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

THE PEOPLE,

Plaintiff and Respondent,

v.

PHIL DOUGLAS REESE, JR.,

Defendant and Appellant.

C070486

(Super. Ct. No. 10F05910)

Defendant Phil Douglas Reese, Jr. repeatedly molested the young daughter of a woman who considered him a close family friend. After years of abuse, victim L.P., who had previously told two school friends about the molestation, told her mother. A jury found defendant guilty of five counts of committing a forcible lewd act on a child under 14 (Pen. Code,¹ § 288, subd. (b)). The trial court sentenced him to 34 years in state prison. On appeal, defendant contends: 1) there is insufficient evidence that two of the acts were committed by duress or fear; 2) the admission of evidence of his two

¹ Further undesignated statutory references are to the Penal Code.

convictions for sexual offenses was prejudicial error; and 3) the \$600 fine under section 243.4 was unauthorized. Disagreeing, we shall affirm.

FACTS

The Crimes

Victim L.P lived with her mother on the second floor of a duplex. Her grandmother lived downstairs. Her mother had known defendant since 1978 or 1979; they had dated in the 1990's. She now thought of defendant like a brother or a close family friend. She trusted him. L.P. sometimes called defendant "Uncle Doug."

The first time defendant molested L.P. was when she was in first or second grade, between August 2002 and June 2004. They were in her bedroom; defendant unzipped his pants and took out his penis and told her to touch it. His penis was hard. L.P. said she did not want to and defendant told her if she did not do it, something would happen to her mother. Her mother might be arrested. L.P. did not want that so she touched defendant's penis for a few seconds (count one). Defendant then touched L.P.'s vagina over her clothes (count two). L.P. was scared; defendant was bigger than she was and told her not to tell anyone. She did not tell her mother or grandmother because she did not want anything to happen to them.

About a year later, defendant touched her again while in her room. Defendant had his pants down and told L.P. to put her mouth on his penis. She did so (count three). Again, his penis was hard. Defendant pulled L.P.'s pants down and touched the outside of her vagina many times (count four). She was scared and did not tell anyone because she was afraid that defendant might hurt her or her family.

The third incident occurred while defendant was babysitting. L.P. was in bed, but not asleep and the lights were still on. Defendant came into the room naked and walked over to her. He took off her pants and underwear. He put his penis on her, rubbing it against her vagina (count five). He asked if he could put it inside and she said no. L.P. thought about getting up and leaving, but she could not because defendant was on top of

her and he was heavy. Defendant told her that if she told anyone, he could get in trouble. She did not tell her mother. She was scared and thought it was her fault because she did not stop it.

L.P. testified defendant touched her other times, but these three incidents were the only concrete ones she could describe.² As she got older, she told defendant she did not want to do it anymore. She once asked him how old she was when it started and defendant replied that she was eight.

Disclosure

L.P. met R.D. in seventh grade and they became best friends. One day L.P. asked her friend to come to school early because she needed to talk. She told R.D. that a family friend, whom she identified as Uncle Doug, was touching her inappropriately. R.D. told L.P. she should tell her mother.

L.P. also told another friend in seventh grade. This disclosure was by texting. This friend also advised telling her mother. L.P. felt relief when she disclosed the abuse. But she was not yet ready to tell her mother because she knew it would hurt her.

In 2010, the summer before ninth grade, one of L.P.'s friends ran away with a boy. L.P. was very concerned about her friend's safety. When her mother probed about why she was so upset, L.P. finally disclosed that defendant had been touching her and making her touch him. The mother called the police and sought counseling for L.P.

Child Sexual Abuse Accommodation Syndrome

Anthony Urquiza, a professor of pediatrics and a psychologist, testified about the Child Sexual Abuse Accommodation Syndrome (CSAAS). He described CSAAS as an

² L.P. also testified about another incident, at Christmas 2008, when defendant had her take pictures during his encounter with a prostitute. This conduct was charged as count six, a violation of section 647.6, subdivision (a). The jury failed to reach a verdict on this count and the People moved to dismiss it.

educational tool to educate therapists and jurors about what typically happens with a child who has been sexually abused. The syndrome helps dispel myths about child molestation, including that a child will immediately disclose the molestation, that a child will protect himself or herself by screaming, that abused children display certain signs and symptoms, and that, if a child recants, there was no abuse.

