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

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
FRANCISCO RODRIGUEZ PENA,  
  
Defendant and Appellant.

C068004  
  
(Super. Ct. No.  
SF114005A)

Defendant Francisco Rodriguez Pena was convicted by jury of committing a lewd act by force on a child under 14. Sentenced to a state prison term of 55 years to life under the "Three Strikes" law, defendant appeals. He contends: (1) the evidence was insufficient to convict him of committing a lewd act by force on the child, (2) the trial court abused its discretion and violated his constitutional rights by admitting evidence of his prior sexual offenses, and (3) the trial court misinstructed the jury with respect to the evidence of the prior sexual

offenses by also allowing the jury to consider associated nonsexual offenses.

Finding no prejudicial error, we affirm.

#### FACTS

In January 2010, when Anna was 11 years old, she went to McKinley Park in Stockton with her father. Anna's seven-year-old cousin, A., also was at the park.

Anna and A. went into the women's restroom at the park. Defendant followed them in. While A. was in one of the stalls, defendant grabbed Anna by the arms and asked her if she wanted to smoke a crack cocaine pipe he had. He pushed her into a stall and closed the door. Still holding her arms, defendant asked Anna if she wanted to kiss him, and he moved his face closer to hers, within about three or four inches, trying to kiss her. Anna successfully avoided contact between their faces by crouching down and moving her head around.

Anna saw A. looking under the partition, and they both screamed. A. opened the stall door, and both girls attempted to run out. Defendant blocked them at the door out of the restroom and again showed them his crack pipe. He threatened Anna that if she did not smoke the pipe he would kiss A. The girls were able to get around defendant and escape from the restroom.

Outside the restroom, the girls ran screaming to Anna's father, and Anna told him that a man had tried to kiss her in the restroom. Her father told her to go call the police on a relative's cell phone, which she did. Officers arrived quickly,

and Anna identified defendant, who was still close by, as the man who tried to kiss her.

Defendant was arrested. Before the officer said anything about the restroom, defendant said, "I didn't go in the bathroom."

#### PROCEDURE

A jury convicted defendant of committing a lewd act by force on a child under 14. (Pen. Code, § 288, subd. (b).) After a bifurcated trial, the court found true allegations that defendant (1) had a prior serious and violent felony (Pen. Code, §§ 667; 1170.12, subd. (b)), (2) had a prior conviction for a forcible sexual offense (Pen. Code, § 667.61, subd. (d)(1)), and (3) had a prior serious felony (Pen. Code, § 667, subd. (a)(1)).

The trial court sentenced defendant to state prison for an indeterminate term of 25 years to life, doubled to 50 years to life under the Three Strikes law, plus five years for the prior serious felony.

#### DISCUSSION

##### I

##### *Sufficiency of Evidence*

Defendant contends that the evidence was insufficient to convict him of committing a lewd act by force because, he claims, there was no evidence of a lewd touching. He asserts that grabbing Anna by the arms and trying to kiss her was not a lewd act because he only touched her arms and there was no evidence the touching was sexually motivated. We disagree.

"It is the prosecution's burden in a criminal case to prove every element of a crime beyond a reasonable doubt." (*People v. Cuevas* (1995) 12 Cal.4th 252, 260, citing *In re Winship* (1970) 397 U.S. 358 [25 L.Ed.2d 368].) "To determine whether the prosecution has introduced sufficient evidence to meet this burden, courts apply the 'substantial evidence' test. Under this standard, the court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses *substantial evidence* -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Cuevas, supra*, at p. 260, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578, italics added by *People v. Cuevas*.) "In reviewing a jury's determination, we view the whole record in a light most favorable to the verdict, drawing all reasonable inferences and resolving all conflicts in support of the jury's verdict. [Citation.] We must uphold the verdict unless it clearly appears that upon no hypothesis whatever is there sufficient evidence to support it. [Citation.]" (*People v. Massie* (2006) 142 Cal.App.4th 365, 371.)

The trial court properly instructed the jury concerning the crime of committing a lewd act by force on a child under 14. As relevant here, the court stated:

"To prove that the defendant is guilty of this crime, the People must prove that the defendant willfully touched any part of a child's body either on the bare skin or through her

clothing; in committing the act the defendant used force . . . ; the defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of himself or the child for that matter; and the child was under the age of 14 years at the time of the act." (See CALCRIM No. 1111.) And later: "Actually arousing, appealing to, or gratifying the lust, passions or sexual desires of the perpetrator or the child is not required." (See *ibid.*)

Under this standard, the evidence was sufficient to sustain defendant's conviction. The jury could reasonably infer that, when defendant grabbed Anna's arms and tried to kiss her, he acted with the intent to arouse himself or Anna. Thus, the touching element and the intent element, as well as the force element, were simultaneously satisfied. That is sufficient to sustain the conviction.

