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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

LOUIS MAYEN,

Defendant and Appellant.

C068009

(Super. Ct. No. 10F06399)

A jury found defendant Louis Mayen guilty of one count of lewd and lascivious conduct with a child under the age of 14. (Pen. Code, § 288, subd. (a).) Sentenced to an eight-year state prison term, defendant appeals, contending the trial court abused its discretion in admitting evidence of his prior uncharged sexual offenses under (1) Evidence Code sections 1108 and 352,¹ and (2) section 1101, subdivision (b). We conclude the court did not abuse its discretion in admitting defendant's prior uncharged sexual offenses and, even if the court did err

¹ Undesignated statutory references are to the Evidence Code.

in failing to sanitize those offenses, any error was harmless. We shall affirm.

FACTUAL BACKGROUND

A. The Charged Offense

M.I., the victim in this case, was born in February 2004 and was seven years old when he testified at trial.

Between June 1, 2008, and November 1, 2008, M.I. was at defendant's house while defendant's wife (M.I.'s grandmother), Toni M., was away. Only M.I. and defendant were there. While lying on a living room couch watching television, M.I. fell asleep. Sometime later, M.I. awoke with his shorts and underpants down. Defendant stood next to M.I. and then touched M.I.'s penis with his hand. At trial, M.I. described that defendant used "his . . . first finger and used pressure and pushed a couple times." M.I. told defendant to stop, which defendant did. During his testimony, M.I. stated that no one had told him to keep the incident a secret.

Defendant claimed M.I. had falsely accused him, citing two conflicting interviews from M.I.

In the first interview, M.I. told Sacramento Police Officer Michael Rinehart that defendant touched his "private parts" on the outside of his pants. M.I. also relayed to Rinehart that he told defendant to stop, at which point defendant touched M.I. five more times. Additionally, M.I. told the officer that both defendant and M.I.'s grandmother told him to keep the incident a secret.

In the second interview, M.I. told forensic specialist Melanie Edwards that when defendant touched his penis his pants and underwear were down. M.I. also told Edwards defendant stopped because he woke up. Lastly, M.I. stated he went back to sleep after defendant touched him.

B. The Prior Uncharged Offenses

Under section 1108, evidence of defendant's prior uncharged sexual offenses was allowed in at trial. The evidence included offenses defendant committed against four of his children, one being his biological child and the other three his stepchildren. Also admitted into evidence was a statement by defendant admitting to some of the uncharged offenses. That evidence was as follows.

1. T.L. (defendant's biological daughter).

Defendant's daughter, T.L., was born in March 1977. In 1984, when T.L. was seven years old, she lived with her mother and her father, defendant. While the mother worked a graveyard shift, defendant began molesting T.L. The first time this happened was when T.L. was watching television in the living room with defendant. Defendant began touching T.L.'s genital area outside of her clothing. Over time, this touching progressed to touching under the clothes, oral copulation and intercourse. Defendant told T.L. to keep these acts just "between us." The molestations continued for six months and ended once T.L.'s mother stopped working the graveyard shift. Defendant tried to resume molesting T.L. when she was about 10,

but T.L. told defendant "no." Defendant never tried to molest T.L. again.

2. D.C. (defendant's stepdaughter).

D.C. is defendant's stepdaughter and the daughter of Toni M. Defendant began molesting D.C. when she was eight or nine years old (1990 or 1991). When no one was home, defendant would molest D.C. in the living room or in the bedroom. The acts of molestation began with touching but gradually progressed to the viewing of pornographic films, masturbation, digital penetration, oral copulation and intercourse. D.C. was molested regularly until she was 13 or 14 years old and was told by defendant that she needed to keep it a secret or he would be in a "lot of trouble." In addition to these acts of molestation, defendant liked to watch D.C. urinate. D.C. had to inform defendant when she had to go to the bathroom so that he could follow her and watch.

3. E.I. (defendant's deceased stepdaughter).²

E.I., defendant's deceased stepdaughter, was the mother of M.I., the victim here, and was also molested by defendant. Defendant had touched E.I.'s "pee-pee." Defendant had also taken pictures of E.I. naked and in various sexual positions.³

² E.I. died in April of 2009 of a heart attack and thus did not testify at trial, but D.C. (E.I.'s older sister) and E.I.'s husband (who stepfathered her son M.I.) testified as to E.I.'s allegations against defendant.

³ D.C. testified that E.I. was "probably 11" when E.I. showed D.C. the photographs defendant had taken of her. This would have been in approximately 1995 or 1996.

4. E.C. (defendant's stepson).⁴

Evidence was introduced that E.C., defendant's stepson, was also touched by defendant. According to an interview of defendant, defendant had masturbated E.C. to ejaculation when he was 11 or 12.

