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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK LEON RICHARDSON,

Defendant and Appellant.

C067882

(Super. Ct. No. 09F04796)

A jury convicted defendant Frank Richardson on three counts of violating Penal Code section 288, subdivision (a), a lewd and lascivious act on a child under the age of 14.¹ The jury also found defendant guilty of false imprisonment, a lesser included offense of the charged offense of false imprisonment by violence, menace, fraud, or deceit. (§ 236.) The victim in all counts was S.R., the granddaughter of defendant's wife.

¹ References to an unnamed section are to the Penal Code unless otherwise specified or indicated by context.

The trial court found true an allegation that defendant had suffered a prior serious felony conviction for first degree robbery in the state of Oklahoma in 1992. The trial court sentenced defendant to a term of 19 years in prison.

Defendant argues the trial court abused its discretion when it admitted evidence of a prior uncharged sexual offense and when it denied his motion to strike his prior serious felony conviction. We find no abuse of discretion and shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The victim, S.R., was born in August 1996. In January 2009 she was 12 years old and in the seventh grade. At that time she was living with her grandmother and defendant, whom she considered to be her grandfather.

On April 27, 2009, S.R. was asleep in her room when she woke up with a pain in her “private area” (count 1). She felt defendant’s hand in her “private area.” Defendant was standing over her, and her pajama pants and underwear were around one of her ankles. The covers were no longer covering her. S.R. got out of bed and tried to run to her grandmother. She thought her grandmother would help her and call the police. She was unable to go out her bedroom door because defendant put his arm against the doorjamb in front of her (count 2). Defendant said, “I won’t do it again.”

S.R. went back to her bed, crying. Defendant stood at the end of her bed. S.R. screamed her grandmother’s name, then ran out of her bedroom. She shook her grandmother to wake her up, and told her what had happened. Defendant left the house to pick up S.R.’s brother from work, and returned about five to seven minutes later.

S.R., her brother, and her grandmother left the house. They went to the hospital, where she was examined.

S.R. testified that the incident was not the first time defendant had touched her inappropriately. When she was nine or ten he put his hand inside her shirt. Another time he grabbed her breasts with his hands (count 3). She told him to move his hands, and he

said, “What if I like my hands on your chest?” She said she would tell her grandmother, and he moved his hands.

On another occasion when she was home sick from school, she was giving defendant a hug goodbye when they started wrestling. He pinned her to the ground and sat over her, holding her breasts (count 4).

Winnifred M., who was 41 years old at the time of trial, testified that defendant touched her inappropriately when she was 12 years old. Defendant was her uncle by marriage. She testified that she was sleeping on her aunt’s couch, when she woke up Defendant was standing over her, fondling her breasts underneath her shirt. The blankets that had been over her were pulled down. He told her not to tell anyone, and that no one would believe her. She did not tell anyone about it until she was about 17 years old, when she told her mother and her aunt.

The jury found defendant guilty of counts 1, 3, and 4. The jury found defendant not guilty of count 2, false imprisonment by force or violence, but guilty of the lesser offense of simple false imprisonment. The trial court sentenced defendant to a total term of 19 years in prison, consisting of six years for count 1, four years each for counts 3 and 4, and a five year enhancement for a 1992 robbery conviction in the state of Oklahoma.

DISCUSSION

I

Admission of Uncharged Incident

The trial court admitted Winnifred M.’s testimony pursuant to Evidence Code sections 1101, subdivision (b), 1108, and 352, over defendant’s objections. These sections provide respectively that: (1) evidence of a person’s wrongful act is admissible to prove some fact other than the person’s disposition to commit such an act; (2) when a criminal defendant is accused of a sexual offense, evidence of defendant’s commission of another sexual offense is admissible if allowed under Evidence Code section 352; and (3) the court has discretion to admit evidence if its probative value outweighs the probability

its admission will necessitate undue consumption of time or create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Defendant argues the trial court abused its discretion in admitting the evidence pursuant to Evidence Code section 352, making its admission under Evidence Code section 1108 improper.² When reviewing the trial court's discretionary ruling under Evidence Code section 352, we will not disturb the ruling except on a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner resulting in a manifest miscarriage of justice. (*People v. Williams* (2008) 43 Cal.4th 584, 634-635.)

The Supreme Court has stated that in considering whether to admit a prior sex offense, the trial court "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." (*People v. Falsetta, supra*, 21 Cal.4th at p. 917.)