But defendant disagrees. He focuses solely on the grabbing of the arms to assert that the touching was not meant to immediately arouse himself or Anna. He claims that, unless he was caressing her arms in a sexual manner or manifested any sexual gratification solely from touching her arms, the evidence was insufficient to show a union of touching and intent to arouse. He argues that, to commit the crime, he had to intend to obtain sexual gratification simply from touching the arms.

That is not the law. Defendant fails to account for the fact that, while he was touching Anna's arms, he was also trying to kiss her. In other words, he was touching her at the same time he was seeking sexual gratification. The touching was to

facilitate the sexual gratification, even if the touching alone may not have been the full object of defendant's prurient desire.

Defendant cites *People v. Perkins* (1982) 129 Cal.App.3d 15 (*Perkins*) as his primary support for his argument. In *Perkins*, the defendant had unlawful sexual intercourse with a minor. Before the intercourse, the defendant placed his arm around the victim in a truck. The victim asked the defendant to stop and briefly left the truck. The defendant brought the victim back into the truck, renewed his advances, forced himself on the victim, and had unlawful intercourse. The defendant was convicted of (1) a lewd act for putting his arm around the victim and (2) unlawful intercourse for the later intercourse. (*Id.* at pp. 18-19.) The *Perkins* court found the defendant's initial placement of his arm around the victim to be merely in preparation for unlawful sexual intercourse and that the defendant had only a single unlawful intent. Therefore, because he had only one unlawful intent, he could not be convicted and punished for both acts. (*Id.* at p. 19.)

*Perkins* does not help defendant here. In fact, the *Perkins* court implicitly recognized that, if there had not been unlawful sexual intercourse, the defendant could have been convicted and punished for a lewd touching based solely on putting the arm around the victim. (*Perkins, supra*, 129 Cal.App.3d at p. 19, citing *People v. Greer* (1947) 30 Cal.2d 589, 600.) Here, it is fortunate that defendant was unable to carry out any further acts on Anna. Thus, it is unnecessary to determine whether,

under *Perkins*, the touching was merely preparatory to another act and thus could not be the basis for a separate conviction and punishment.<sup>1</sup>

We therefore conclude that defendant's contention that the evidence was insufficient is without merit.

## II

### *Propensity Evidence*

The trial court admitted evidence of two prior incidents in which defendant committed sexual offenses. Applying Evidence Code section 1108, the court allowed the jury to consider these incidents in determining whether defendant has a propensity for committing sexual offenses.<sup>2</sup> On appeal, defendant challenges the admission of the evidence on two grounds: (1) Evidence Code section 1108 is unconstitutional on its face and (2) the admission of the other sexual offenses was an abuse of discretion under Evidence Code section 352 and violated his due process rights. Neither argument has merit.

#### A. *Factual Background*

"We review the correctness of the trial court's ruling at the time it was made, . . . and not by reference to evidence

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<sup>1</sup> Because we distinguish *Perkins* on the facts, we need not decide whether *Perkins* was properly decided.

<sup>2</sup> Evidence Code section 1108, subdivision (a) 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 [Evidence Code] Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352."

produced at a later date. [Citations.]” (*People v. Welch* (1999) 20 Cal.4th 701, 739.) Therefore, we recount the evidence presented to the trial court in connection with the motion to admit the evidence of prior sexual offenses.

The prosecution filed a motion in limine, citing Evidence Code section 1108. In it, the prosecution recounted the following facts concerning defendant’s prior sexual offenses:

“During the early morning hours of January 27, 1991, [J.L.], 29 years old, went to [a liquor store] to buy rock cocaine. While she was in front of the store, [defendant] approached her and began a conversation. [J.L.] did not know [defendant]. [¶] He proceeded to grab her, throw her to the sidewalk, and climb on top of her. She struggled from underneath [defendant] and fled across the street to [a restaurant]. [Defendant] chased her and attempted to grab her again. She fled into the kitchen [area] of the restaurant and [defendant] picked up a knife from the counter and followed her. He stopped the victim in the kitchen of the restaurant. He pushed her to the floor and with the knife he was holding, he cutoff [*sic*] [J.L.’s] underwear. [Defendant] then stabbed [J.L.] in the leg. [¶] [Defendant] then threatened to cut [J.L.’s] vagina if she did not agree to have sex with him. [Defendant] pushed [J.L.] to a back room in the restaurant. [Defendant] held a knife to [J.L.’s] vagina. He told [J.L.] to orally copulate the victim [*sic*]. [J.L.] began to orally copulate the victim [*sic*] as [defendant] held a knife to her

head. He then laid the victim on the floor and began having sex with the victim."

