica did not tell anyone about the abuse even after it stopped because she wanted to put it all behind her.

Briana M.

Briana M. was 19 years old when she testified. Briana was best friends with Cynthia and Erica. Briana occasionally stayed the night with Cynthia and Erica. In 2006, when Briana was 15 turning 16, she attended a family gathering with Cynthia and Erica, at which defendant gave Briana alcoholic beverages. That night, Briana slept on the floor in the sisters' bedroom.

Briana woke up when she felt defendant touching her all over. Defendant pulled down Briana's shorts, turned her on her back, and licked her vagina. Briana cried; defendant said he

loved her. Defendant then raped Briana. Briana was afraid; she was afraid defendant would hurt her, afraid her friends' mother would find out about the abuse and hate Briana. The rape did not stop until defendant ejaculated. Briana told Cynthia about the rape; Cynthia told Briana defendant had done the same to her. A few years later, Briana told G.W. about the rape.

G.W.

G.W. was in the process of dissolving her marriage to defendant when she testified. G.W. had known defendant for approximately 11 years. G.W. had four daughters at the time she met defendant, including Cynthia and Erica.

After dating only a few months, defendant moved in with G.W. and her daughters. They married in July 2000. Defendant kept pornography in G.W.'s bedroom and was often home while G.W. was out of the house working.

In 2009, G.W. walked in on defendant climbing on top of Cynthia who was lying on her back. Defendant, wearing only a shirt, grabbed his pants as G.W. started swinging at him. Defendant cried and said nothing happened; Cynthia told G.W. defendant had not touched her, although she too had no pants on. G.W. wanted to believe nothing had happened but she told defendant to get out of her house.

A few days later, Cynthia and Erica approached G.W. with their older sister. The girls told G.W. about how defendant had been molesting them since they were six or seven years old, and

raping them when they were 11 and 12, respectively. Cynthia also told G.W. about defendant raping their friend Briana. G.W. called the police that day. G.W. also called defendant and confronted him; defendant threatened to kill himself. Defendant was arrested days later in Texas after the case appeared on the television program, *America's Most Wanted*.

Prior Acts of Sexual Misconduct

L.S.

Following an Evidence Code section 402 hearing, the trial court permitted the prosecution to admit evidence that, during his prior marriage, defendant also sexually abused his daughter, L.S. Twenty-nine years old when she testified, L.S. described how defendant began sexually abusing her when she was in the fourth grade (approximately nine years old). L.S. and defendant were cuddling while watching television when defendant started rubbing L.S.'s thigh, down toward her vagina. L.S. cried, squirmed, and told him to stop.

On a separate occasion, L.S. was in defendant's bedroom when defendant put his hands under her clothes and felt L.S.'s breasts. After that, and throughout her years in elementary school, defendant often called L.S. into his bedroom to watch television and he would put his hand on her vagina. Defendant also made L.S. and her older sister put lotion on his back and "butt" while he was naked. Two years later, defendant stopped abusing L.S. after she told her mother about the abuse.

T.C.

The court also allowed the prosecution to admit evidence that defendant abused T.C., a friend of his older daughter, J.W. T.C. was 31 years old when she testified. T.C. was 10 years old when she met defendant; she was best friends with J.W. Defendant and his then-wife babysat T.C. before and after school, so she was in defendant's home nearly every day during the week. Defendant was like a father to T.C.

Then, when T.C. was 11 years old, defendant vaginally raped her, causing her to bleed. Defendant repeatedly raped T.C. until she was 12 or 13 years old. Defendant told T.C. he loved her; she believed him and she told him the same. Defendant also told T.C. to keep their "relationship" a secret.

Once, defendant hit T.C. when he overheard her mention their "relationship" to another person. T.C. also "ran away" with defendant when she was 12 or 13. They went to a parking lot where defendant raped her, then they returned home.

When T.C. was 16 years old, she went to see defendant after a court session. Defendant told T.C. he wanted to "fuck the shit" out of her but by then, T.C. knew defendant's behavior was wrong.