5. Defendant's 2010 interview with police.

On August 25, 2010, Sacramento Police Detective Erika Woolson interviewed defendant. With regard to his daughter, T.L., defendant stated he and T.L. once were watching a movie when T.L. climbed on top of him, giving him an erection. Defendant subsequently went into the bathroom and ejaculated.

With regard to defendant's stepdaughters, D.C. and E.I., defendant would have them walk around the house wearing only their underwear. Defendant added that he would have D.C. and E.I. sit on his lap without pants on while he felt their breast and vaginal areas. Defendant also shaved D.C.'s vagina. Additionally, D.C. had asked defendant how he masturbated; defendant showed her and had her manually stimulate him. Defendant also indicated that he liked hearing the girls go to the bathroom. According to defendant, he did this when E.I. was between seven and nine, and when D.C. was 11 or 12.

With regard to defendant's son, E.C., defendant said that Toni M. asked him to show E.C. how to masturbate when E.C. was

⁴ E.C. did not testify at trial, but D.C., his younger sister, testified as to E.C.'s allegations against defendant.

11 or 12 years old. Defendant then masturbated E.C. to ejaculation.

Throughout the interview, defendant denied ever touching M.I.

DISCUSSION

I. Evidence of Defendant's Prior Uncharged Sexual Offenses

Defendant contends the trial court erred by admitting the evidence of the prior uncharged sexual offenses involving his daughter, T.L., and stepchildren, D.C., E.I., and E.C. The court's ruling is subject to review for abuse of discretion. (*People v. Loy* (2011) 52 Cal.4th 46, 61.)

In sexual offense cases, section 1108 creates an exception to the longstanding principle that prohibits propensity evidence. (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1115.) Section 1108, subdivision (a) 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."

Section 352, in turn, provides, "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."

Defendant contends the trial court abused its discretion in admitting the evidence of the prior uncharged offenses because this evidence: (1) encompassed far more serious offenses than the current charge and had little probative value; (2) tended to confuse the issues; (3) involved remote offenses; and (4) consumed an undue amount of time. We disagree.

A. Nature of the Prior Offense Evidence and Its Probative Value

Defendant argues that the nature of the uncharged offense evidence is unduly prejudicial. We disagree. The prejudice that exclusion of evidence under section 352 is designed to avoid applies to evidence which uniquely tends to evoke an emotional bias against a defendant and which has very little effect on the issues. (*People v. Escudero* (2010) 183 Cal.App.4th 302, 312, citing *People v. Karis* (1988) 46 Cal.3d 612, 638).

We agree with the trial court that the prior uncharged sex offense evidence was "prejudicial," like adverse evidence in general, but the evidence did not carry with it the "undue prejudice" referred to in section 352. (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1277 (*Hollie*).)

Defendant contends the present case is similar to our decision in *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*), arguing that the prior offense evidence here was "inflammatory in the extreme." (*Id.* at p. 738.) We disagree.

In *Harris*, the defendant was charged with raping two women that he had known and for whom he had cared as a mental health

nurse. (*Harris, supra*, 60 Cal.App.4th at p. 738.) At trial, the prosecution introduced evidence that 23 years prior to the current charges the defendant had brutally raped a stranger, viciously beating and bloodying her. (*Ibid.*) This court wrote, "The charged crimes involving a breach of trust and the 'taking advantage' of two emotionally and physically vulnerable women are of a significantly different nature and quality than the violent and perverse attack on a stranger that was described to the jury." (*Ibid.*) Because of these vast differences and the inflammatory nature of the prior offense, we reversed. (*Id.* at pp. 741-742.)

Defendant's case is distinguishable from *Harris*. The prior and charged offenses in *Harris* were of a significantly different nature and quality, whereas such evidence in the present case is not.

In contrast to *Harris*, here, the prior uncharged offenses and the charged offense had significant similarities. As the trial court observed when conducting its section 352 analysis, there was "similarity in age," all the incidents "occurred while the victims were either sleeping, in bed, and/or on the couch watching television." All the victims were related to defendant, either by marriage or blood. In all cases, defendant was in a position of authority and trust, viewed as a father or grandfather figure.

In addition to the similarities observed by the trial court, all the molestations began with touching, and only with

time, in regard to the prior offenses, did the touching progress to more serious acts. In the case of T.L. and M.I., the molestations ended when the victim told defendant to stop or said "no." The molestations also occurred while the mother or grandmother was out of the home. Furthermore, in all cases, there was evidence that defendant told the victims to keep the molestations a secret.