For this incident, defendant was convicted in 1991 of false imprisonment, assault with a deadly weapon or by force likely to produce great bodily injury, and sexual battery, and served 16 months in prison.

"On July 9, 2000, at around 11:00PM, [C.C.] was walking home from her friend's house to her home. [C.C.] was 14 years old. [Defendant] approached [C.C.] and began walking with her. [Defendant] said to her he wanted to walk [her] home. [C.C.] did not know [defendant]. As they continued walking on El Dorado Street, [defendant] asked if [C.C.] would mind talking to him. She agreed to talk to him for a few seconds. [Defendant] asked [C.C.] if she would marry him. [C.C.] said no because she was too young for him because she was 14 years old. [Defendant] asked her if she would be his girlfriend. She responded by saying that she had a boyfriend. [Defendant] became angry. [¶] [Defendant] told her he would walk her the rest of the way home. As they were walking, [defendant] grabbed [C.C.] around the waist and carried her to the south side of [a market]. She yelled at [defendant] to let her go. [¶] There, [defendant] threw [C.C.] to the ground. He got on top of [C.C.] and straddled her while sitting on her stomach. [Defendant] began to suck on the right side of [C.C.'s] neck. As this was happening, [C.C.] was screaming for help and fighting. [Defendant] attempted to kiss [C.C.'s] mouth. [Defendant] asked her to 'kiss him.' [¶] [Defendant] pulled [C.C.'s] underwear

off. He put his fingers in her vagina. [C.C.] yelled for [defendant] to stop and tried to push and kick him off her. As he put his fingers into [C.C.], [defendant] also tried to kiss [C.C.]. He kept on telling [C.C.] he wanted her. [¶] At this point in the sexual assault, [defendant] unzipped his pants and tried to insert his penis in [C.C.'s] vagina. Fortunately, she was kicking and screaming and ended up getting the attention of law enforcement before [defendant] could rape her."

For this incident, defendant was convicted in 2000 of penetration by a foreign object and was sentenced to six years in state prison.

At the hearing on the prosecution's motion to admit the evidence of the prior sexual offenses, the defense argued that the evidence should be excluded under Evidence Code section 352 because the prior sexual offenses were only minimally probative and they were more severe than the present case. The trial court granted the prosecution's motion, finding that the probative value of the prior sexual offenses on the issue of what defendant intended when he attacked Anna outweighed any prejudicial effect that admitting the evidence would have.

The defense and prosecution stipulated that defendant was convicted of (1) sexual battery, assault with force likely to cause great bodily injury, and false imprisonment of J.L. in 1991 and (2) rape by a foreign object on C.C. in 2000.

B. *Legal Arguments*

1. Constitutionality of Evidence Code section 1108

Defendant acknowledges that our Supreme Court has rejected a due process challenge to Evidence Code section 1108. (*People v. Falsetta* (1999) 21 Cal.4th 903, 922 ["We conclude, consistent with prior state and federal case law, that (Evidence Code) section 1108 survives defendant's due process challenge."]; see also *People v. Lewis* (2009) 46 Cal.4th 1255, 1288-1289 ["We decline defendant's invitation to reconsider our decision in *Falsetta, supra*, 21 Cal.4th 903, and to hold that the admission of evidence under Evidence Code section 1108 to establish a defendant's propensity to commit a sexual offense violates his or her due process rights."].) Defendant also acknowledges that we are bound to follow our Supreme Court's ruling. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). Defendant explains that he asserts the issue solely to preserve it for further review in federal court. We accordingly reject defendant's constitutional challenge to Evidence Code section 1108.

2. Fair Trial and Evidence Code section 352

Defendant also claims that, as applied in this case, the admission of sexual offense evidence under Evidence Code section 1108 resulted in an unfair trial and also was an abuse of discretion under Evidence Code section 352. These claims are also without merit.

Evidence Code section 1108 is an exception to the general prohibition on propensity evidence and permits the admission of other sexual offenses, in a sexual offense prosecution, for the purpose of showing a defendant's propensity to commit such crimes. The admissibility of this evidence is subject only to the weighing of probative value and prejudicial impact under Evidence Code section 352. (*People v. Falsetta, supra*, 21 Cal.4th at p. 911; *People v. Britt* (2002) 104 Cal.App.4th 500, 505.) In deciding whether to admit prior sexual offense evidence under Evidence Code sections 1108 and 352, the trial court should consider its probative value, its potential to evoke an emotional bias unrelated to guilt, its capacity to consume time, its chronological remoteness, and its capacity to distract the jury from the present offense. (*People v. Falsetta, supra*, 21 Cal.4th at pp. 916-917; *People v. Harris* (1998) 60 Cal.App.4th 727, 737-740 (*Harris*).) We review decisions to admit evidence under Evidence Code section 352 for abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; *People v. Fitch* (1997) 55 Cal.App.4th 172, 183.)

