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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIAN JOSHUA CUSIO,

Defendant and Appellant.

D060312

(Super. Ct. No. SCD225511)

APPEAL from a judgment of the Superior Court of San Diego County, Robert F. O'Neill, Judge. Affirmed.

A jury convicted Julian Joshua Cusio of two counts (counts 1 & 2) of sexual penetration of a child 10 years old or younger (Pen. Code, § 288.7, subd. (b)), and two counts (counts 3 & 4) of committing a lewd act upon a child (Pen. Code, § 288, subd. (a)). As to counts 3 and 4, the jury also found true allegations that Cusio had substantial sexual conduct with a child under fourteen years of age (Pen. Code, § 1203.066, subd. (a)(8)). The court sentenced Cusio to prison for 15 years to life.

Cusio appeals, contending the court prejudicially erred by improperly admitting photographs depicting child pornography as propensity evidence. We affirm the judgment.

## FACTS

As Cusio does not challenge the sufficiency of the evidence of his convictions, we summarize the majority of the facts as background and expand on those facts relevant to a particular issue in our discussion.

Cusio married Elizabeth S. in 2006. Elizabeth had one daughter, E., from a previous marriage. E. was born in 2000. Cusio took care of E. from November 2007 to June 2008, while Elizabeth was on a Navy deployment. Sometime during this period, Cusio digitally penetrated E. on two separate occasions. In June 2008, E. went to live with her biological father in Alabama, and did not have any further contact with Cusio.

Cusio and Elizabeth separated in September 2008. In June 2009, Elizabeth took E. to the doctor after E.'s babysitter called and told her E. had blood in her urine. As part of the examination, the doctor asked E. if she had ever been touched inappropriately. E. said she had not. However, as Elizabeth and E. were driving home from the doctor's office, E. said to Elizabeth, " 'Well, someone might have touched me if I was asleep.' " E. did not respond when Elizabeth asked her who would have done that. About two weeks later, E. again told Elizabeth, " 'maybe someone touched me if I was asleep.' " One night, Elizabeth awoke to E. screaming hysterically that Cusio was the one who had touched her. When Elizabeth asked E. how Cusio had touched her, E. said he had both

hands on her private parts and was rubbing her. E. physically demonstrated the touching to Elizabeth.

Elizabeth reported the touching to the Naval Family Advocacy Program. Over the next few weeks, E. was interviewed on three separate occasions by three different persons: a Naval criminal investigator, a social worker, and a forensic interviewer. During each interview, E. said Cusio had touched her vagina on two separate occasions, once in her mother's bed and once in her own bed.

As part of the investigation, agents seized Cusio's computer after allowing Cusio to enter his password to unlock it and save some information. During a forensic analysis of Cusio's computer, agents found two file-erasing programs designed to permanently delete files without keeping track of its deletion history. The forensic analysis also revealed approximately 250 images of adult and child pornography.

At trial, the People moved in limine to admit five photographs of child pornography under Evidence Code section 1101, subdivision (b) to prove intent, motive, and plan.<sup>1</sup> Four of the photographs depict nude females, some apparently preadolescent, standing in nonprovocative poses. The fifth photograph, a small and somewhat dark

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<sup>1</sup> These photographs, People's Exhibit No. 6, were lodged with this court. Evidence Code section 1101, subdivision (b), states: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." All statutory references are to the Evidence Code unless otherwise specified.

"close up," appears to depict an unidentifiable object inside a young girl's vagina. The photograph only depicts the girl's lower abdomen, vagina, and inner thighs. The People argued these photographs tended to prove Cusio had a sexual preference for minor girls, and this preference was probative of his motive, intent, and plan to perform sexual acts with E. In addition, the People asserted the photographs were allowed under section 1108 because possession of child pornography constituted another sexual offense relevant to prove Cusio's predisposition to commit the charged crimes. Cusio filed a companion motion to exclude the photographs on grounds they were unduly prejudicial under section 352.

In its initial review of the evidentiary motions, the trial court ruled the photographs admissible under both sections 1101, subdivision (b) and 1108, and discussed possible implications under section 352. The court granted the People's motion, subject to the prosecution establishing a sufficient foundation. Later, the court viewed the photographs, described them in detail in the presence of counsel, and confirmed its earlier ruling.

During their case in chief, the People were permitted to show the photographs to the jury. In addition, an agent testified he found file paths on the computer indicating Cusio used a file-sharing program to download and view child pornography.

## DISCUSSION

Cusio contends the court erred when it admitted into evidence the five photographs of child pornography found on his computer. Cusio concedes the photographs were provisionally admissible under section 1108, but asserts their admission violated section 352. Specifically, Cusio asserts all five photographs had an

unduly prejudicial impact on the jury, especially the fifth photograph which he describes as "a man inserting his penis into the vagina of a six or seven-year-old girl." Citing *People v. Harris* (1998) 60 Cal.App.4th 727, Cusio challenges this photograph as more "inflammatory than the testimony concerning the charged offenses." Cusio contends the admission of these photographs constituted a prejudicial abuse of discretion requiring reversal. As we will explain, we disagree.