Urquiza identified the five areas used to describe the common characteristics of children who have been abused. The first is secrecy; most abuse occurs within the context of a relationship and the abuser has strategies to keep the child from disclosing, such as threats or gifts. Other characteristics of abused children are helplessness, entrapment and accommodation or coping, and a delayed and unconvincing disclosure. After a year, three-fourths of abused children have not disclosed. The final category is retraction. About 20 to 25 percent of children retract, usually due to family pressure.

Defendant's Prior Convictions for Sexual Offenses

Over defendant's objection, the trial court allowed the People to present evidence of defendant's two prior convictions for sexual offenses under Evidence Code sections 1101, subdivision (b), and 1108. The court found the two incidents were probative of defendant's unnatural sexual interest in minor females and were not unfairly prejudicial under Evidence Code section 352.

In 2003, defendant was caught in an undercover sting involving solicitation of underage girls over the Internet. An undercover officer posing as a 13-year-old girl engaged with defendant in a chat room conversation. During the chat, defendant "was fixated" on fact that he wanted the girl's "private area" shaved. Defendant arranged to meet the girl; when he went, he was arrested. Defendant pled guilty to a felony charge of attempting to distribute lewd material with the intent to seduce a minor (§ 288.2).

In 2008, police stopped defendant while driving and found a laptop computer containing child pornography in his car. The computer contained videos depicting both male and female minors engaged in various sex acts; some showed female minors

engaged in sex acts with adult males. In 2010, a jury found defendant guilty of possession of child pornography (§ 311.11, subd. (a)).

Defense

Defendant denied he did anything of things about which L.P. testified. He asserted he never behaved inappropriately with her. He claimed the Internet chat was all fantasy; he did not think he was chatting with a real 13 year old. He wanted to meet someone who liked role playing. He entered his plea on his attorney's advice. As to the pornography charge, defendant testified his computer had been repaired just before the police seized it. It was not in his possession when the pornography was downloaded. The jury did not believe him, so he was convicted.

DISCUSSION

I

Sufficiency of the Evidence

Defendant contends there is insufficient evidence that he committed counts three and four (the second incident) by duress or fear. He contends there is no evidence he threatened L.P. at that time; the threat to have her mother arrested occurred a year earlier. Defendant asserts evidence of L.P.'s sustained fear after the initial incident is insufficient to sustain the conviction.

A. The Law

Section 288, subdivision (b) makes it a felony to commit a lewd or lascivious act upon a child under the age of 14 "by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." In determining whether defendant used duress, "the focus must be on the defendant's wrongful act, not the victim's response to it." (*People v. Soto* (2011) 51 Cal.4th 229, 246 (*Soto*)). Our Supreme Court approved the following instruction defining duress. "Duress means *the use of* a direct or implied threat of force, violence, danger, hardship, or retribution *sufficient to cause* a reasonable person to do [or submit to] something that he or she

would not otherwise do [or submit to]. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the child and (his/her) relationship to the defendant.” (*Soto, supra*, 51 Cal.4th at p. 246, fn. 9.) Factors to be considered in assessing the presence of duress include the age of the victim; the victim’s relationship to defendant; whether the defendant threatened to harm the victim, physically controlled the victim when the victim attempted to resist, or warned the victim that revealing the molestation would jeopardize the victim’s family. (*People v. Veale* (2008) 160 Cal.App.4th 40, 45-46.)

When a criminal defendant challenges the sufficiency of the evidence to support his conviction, this court “review[s] 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. Johnson* (1980) 26 Cal.3d 557, 578.) On appeal, “[t]he uncorroborated testimony of a single witness is sufficient to sustain a conviction unless the testimony is physically impossible or inherently improbable.”³ (*People v. Panah* (2005) 35 Cal.4th 395, 489, quoting *People v. Scott* (1978) 21 Cal.3d 284, 296.) We do not review the factfinder’s credibility determinations. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

B. Analysis

Counts three and four were alleged to have occurred between September 2003 and June 2005, when L.P. was in the second or third grade and was at most nine years old. That is an age when adults are authority figures and the size differential between the child

³ During jury deliberations, juror #8 reported he had a problem with the only witness being a child. The juror was also troubled by the nebulous nature of the charges. Juror #8 asked to be excused because otherwise it would be a hung jury; the juror had a reasonable doubt as to the evidence. The court did not excuse the juror, who later voted to convict on five counts.

and an adult is intimidating. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 51, disapproved on another point in *Soto, supra*, 51 Cal.4th at p. 248, fn. 12.) ““Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim” [are] relevant to the existence of duress.” (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1320 (*Espinoza*)). While defendant was not a family member, L.P.’s family had known him for decades and he was a close, trusted family friend.