Fundamentally, "the ultimate object of the [Evidence Code] section 352 weighing process is a fair trial." (*Harris, supra*, at p. 736.) Therefore, when admission of evidence under Evidence Code section 352 is not an abuse of discretion, it also does not result in an unfair trial.

In *Harris*, the defendant was accused of sexually molesting two state hospital patients while he served as a nurse at the hospital. (*Harris, supra*, 60 Cal.App.4th at pp. 730-732.) The

molestation involved kissing and fondling, and in one case, arguably consensual sexual intercourse. (*Id.* at pp. 731-732.) Pursuant to Evidence Code section 1108, the prosecution introduced evidence that 23 years earlier, the defendant had violently raped a woman who lived in his apartment complex. (*Id.* at p. 733.) When the police found the victim, she had blood on her vagina and mouth area, along with swelling on the right side of her face. In fact, one of the officers testified he "'couldn't tell if she was injured in the crotch and lower stomach area or not due to the blood.'" (*Id.* at p. 734.) The defendant was apprehended at the scene, with blood on his pants, his shorts, and his penis. (*Ibid.*) The Court of Appeal found the evidence was remote in time, inflammatory, and "nearly irrelevant." In fact, the only similarity between the prior incident and the current offenses was that both involved sexual conduct. (*Id.* at pp. 738, 741.) Therefore, the evidence should have been excluded under Evidence Code section 352. (*Harris, supra*, at p. 741.)

As the trial court noted during the hearing on the prosecution's motion in this case, the probative value of the prior sexual offenses evidence was strong, making this case dissimilar to *Harris*, in which the probative value was minimal. The prior sexual offenses were useful to the jury here to determine defendant's intent when he attacked Anna, as well as to establish that defendant has a propensity for committing sexual offenses against random, vulnerable and isolated victims, trying to arouse passions by kissing them. Indeed, we agree

with the trial court that the evidence may have also been admissible under Evidence Code section 1101 to show intent. Therefore, the prior sexual offenses were, in this case, highly probative and useful to the jury.

Defendant asserts, however, that the prior offenses are remote and the facts of those offenses more violent than this case. He also asserts that the jury may have been confused by the evidence of the prior sexual offenses or may have believed defendant was not adequately punished. Although we agree with defendant that the facts of the two prior sexual offenses were somewhat remote and more severe than the facts of this case, only speculation supports the argument that the jury was confused or believed defendant was not adequately punished. The prior offenses were not so remote and inflammatory to require their exclusion.

As did the trial court, we conclude the manifest probative value outweighed any prejudicial effect of admitting the prior sexual offenses evidence. Accordingly, the trial court did not abuse its discretion under Evidence Code section 352 and did not violate defendant's right to a fair trial.

### III

#### *Jury Instruction on Propensity Evidence*

Concerning propensity evidence, the trial court instructed the jury that it could use the prior sexual offenses to determine that defendant was disposed to commit sexual offenses. In doing so, the trial court included the offenses that, abstractly, are not sexual offenses: assault with force likely

to cause great bodily injury and false imprisonment. On appeal, defendant contends that including the nonsexual offenses was prejudicial error. We conclude that, even if the court erred by including the nonsexual offenses in the instruction with the sexual offenses, any error was harmless.

The trial court instructed the jury as follows:

"The People presented evidence here that the defendant committed prior crimes that were not charged in this case. That's the evidence of the prior sexual battery; assault likely to cause great bodily injury; false imprisonment; and forcible penetration with a finger as set forth in the exhibits here. . . . [¶] . . . If you decide the defendant committed the uncharged offenses, you may, but are not required to conclude from that 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 a lewd act upon a child as charged in this case. . . ." (See CALCRIM No. 1191.)

Evidence Code section 1108, subdivision (a) allows evidence of "another sexual offense or offenses" to show propensity to commit sexual offenses. We need not determine whether the instruction violated the trial court's authority to admit evidence under Evidence Code section 1108 or defendant's due process rights because, under any standard of harmless error, inclusion of the nonsexual offenses in the jury instruction was harmless. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 [state standard -- reasonably probable that an outcome more favorable to defendant would have resulted absent the error];

*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711] [federal standard -- error was harmless beyond a reasonable doubt].)

Including the nonsexual offenses in the instruction really added nothing of importance to the jury's consideration. The jury was allowed under Evidence Code section 1108 to consider the prior incidents giving rise to the convictions for sexual offenses. That those incidents included nonsexual offenses did not make the incidents any more prejudicial to defendant. Therefore, even assuming the trial court erred by including the nonsexual offenses in the instruction, any error was harmless.

DISPOSITION

The judgment is affirmed.

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NICHOLSON, Acting P. J.

We concur:

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ROBIE, J.

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HOCH, J.