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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL MCKINZIE,

Defendant and Appellant.

D059969

(Super. Ct. No. SCN278171)

APPEAL from a judgment of the Superior Court of San Diego County, K. Michael Kirkman, Judge. Affirmed.

A jury convicted Michael McKinzie of one count of felony indecent exposure (Pen. Code, § 314, subd. (1)). In a subsequent proceeding, the court found true that McKinzie suffered a prior conviction for committing a lewd act upon a child under the age of 14 (Pen. Code, § 288, subd. (a)) and found this conviction to be a prior strike (Pen. Code, § 667, subs. (b)-(i)). The court sentenced McKinzie to prison for four years,

consisting of the middle term of two years, doubled to four years based on the strike prior. McKinzie timely filed a notice of appeal.

McKinzie's counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 raising possible, but not arguable issues. In response to McKinzie's counsel's brief, we requested the parties provide letter briefs on whether the trial court erred in admitting evidence of McKinzie's prior sexual misconduct.

The parties provided letter briefs. After reviewing the briefs and the record, we determine the court erred in admitting evidence of McKinzie's prior sexual misconduct, but the error was harmless. As such, we affirm.

FACTUAL AND PROCEDURAL HISTORY

At about 7:10 a.m. on June 4, 2010, McKinzie approached the register at a 7-Eleven in Escondido, placed his penis on the counter, and purchased energy drinks. When the cashier, Sylvia Perez, gave him his change, McKinzie grabbed her hand and pulled it toward his penis. McKinzie then left the store, and Perez went to the bathroom and cried.

Perez did not report the incident to her manager until her shift ended at 9:00 a.m. because she was ashamed. The police sergeant who interviewed Perez that same day testified that she was "visibly upset."

In addition to witness testimony, the prosecutor introduced still shots from 7-Eleven's video surveillance cameras, two of which showed McKinzie with his exposed penis at the counter with Perez. The jury also watched videotape segments from different

cameras at the store. The tapes showed McKinzie arriving at the store in a Cox Communications cable truck, entering the store, and exposing his penis. One segment also showed Perez washing her hands after the incident. A Cox Communications investigator identified the van as being a Cox vehicle, and a Cox human resource manager identified McKinzie as the person in the video.

Over McKinzie's counsel's objection, the court granted the prosecutor's motion in limine to admit evidence under Evidence Code¹ section 1108 of McKinzie's prior sexual misconduct, which resulted in his previous conviction under Penal Code section 288, subdivision (a). Based on this ruling, the prosecution presented evidence regarding McKinzie's niece, A. A. testified that in 2008, when she was 11 years old, McKinzie rubbed her legs on the inside and outside with his hands, played with her bra straps, and touched the area of her body around her bra straps and over her clothing. McKinzie touched A. in this manner at the movie theater and in the theater parking lot. The same touching occurred at A.'s house and her grandmother's house. McKinzie was aroused by touching A., and rubbed his penis under his shirt after touching her in the movie theater parking lot. He, however, covered his penis with his shirt during the incident.

DISCUSSION

McKinzie contends the court abused its discretion by admitting evidence of prior sexual offenses. Although we agree that the court erred in admitting the evidence, we conclude the error was harmless because McKinzie was not prejudiced.

¹ Statutory references are to the Evidence Code unless otherwise specified.

Subject to section 352, section 1108 permits a jury to consider prior incidents of sexual misconduct for the purpose of showing a defendant's propensity to commit offenses of the same type and essentially permits such evidence to be used in determining whether the defendant is guilty of a current sexual offense charge. (§ 1108, subd. (a).) Although before section 1108 was enacted, prior bad acts were inadmissible when their sole relevance was to prove a defendant's propensity to engage in criminal conduct (see § 1101; *People v. Falsetta* (1999) 21 Cal.4th 903, 911, 913 (*Falsetta*)), its enactment created a statutory exception to the rule against the use of propensity evidence, allowing admission of evidence of other sexual offenses in cases charging such conduct to prove the defendant's disposition to commit the charged offense. (*Id.* at p. 911.) The California Supreme Court has ruled section 1108 is constitutional and does not violate a defendant's due process rights. (*Id.* at pp. 910-922.)

However, because section 1108 conditions the introduction of uncharged sexual offense evidence on whether it is admissible under section 352, any objection to such evidence, as well as any derivative due process assertion, necessarily depends on whether the trial court sufficiently and properly evaluated the proffered evidence under that section. "A careful weighing of prejudice against probative value under [section 352] is essential to protect a defendant's due process right to a fundamentally fair trial." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314 (*Jennings*)). As our high court stated in *Falsetta*, in balancing such propensity evidence under section 352, "trial judges 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 . . . offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta, supra*, 21 Cal.4th at p. 917.)

We review the admission of other acts or crimes evidence under section 1108 for an abuse of the trial court's discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 371 (*Kipp*)). The determination as to whether the probative value of such evidence is substantially outweighed by the possibility of undue consumption of time, unfair prejudice or misleading the jury is "entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence." (*People v. Fitch* (1997) 55 Cal.App.4th 172, 183.)