Defendant relies on *Espinoza* and argues that L.P.’s fear of defendant is insufficient to show duress. In *Espinoza*, the victim testified that the defendant, her father, entered her bedroom in the early morning on five occasions to molest her. The victim was ““too scared to do anything”” and afraid defendant ““would come and do something”” if she reported the molestations. (*Espinoza, supra*, 95 Cal.App.4th at p. 1293.) The court found insufficient evidence of duress because there was no direct or implied threat; duress cannot be established without evidence the victim’s participation was driven by an implied threat. (*Espinoza, supra*, at p. 1321.)

We find *Espinoza* distinguishable from the instant case. Here, when L.P. resisted defendant’s first act of molestation, defendant threatened that something would happen to her mother, or she might be arrested, and he told L.P. not to tell. The jury could reasonably infer that L.P. submitted to subsequent abuse because she feared for her mother’s safety or her freedom or both. Indeed, she testified she did not tell her mother or grandmother about the abuse because she feared for them.

“The very nature of duress is psychological coercion. A threat to a child of adverse consequences, such as suggesting the child will be breaking up the family or marriage if she reports or fails to acquiesce in the molestation, may constitute a threat of retribution and may be sufficient to establish duress, particularly if the child is young and the defendant is her parent. We also note that such a threat also represents a defendant’s attempt to isolate the victim and increase or maintain her vulnerability to his assaults.”

(*People v. Cochran* (2002) 103 Cal.App.4th 8, 15, disapproved on another point in *Soto*, *supra*, 51 Cal.4th at p. 248, fn. 12.)

Defendant attempts to distinguish between threats to force L.P.'s compliance and threats to prevent disclosure, contending only the former is sufficient for duress. He notes that L.P. testified about her concern for her mother only in answering why she did not report the abuse. We reject the distinction. "We doubt that young victims of sexual molestation readily perceive this subtle distinction. A simple warning to a child not to report a molestation reasonably implies the child should not otherwise protest or resist the sexual imposition." (*People v. Senior* (1992) 3 Cal.App.4th 765, 775.)

II

Admission of Prior Sex Offenses

The trial court admitted defendant's prior convictions for attempted distribution of lewd material (§ 288.2) and possession of child pornography (§ 311.11) under Evidence Code section 1108 to show defendant's disposition, and under Evidence Code section 1101, subdivision (b) to prove defendant's intent. Defendant contends the trial court abused its discretion in the admission of this evidence. He contends the prior offenses were not similar to the charged offenses, their admission resulted in a time-consuming mini-trial, and Evidence Code section 1108 violates due process.

A. *The Law*

As a general rule, evidence of a person's character or character trait is inadmissible when offered by the opposing party to prove the defendant's conduct on a specified occasion unless it involves commission of a crime, civil wrong or other act and is relevant to prove some fact (e.g., motive, intent, plan, identity) other than a disposition to commit such an act. (Evid. Code, § 1101, subs. (a), (b)). There is an exception for the use of propensity evidence in sex offense cases. "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 by Section 1101, if the evidence is not inadmissible pursuant to Section 352.” (Evid. Code, § 1108, subd. (a).) As our Supreme Court has explained, “evidence of a defendant’s other sex offenses constitutes relevant circumstantial evidence that he committed the charged sex offenses.” (*People v. Falsetta* (1999) 21 Cal.4th 903, 920 (*Falsetta*).

“The charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under Evidence Code section 1101, otherwise Evidence Code section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in section 1108.” (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41, fn. omitted.) Both the offenses described by section 288.2 and section 311.11 are “sexual offenses” as defined in Evidence Code section 1108. (Evid. Code, § 1108, subd. (d)(1)(A).) Thus, they are admissible subject to Evidence Code section 352.

“Evidence Code section 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. Such evidence is still subject to exclusion under Evidence Code section 352. (Evid. Code, § 1108, subd. (a).)” (*People v. Fitch* (1997) 55 Cal.App.4th 172, 183 (*Fitch*)). Evidence Code section 352 provides “a realistic safeguard” for the admission of sex offense evidence to show propensity. (*Falsetta, supra*, 21 Cal.4th 903, 918.)

In *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*), we identified the following factors as relevant to the proper balance of prejudice and probative value in connection with prior uncharged sex offenses: (1) the inflammatory nature of the prior offense evidence; (2) the probability that admission of the evidence will confuse the jury; (3) the remoteness of the prior offense; (4) the consumption of time necessitated by introduction of the evidence, and (5) the probative value of the evidence. (*Harris, supra*, 60 Cal.App.4th at pp. 737-740.)