Defendant admitted to his pastor that he sexually abused T.C. Defendant told his pastor the abuse started when he went to T.C.'s house and T.C., wearing nothing but a T-shirt, said she needed to be loved and began "rubbing" defendant.

After hearing the evidence, a jury found defendant guilty of all charges. Defendant was then sentenced to state prison in February 2011 for a term of two years eight months, plus 30 years to life. Various fines and fees were imposed and defendant was awarded 496 days of custody credit (432 actual and 64 conduct). (§ 2933.1.)

DISCUSSION

I. Evidence Code Section 1108 Uncharged Acts

Defendant contends the trial court erred in admitting evidence of uncharged acts under Evidence Code section 1108. Specifically, defendant contends the trial court should have excluded evidence that he sexually abused Cynthia and Erica's older half sister, L.S., as well as her older sister Z.W.'s friend, T.C., under Evidence Code section 352 and federal due process. Defendant's claim lacks merit.

Evidence Code section 1108 authorizes the admission of evidence that a defendant committed another sexual offense or offenses, to show the defendant's propensity to commit such offenses. (Evid. Code, § 1108, subd. (a); *People v. Falsetta* (1999) 21 Cal.4th 903, 907.) To satisfy due process concerns, however, the admission of propensity evidence is subject to Evidence Code section 352, under which the prejudicial effect of such evidence must be weighed against its probative value. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1288-1289; *People v. Falsetta, supra*, 21 Cal.4th at pp. 907, 916; *People v. Escudero* (2010) 183 Cal.App.4th 302, 310 (*Escudero*).)

“The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense. Other factors affecting the probative value include the extent to which the source of the evidence is independent of the charged offense, and the amount of time between the uncharged acts and the charged offense. The factors affecting the prejudicial effect of uncharged acts include whether the uncharged acts resulted in criminal convictions and whether the evidence of uncharged acts is stronger or more inflammatory than the evidence of the charged offenses.’ [Citation.] ‘The weighing process under [Evidence Code] section 352 depends upon the trial court’s consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules.’ [Citation.]

“We will only disturb the trial court’s exercise of discretion under Evidence Code section 352 ‘when the prejudicial effect of the evidence clearly outweighed its probative value.’ [Citation.] A trial court abuses its discretion when its ruling ‘falls outside the bounds of reason.’” (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274 (*Hollie*).)

Here, the prosecution sought to introduce evidence of defendant’s prior sexual misconduct to show his pattern of abusing young girls. Defendant argued the evidence was unduly prejudicial and not probative. The court disagreed: “I will allow that prior conduct in involving [T.C.] It’s within the same period of time as the issues . . . with the victims of this

trial. Same type of conduct, same type of victim. [¶] I don't find the conduct overly inflammatory in that it's the same type of conduct. If you read . . . Evidence Code [section] 1108, it talks about the propensity for the same or similar type of evidence. [¶] So I find it all fits, and I will allow the prior conduct involving [T.C.]"

The trial court later stated, "Based on what [L.S.] testified to on the stand, I believe it is appropriate and falls within the realm of [Evidence Code section] 1108 evidence as it relates to this particular case, especially the age frame, the incidents that occurred to her."

We find the trial court's decision to be well reasoned and supported by the evidence. The evidence of defendant's prior conduct was undeniably probative. (See *Hollie, supra*, 180 Cal.App.4th at p. 1274.) The conduct was remarkably similar to that with which he was charged here. The girls were young and defendant held a position of trust and authority over both of them. The girls were also subject to a similar pattern of abuse including fondling, oral copulation, and rape.

Defendant's prior sexual abuse of children also was not remote in time from the crimes here. (See *Hollie, supra*, 180 Cal.App.4th at p. 1274.) By defendant's own calculation there were only eight to nine years between the uncharged acts and those charged here. Eight to nine years is not a long time, particularly when, as here, the similarities between the prior

and current acts balance out any remoteness. (*People v. Branch* (2001) 91 Cal.App.4th 274, 284-285.)