The five most significant factors are: "(1) whether the propensity evidence has probative value, e.g., whether the uncharged conduct is similar enough to the charged behavior to tend to show the defendant did in fact commit the charged offense; (2) whether the propensity evidence is stronger and more inflammatory than evidence of the

² Defendant also asserts that admission of the evidence under Evidence Code section 1108 violated due process. He acknowledges this argument was rejected by the Supreme Court in *People v. Falsetta* (1999) 21 Cal.4th 903, and that we are bound to follow *People v. Falsetta*, but asserts the claim in order to preserve it for federal review. Defendant's federal claim is so noted, and we need not address the argument.

defendant's charged acts; (3) whether the uncharged conduct is remote or stale; (4) whether the propensity evidence is likely to confuse or distract the jurors from their main inquiry, e.g., whether the jury might be tempted to punish the defendant for his uncharged, unpunished conduct; and (5) whether admission of the propensity evidence will require an undue consumption of time.” (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1117.) The first factor (the probative value) must be balance against the remaining factors. (*Ibid.*)

In this case the probative value of the prior incident was high because of the similarity of the incidents. The victims were about the same age, they were both related in some way to defendant, and they were both molested when defendant came to their beds while they were asleep. They both testified they had been covered when they went to sleep, and were uncovered when they woke up. The trial court agreed with this assessment and found that the prior incident was “quite similar and, therefore, . . . very probative”

The trial court also considered the other factors. It found that the prior incident was not more inflammatory and would not inflame the passions of the jury. It found that although the prior conduct was remote, this was offset by the similarity of the incidents.

The court then considered whether the evidence was likely to confuse or distract the jurors because they might be tempted to punish defendant for the uncharged conduct. The court found this issue was closely related to the inflammatory nature of the prior conduct, which was no more inflammatory than the current offense. The court concluded that the jury was unlikely to misuse the information, since it would be given a limiting instruction. The trial court gave a limiting instruction, telling the jury it could consider the prior conduct in determining whether defendant committed the charged sex offense, and that it was not to consider the evidence for any other purpose.

Finally, the court considered whether the prior incident would require undue consumption of time. It determined the single witness who the People proposed to call to testify would not be likely to take long.

The trial court thus concluded the evidence was highly probative because of the degree of similarity in the charged and uncharged incidents. The trial court further found that three of the remaining four factors weighed in favor of admitting the evidence. Only the remoteness factor may have weighed in favor of excluding the evidence. In *People v. Hernandez* (2011) 200 Cal.App.4th 953, 957, 968, the court allowed evidence of prior incidents that occurred 30 to 40 years prior to the charged incident. *Hernandez* held that the similarity of the offenses balanced out the remoteness. (*Id.* at p. 968.) There is no bright line test with regard to how remote is too remote, and given the similarity of the incidents here, the trial court did not abuse its discretion in determining that the remoteness factor did not outweigh the remaining factors supporting admission of the evidence.

We conclude the trial court carefully considered the appropriate factors in deciding to admit the evidence, and its discretion was not exercised in an “ ‘ “arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” ’ ” (*People v. Williams, supra*, 43 Cal.4th at p. 634-635.)

II *Romero* Motion

In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530, the Supreme Court held that a trial court has the discretion under section 1385, subdivision (a), to strike prior conviction allegations. Defendant made a motion pursuant to *Romero* to strike his prior robbery conviction, which the trial court denied.

The Supreme Court has set forth certain parameters that govern a trial court’s discretion to strike a prior conviction allegation under section 1385. The court “must consider whether, in light of the nature and circumstances of his present felonies and

prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.) We review the trial court’s decision under a deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.)

Defendant argues his prior felony conviction for first degree robbery should have been stricken because of its remoteness, because the current crimes were less egregious than most cases involving lewd and lascivious conduct, and because defendant’s background, character, employment history and prospects, and lack of parole violations demonstrate that he should be outside the spirit of three strikes.

In considering defendant’s argument to strike the robbery strike, the trial court found that the remoteness of the robbery was mitigated by the fact that defendant was incarcerated for nine years. Further, the trial court was persuaded by the vulnerability of the victim, for whom defendant had assumed the role of a parent. The trial court found that defendant had “abused that privilege significantly.” The trial court further found that the fact that the level of conduct was less than sometimes seen in such cases was not enough to justify striking the strike.

The Supreme Court has emphasized that “[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance’ [citation.]” (*People v. Carmony, supra*, 33 Cal.4th at p. 378.) A trial court will be found to have abused its discretion in only limited circumstances, such as where it was not aware of its discretion to dismiss, or where it considered impermissible factors. (*Ibid.*) Circumstances must be “extraordinary” to take a criminal outside the spirit of the three strikes scheme. (*Ibid.*)

The trial court was aware of its discretion and did not consider any impermissible factors in the case. The circumstances presented here are not extraordinary. The trial court did not abuse its considerable discretion in refusing to dismiss the strike.

DISPOSITION

The judgment is affirmed.

BLEASE _____, Acting P. J.

We concur:

HULL _____, J.

HOCH _____, J.