We recognize there are dissimilarities between the charged and prior uncharged acts (most prominently, oral copulation and intercourse in the prior offenses), but these dissimilarities do not rise to the level of *Harris*. It is important to note that the touching in the present case did not progress into something more because there is evidence that M.I. had told defendant to stop. Moreover, as case law has recognized, "[m]any sex offenders are not 'specialists,' and commit a variety of offenses which differ in specific character," meaning the acts need not be identical. (*People v. Soto* (1998) 64 Cal.App.4th 966, 984 (*Soto*).)

Defendant also argues that the evidence of the prior uncharged offenses had little probative value relative to its prejudicial nature. We disagree. Besides similarity, other factors affecting the probative value of prior offense evidence include: whether the evidence tended to illustrate defendant's predisposition to commit the charged offense and bolster the victim's testimony; the extent to which the prior uncharged offense evidence came from independent sources; and the

certainty of the commission of the uncharged offenses. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 917, 924 (*Falsetta*); see also *Hollie, supra*, 180 Cal.App.4th at p. 1274; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 (*Waples*).)

The evidence of the prior uncharged sexual offenses tended to illustrate defendant's predisposition to engage in the charged conduct, and tended to establish M.I.'s credibility. As our Supreme Court has noted, "'The Legislature has determined the need for this [other sexual offense] evidence is "critical" given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial.'" (*Falsetta, supra*, 21 Cal.4th at p. 911; *Soto, supra*, 64 Cal.App.4th at p. 983 [stating evidence of "'any prior sexual offenses is particularly probative and necessary for determining the credibility of the witness'"].) Uncharged sexual offense evidence is "highly relevant" and probative when credibility is directly at issue, as here. (*Waples, supra*, 79 Cal.App.4th at p. 1395.)

M.I. was seven when he testified at trial, and in two interviews M.I. had recounted what defendant had done to him. In one of these interviews, M.I. stated that defendant had touched him once while his underwear and shorts were down; in the other statement, M.I. stated that it was over his shorts and happened five times. Due to the variations in M.I.'s accounts of what occurred, the defense portrayed M.I. as either mistaken or a liar. Consequently, evidence of defendant's uncharged

sexual offenses was probative of and relevant to M.I.'s credibility.

The evidence of defendant's prior uncharged sexual offenses came from sources independent of the charged offense; as a result, the probative value of the prior offense evidence was increased. (See *Falsetta, supra*, 21 Cal.4th at p. 919.) T.L. and D.C. had never told M.I. about what defendant had done to them. In fact, T.L. did not know M.I., but only knew of him, because T.L. was not a part of her father's other family. Furthermore, T.L. had confronted defendant about her molestations in 2003, years prior to defendant's touching M.I. Similarly, in 1998—a decade before the charged offense here—D.C. reported to the police what defendant had done to her. We do recognize there may have been evidence indicating that E.I. had explained to her son, M.I. (the victim here), what defendant had done to her prior to M.I.'s allegations, but this evidence is counterbalanced by the independent nature of the claims by T.L., D.C., and E.C.

Finally, there was a high degree of certainty in the commission of the prior uncharged sexual offenses. (See *Falsetta, supra*, 21 Cal.4th at p. 919.) Aside from the independent sources underlying this evidence, defendant's incriminating admissions to police officers in 2010 corroborated, in part, the allegations of molestation by T.L., D.C., E.I., and E.C.

B. Confusion of the Issues

Defendant contends the prosecutor's focus on the T.L., D.C., E.I., and E.C. molestations confused the jurors as to the issues because it inclined them to punish defendant for the prior uncharged offenses. We disagree.

As *People v. Frazier* (2001) 89 Cal.App.4th 30, 42, conveys, "[a] risk does exist a jury might punish the defendant for his uncharged crimes regardless of whether it considered him guilty of the charged offense especially where, as here, the uncharged offenses . . . were much more serious than the charged offense This risk, however, is counterbalanced by instructions on reasonable doubt, the necessity of proof as to each of the elements of a lewd act with a minor, and specifically that the jury 'must not convict the defendant of any crime with which he is not charged.'"

In the instant case, the trial judge instructed the jury on reasonable doubt, the necessity of proof as to each of the elements of a lewd act with a minor, and specifically instructed, "If you conclude that the defendant committed the uncharged offenses, 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 lewd or lascivious conduct with a child under age 14.* The People must still prove the charge beyond a reasonable doubt." (Italics added.) In addition to these instructions, the trial court also prohibited the parties from presenting evidence that defendant was never punished for the prior uncharged sexual

offenses. Thus, the jury, not knowing that defendant had not been previously convicted or punished, was not inclined to punish him for the uncharged prior offenses. (See *Waples, supra*, 79 Cal.App.4th at p. 1395.)