Furthermore, there is no evidence in the record that the jury was confused or wanted to punish defendant for crimes committed against L.S. or T.C. (See *Hollie, supra*, 180 Cal.App.4th at p. 1274.) In any event, the trial court instructed the jury on propensity evidence. (CALCRIM No. 1191.) There was no "substantial likelihood the jury [would] use [the propensity evidence] for an illegitimate purpose.'" (*Escudero, supra*, 183 Cal.App.4th at p. 310.)

There also was no undue consumption of time in admitting the evidence that defendant previously abused prepubescent girls in his care. (See *Hollie, supra*, 180 Cal.App.4th at p. 1276.) Contrary to defendant's argument on appeal, the time it takes to consider whether to admit the evidence is not the relevant time to consider. Rather, it is the time taken to admit the testimony into evidence at trial. Here, the trial testimony regarding the uncharged acts occupies only 37 pages in a transcript that exceeds 600 pages. But even if we concluded this was an extraordinary amount of time allotted to the evidence, which we do not, any amount of time spent was warranted given the probative value of the evidence.

In sum, we agree with the trial court: The probative value of propensity evidence was substantial and not outweighed by the prejudicial effect. Accordingly, the trial court did not err in admitting the propensity evidence.

II. CALCRIM No. 1191

Defendant further contends "it was a prejudicial violation of due process for the court to instruct the jury that it could use two prior episodes of lewd and lascivious conduct[], proved merely by the preponderance of the evidence, as a direct link in the chain of evidence establishing [defendant's] guilt as to the charged offenses." Defendant's argument is unpersuasive.

The court gave this instruction at the close of evidence:

"The People received [*sic*] evidence that the defendant committed the crimes of lewd and lascivious conduct that was not charged in this case. These crimes are defined for you in these instructions. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense[s]. [¶] Proof by a preponderance of the evidence is a different burden of proof [than] proof beyond a reasonable doubt. [¶] A fact is proved by a preponderance of the evidence if you can prove that it is more likely than not that the fact is true. If the People have not met this burden of proof, you must disregard the evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses, you may, but are not required to, conclude that the evidence that the defendant [was] disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit the offenses as charged here. [¶] If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence.

It is not sufficient by itself to prove that the defendant is guilty of the charged offenses. [¶] The People must still prove each charge beyond a reasonable doubt."

Defendant concedes the Supreme Court found CALCRIM No. 1191's predecessor, CALJIC No. 2.50.01, to be "constitutionally permissible as long as the inference is not arbitrary and does not shift the burden of persuasion." Defendant argues, however, that the Supreme Court "did not decide . . . whether the state can use propensity evidence *at all* to prove that a defendant was likely to have committed the charged offenses, unless the predicate facts—the uncharged offenses—are proved beyond a reasonable doubt."

In support of his argument, defendant relies on the Supreme Court's decision in *People v. Tewksbury* (1976) 15 Cal.3d 953 (*Tewksbury*). In *Tewksbury*, the Supreme Court noted there are facts, collateral to the question of a defendant's guilt or innocence, which "do not bear directly on any link in the chain of proof of any element of the crime," and which need only be proven by a preponderance of the evidence. (*Id.* at pp. 964-965.) Such facts include challenges to the reliability of evidence and certain affirmative defenses (including entrapment). (*Id.* at pp. 964-965 & fns. 10 & 11.)

The Supreme Court reasoned that, "Proof of such collateral factual issue, as in the case of the proof of the factual issue on which the [defense of entrapment] rests, is not one which must be established in the direct chain of proof of the

accused's guilt. There is thus no constitutional compulsion that such collateral fact be proved beyond a reasonable doubt, nor does the presumption of the accused's innocence aid in the resolution of such fact." (*Tewksbury, supra*, 15 Cal.3d at p. 965, fn. omitted.)

A defendant's propensity to commit a particular type of crime, here the sexual abuse of young girls in his care, is precisely the type of collateral fact contemplated by the Supreme Court in *Tewksbury*. It does not "bear directly on any link in the chain of proof of any element of the crime." (*Tewksbury, supra*, 15 Cal.3d at p. 964.) In other words, it is not direct evidence. Accordingly, it need be proven only by a preponderance of the evidence. The court did not err in giving the instruction.

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

RAYE, P. J.

BLEASE, J.