The weighing process under 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." (*Jennings, supra*, 81 Cal.App.4th at p. 1314.) "The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' " (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) We will not conclude that a court abuses its discretion in admitting such other sexual acts evidence unless its ruling " 'falls outside the bounds of reason.' " (*Kipp, supra*, 18 Cal.4th at p. 371.) We affirm a

trial court's ruling under section 352 " 'except on a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; italics omitted.) Nothing requires a trial court to consider or apply a list of particular factors. We need not go beyond the settled appellate standards for assessing a trial court's decision to admit evidence under section 352. (*Jennings, supra*, 81 Cal.App.4th at pp. 1314-1315.)

Here, the court weighed the evidence of prior sex offenses under section 352 and found the evidence's probative value was not substantially outweighed by its prejudicial impact, undue consumption of time, or confusion of the issues. We disagree.

"[F]or evidence to be relevant under Evidence Code section 1108, it must have some tendency in reason to show that the defendant is predisposed to engage in conduct *of the type charged.*" (*People v. Earle* (2009) 172 Cal.App.4th 372, 397 (*Earle*).) We struggle to see the connection between the prior sex offense (committing a lewd act on a child under the age of 14 that required McKinzie to touch his niece) and the charged crime of indecent exposure. There is no evidence that McKinzie exposed his penis to his niece or tried to get her to touch it. To the contrary, there was evidence that McKinzie tried to hide his erection in the presence of his niece by pulling his shirt down. The charged crime involved McKinzie exposing his penis to an adult and then pulling her hand toward it. We fail to perceive any connection between the two sex offenses.

The court, however, explained because he was aroused by touching his niece, McKinzie "was touching his penis, rubbing himself and seeking some level of sexual

gratification in that regard, of course, all of this conduct done for purposes of some level of personal sexual gratification. [¶] In the end, this case involves an act wherein [McKinzie], it's alleged, did something to seek his own personal sexual gratification, certainly relevant for that purpose as relates to Evidence Code section 1108 and certainly may well establish that [McKinzie] has a propensity to do those things which result in his sexual gratification, things contrary to law." The court's focus on McKinzie's pursuit of sexual gratification in weighing the evidence under section 352 was incorrect. Instead, the court needed to decide: Does the commission of lewd touching of a child under the age of 14 rationally support an inference that McKinzie has the propensity or predisposition to commit indecent exposure. (See *Earle, supra*, 172 Cal.App.4th at p. 398.) Had the court weighed the evidence with this question in mind, we are confident it would have excluded it.

Here, the chasm between the prior sex offense and the charged crime is vast. They are two completely different crimes, involving dissimilar circumstances, type of victim, and conduct. Moreover, there was no additional evidence or commonality between the acts that bridges the gap. Accordingly, we find the reasoning of the Court of Appeal in *Earle, supra*, 172 Cal.App.4th at page 399 to be applicable to the instant action:

"But a propensity to commit one kind of sex act cannot be supposed, without further evidentiary foundation, to demonstrate a propensity to commit a different act. The psychological manuals are full of paraphilias, from clothing fetishes to self-mutilation, some of which are criminal, some of which are not. No layperson can do more than guess at the extent, if any, to which a person predisposed to one kind of deviant sexual conduct may be predisposed to another kind of deviant sexual conduct, criminal or otherwise. Is one who commits an act of necrophilia [citation] more likely than a randomly selected

person to commit an act of rape? Child molestation? Indecent exposure? Is a pedophile more likely than a rapist or a member of the public to commit necrophilia? Without some *evidence* on the subject, a jury cannot answer these questions."

Simply put, lewd touching of a child and indecent exposure are different acts.

Further, there is nothing in the record showing how these two acts are connected, which would allow the jury to infer the lewd touching proves McKinzie's propensity to commit indecent exposure. Contrary to the People's argument, we do not find any support in the record that McKinzie was touching his penis in front of others in either offense. While touching his penis after he molested his niece, McKinzie covered his penis with his shirt (from the record, it appears that McKinzie did not remove his penis from his pants during this incident). Although the prosecution argued the videotape showed McKinzie with his hand in his pocket arousing himself, there is no evidence that Perez witnessed him doing so. Therefore, McKinzie's prior sex offense does not prove his propensity or disposition to commit the charged crime.

Moreover, McKinzie's prior sex offense involving the molestation of a child is far more inflammatory than the charged crime of indecent exposure to an adult. (See *People v. Harris* (1998) 60 Cal.App.4th 727, 737-738.) Evidence of the prior sex offense should have been excluded as its probative value was far outweighed by its undue prejudice.

In summary, the court's ruling allowing the prosecution to present evidence of McKinzie's prior sex offense " 'falls outside the bounds of reason' " (*Kipp, supra*, 18 Cal.4th at p. 371) and " 'the court exercised its discretion in an arbitrary, capricious, or patently absurd manner' " (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1124.)

Although we determine the court abused its discretion in admitting the evidence of the prior sex offense, we conclude the error was harmless. Perez, the victim, provided reliable eye witness testimony of the crime. The prosecution offered still shots and videotape depicting McKinzie exposing his penis. In all, the evidence of McKinzie's guilt was overwhelming. We conclude it is not reasonably probable McKinzie would have received a more favorable verdict absent the error. (See *Falsetta, supra*, 21 Cal.4th at pp. 924-925, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.