C. Remoteness

Nor does remoteness weigh in favor of excluding the prior uncharged sexual offense evidence, as defendant claims. Defendant began molesting T.L. in 1984, 24 years before the incident at issue. Defendant subsequently molested D.C., E.I., and E.C. from approximately 1990 to 1996; 1996 is 12 years prior to the alleged incident. Similarities may balance out the remoteness. (*People v. Branch* (2001) 91 Cal.App.4th 274, 285; *Waples, supra*, 79 Cal.App.4th at p. 1395.) As mentioned above, there are significant similarities between the prior uncharged offenses and the charged offense. Furthermore, the 12-year gap is no more remote than the gaps in *Branch*, *Frazier* and *Soto*. (*Branch, supra*, 91 Cal.App.4th at pp. 284-285 [30-year gap is not remote]; *Frazier, supra*, 89 Cal.App.4th at p. 41 [15- or 16-year gap is not remote]; *Soto, supra*, 64 Cal.App.4th at pp. 977, 991-992 [more than 20-year gap is not remote].) Consequently, we decline to view the prior uncharged sexual offense evidence as remote; rather, we see the ongoing nature of defendant's conduct, with multiple victims, demonstrative of his pattern of abuse of children. (See *Frazier, supra*, 89 Cal.App.4th at p. 41.)

D. Consumption of an Undue Amount of Time

Defendant asserts the prior offense evidence consumed an undue amount of trial time because "all but two of the prosecution's ten witnesses testified wholly or in part about the uncharged acts. The uncharged acts evidence was protracted, overwhelming the evidence about the charged offense." Defendant's argument is unavailing.

Inherent in there being four prior victims of defendant's abuse as witnesses is the fact that there will be more witnesses testifying as to the uncharged offenses. Moreover, the prosecution only had two of the prior victims testify, one of whom, D.C., also testified in large part about the occurrences of the charged offense. In addition, the testimony regarding the prior uncharged sexual offense evidence constituted less than 15 percent of the total trial transcript (27 pages for T.L., 13 pages for two officers, roughly 25 pages for D.C., in a trial transcript of over 600 pages). Less than 15 percent of the trial transcript is a percentage that we cannot say is an undue consumption of time. (See *Frazier*, *supra*, 89 Cal.App.4th at p. 42 [27 percent of the trial transcript not an undue consumption of time].)

After reviewing the factors affecting the admissibility of prior offense evidence, we conclude the trial court did not abuse its discretion. Because we conclude the uncharged sexual offense evidence was properly admitted under section 1108, we need not consider defendant's argument under section 1101, subdivision (b).

II. Failure to Sanitize Prior Offense Evidence

Defendant contends that even if the prior offense evidence was admissible, the evidence at least should have been sanitized. (See *Falsetta, supra*, 21 Cal.4th at p. 917.) Even if we assume *arguendo* that the trial court erred in failing to sanitize the uncharged sexual offenses that went well beyond mere touching, and that defendant preserved this issue, any error was harmless.

Defendant contends that if the trial court erred in admitting the prior uncharged sexual offense evidence, the "harmless beyond a reasonable doubt" standard for federal constitutional error applies. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711].) We disagree. At the very least, the propensity evidence involving the touching of T.L., D.C., E.I., and E.C. would have been admitted into evidence under sections 1108 and 352. Because some propensity evidence would have been admitted even absent the claim of error, the trial was not rendered fundamentally unfair on due process grounds as defendant argues. Thus, the proper test is the state law error standard: whether it is reasonably probable the jury would have returned a more favorable verdict had the prior uncharged sexual offense evidence been sanitized. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

Applying the *Watson* standard, we conclude any failure to sanitize was harmless. As noted, evidence concerning defendant's touching T.L., D.C., E.I., and E.C. still would have

been admitted into evidence under sections 1108 and 352. This evidence still would have bolstered M.I.'s credibility. Furthermore, the evidence of prior touching still would have portrayed defendant as having a propensity to touch young relatives for sexual gratification, because he had done so with four other relatives. Lastly, and more importantly, defendant's incriminating admissions regarding T.L., D.C., E.I., and E.C. still would have been heard by the jury. As a result, we cannot say that it is "reasonably probable" that the jury would have returned a more favorable verdict for defendant if the prior uncharged sexual offense evidence had been sanitized. (See *Watson, supra*, 46 Cal.2d at p. 836.)

DISPOSITION

The judgment is affirmed.⁵

BUTZ, J.

We concur:

BLEASE, Acting P. J.

DUARTE, J.

⁵ Defendant was sentenced on April 22, 2011, pursuant to Penal Code section 2933.1. The recent amendments to Penal Code sections 2933 and 4019 do not operate to provide defendant with any additional presentence custody credit, as he was convicted of a lewd act on a child under the age of 14, a violent felony. (Pen. Code, §§ 288, subd. (a), 667.5, subd. (c)(6).)