B. Analysis

Considering the *Harris* factors, we find no abuse of discretion in admitting evidence of defendant's prior sex offenses. The prior offenses were less inflammatory than the current charges; they did not involve defendant's harmful acts on an actual minor victim. Nothing in the record suggests the admission of the other crimes evidence confused the jury. The offenses were not remote. They were not even "prior" offenses as they occurred in 2003 and 2008, contemporaneously with the charged offenses. The propensity evidence had probative value in tending to show defendant committed the charged offenses; it demonstrated defendant's unnatural sexual interest in young girls. "Evidence of a prior sexual offense is indisputably relevant in a prosecution for another sexual offense. 'In the determination of probabilities of guilt, evidence of character is relevant. [Citations.]" [Citation.] Indeed, the rationale for excluding such evidence is not that it lacks probative value, but that it is too relevant." (*Fitch, supra*, 55 Cal.App.4th at p. 179.)

Defendant contends the admission of the other crimes evidence resulted in a mini-trial with a "plethora of unnecessary evidence." But the admission of the evidence of defendant's other crimes was straightforward and not unduly time-consuming. Two police officers testified about the laptop computer found in defendant's car and the videos it contained. One officer testified about the Internet sting operation. The parties stipulated as to defendant's convictions and the nature of the pornography. While it is true that defendant was cross-examined at length about what occurred in the chat room, he failed to object to this line of questioning. Instead, it was the trial court that ended this cross-examination with a sidebar conference. The court believed the cross-examination was becoming cumulative and repetitive--potentially prejudicial with little probative value. The court directed the People to "wrap it up." Given the trial court's allegiance to applying the safeguard of Evidence Code section 352 to the propensity evidence--even in

the absence of a defense objection--to protect defendant, we find no abuse of discretion in the admission of such evidence.

To preserve the issue for federal review, defendant contends Evidence Code section 1108 violates due process. As defendant recognizes, our Supreme Court rejected that contention in *Falsetta, supra*, 21 Cal.4th at page 917, and we are bound by that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Since the trial court correctly admitted the testimony concerning the uncharged offenses under Evidence Code section 1108, we need not reach the question of its admissibility under Evidence Code section 1101. The test under Evidence Code section 1101, subdivision (b) for admissibility of prior uncharged offenses in a sex offense case did not survive the enactment of Evidence Code section 1108. (*People v. Britt* (2002) 104 Cal.App.4th 500, 506.) “In enacting Evidence Code section 1108, the Legislature decided evidence of uncharged sexual offenses is so uniquely probative in sex crimes prosecutions it is presumed admissible without regard to the limitations of Evidence Code section 1101. [Citations.] The only restrictions on the admissibility of such evidence are those contained in Evidence Code section 352. [Citation.]” (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 405-406.)

III

\$600 Fine

Following the recommendation of the probation report, the trial court imposed a \$600 fine, citing section 243.3. Section 243.3 authorizes a fine of up to \$10,000 for anyone convicted of sexual battery. Defendant was not convicted of that offense; he was convicted instead of violating section 288, subdivision (b). Section 288, subdivision (e), however, also authorizes a fine of up to \$10,000 for anyone convicted of a violation of subdivision (a) or (b).

Defendant contends that since he was not convicted of sexual battery, the \$600 fine imposed under that statute is unauthorized and must be stricken. We find that defendant forfeited this contention of error for appeal because he failed to raise it at the sentencing hearing. “Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court’s statement of reasons are easily prevented and corrected if called to the court’s attention. As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them.” (*People v. Scott* (1994) 9 Cal.4th 331, 353 (*Scott*)). Here, had defendant raised the inapplicability of section 243.4 below, the trial court could have corrected the error in the statutory basis for the fine. Because defendant did not, he may not challenge the fine on appeal.

Defendant argues the fine was “unauthorized,” and, therefore, the trial court exceeded its authority in imposing the fine. We disagree. “Although the cases are varied, a sentence is generally ‘unauthorized’ where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is ‘clear and correctable’ independent of any factual issues presented by the record at sentencing. [Citation.] . . . [¶] In essence, claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner.” (*Scott, supra*, 9 Cal.4th at p. 354, emphasis added.) Here, due to the nature of defendant’s convictions, the court could lawfully have imposed the fine under section 288, subdivision (e), which authorizes a fine “not to exceed ten thousand dollars (\$10,000).” Accordingly, a \$600 fine was authorized and defendant has forfeited the contention that the statutory basis was incorrect.

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

NICHOLSON, Acting P. J.

ROBIE, J.