### I. *Standard of Review*

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) "We review a trial court's ruling under [section 352] for abuse of discretion and will reverse a trial court's exercise of discretion to admit evidence 'only if "the probative value of the [evidence] clearly is outweighed by [its] prejudicial effect." ' " (*People v. Valdez* (2012) 55 Cal.4th 82, 133.) " 'Prejudice for purposes of [section 352] means evidence that tends to evoke an emotional bias against the defendant with very little effect on issues, not evidence that is probative of a defendant's guilt." (*Ibid.*) Even if this court might not have made the same decision as the trial court, we must defer to the lower court's proper exercise of its discretion. (*Rodrigues, supra*, 8 Cal.4th at pp. 1124-1125.) The court's exercise of this discretion " 'must not be disturbed on appeal *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.' " (*Ibid.*)

## II. Admission of the Photographs was Not an Abuse of Discretion

As stated, Cusio concedes the five photographs were provisionally admissible under section 1108, subdivision (a). That provision 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 Section 1101, if the evidence is not inadmissible pursuant to Section 352." (§ 1108, subd. (a).) Among the qualifying offenses listed in subdivision (d)(1)(A) of section 1108 is possession of child pornography as defined in section 311.11. (§ 1108, subd. (d)(1)(A).) Here, Cusio was charged with multiple sexual offenses: two counts of sexual penetration of a child 10 years old or younger, and two counts of committing a lewd act upon a child. Possession of five photographs of child pornography in violation of Penal Code section 311.11 was undisputedly a qualifying offense under section 1108. "It is enough the charged and uncharged offenses are sex offenses as defined in section 1108." (*People v. Hernandez* (2011) 200 Cal.App.4th 953, 966.)

However, to be admissible under section 1108, evidence of the qualifying sexual offense must not run afoul of section 352. (§ 1108, subd. (a).) Section 352 is the safeguard against the use of section 1108 evidence resulting in a fundamentally unfair trial. (See *People v. Villatoro* (2012) 54 Cal.4th 1152, 1163 [section 352 "serves as a limitation on the admission of all evidence" including under section 1108]; *People v. Hernandez, supra*, 200 Cal.App.4th at p. 965; *People v. Fitch* (1997) 55 Cal.App.4th 172, 183.) Even though possession of child pornography is a qualifying offense expressly identified in section 1108, an analysis under section 352 is nevertheless required to

determine whether the evidence's "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." (§ 352.) The weighing process of section 352 "is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence." (*Fitch*, at p. 183.)

Here, the record reflects the trial court conducted a careful and appropriate section 352 analysis before it concluded the five photographs were probative of Cusio's sexual proclivity for prepubescent females like E. The court discussed the photographs extensively with counsel on more than one occasion, and viewed and described them in detail. The court acknowledged the photographs were "somewhat prejudicial." However, it found this prejudice did not outweigh their probative value in demonstrating Cusio's sexual interest in girls under the age of 14, and specifically in E. "In applying section 352, 'prejudicial' is not synonymous with 'damaging.'" (*People v. Bolin* (1998) 18 Cal.4th 297, 320.)

Our Supreme Court has held evidence of child pornography admissible under section 352 in circumstances similar to these. In *People v. Memro* (1995) 11 Cal.4th 786, 864 (*Memro*), abrogated on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 639, footnote 18, the trial court admitted evidence of sexually suggestive and non-sexually suggestive photographs depicting clothed and unclothed prepubescent youths, "as evidence of motive and intent to perform a lewd or lascivious act on [the victim] in violation of section 288." The court held the trial court did not abuse its discretion because "the photographs, presented in the context of defendant's possession of them,

yielded evidence from which the jury could infer that he had a sexual attraction to young boys and intended to act on that attraction." (*Id.* at p. 865.) It explained: "[t]o be sure, some of this material showed young boys in sexually graphic poses. It would undoubtedly be disturbing to most people. But we cannot say that it was substantially more prejudicial than probative, for its value in establishing defendant's intent to violate section 288 was substantial." (*Ibid.*)

Here, the five photographs were no more prejudicial than the sexually explicit images described in *Memro, supra*, 11 Cal.4th 786. Four of the photographs are not sexually graphic in that they depict only female nudity. The fifth photograph is arguably more sexually explicit and depicts a portion of a young girl's lower body with an object seemingly inserted into her vagina. Assuming the jury viewed the photograph in that manner, it is no more prejudicial than the images in *Memro* of young boys in sexually graphic poses.

Moreover, the trial court's decision to admit the photographs was reasonable because they were less inflammatory than E.'s testimony regarding the molestation. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [potential for prejudice decreased because "[t]he testimony describing defendant's uncharged acts . . . was no stronger and no more inflammatory than the testimony concerning the charged offenses"].) Some if not all of the five photographs could be offensive. (Accord, *Memro, supra*, 11 Cal.4th at p. 865.) However, they are no more offensive or inflammatory than E.'s testimony that Cusio digitally penetrated her vagina using both of his hands. As long as a reasonable jurist would admit the photographs as more probative than prejudicial, we must defer to the

trial court's proper exercise of its discretion. (*People v. Rodrigues, supra*, 8 Cal.4th at pp. 1124-1125.) The circumstances are unlike those in *People v. Harris, supra*, 60 Cal.App.4th 727, relied upon by Cusio, in which the prior offense admitted under section 1108 was not only 23 years old, but unlike the charged offenses, it was " 'forcible and the evidence of it was 'inflammatory in the extreme.' " (*People v. Loy* (2011) 52 Cal.4th 46, 64 [distinguishing *Harris*].) Nothing in *Harris* compels us to conclude there was reversible error in this case. We hold the court did not abuse its discretion by admitting the five photographs into evidence.

### III. Harmless Error

Even if we assume the court should have excluded the five photographs, any error was harmless because it did not result in a "manifest miscarriage of justice." (*People v. Rodrigues, supra*, 8 Cal.4th at pp. 1124-1125.) A " 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Further, Cusio's claim of federal constitutional error is meritless because "[a]s a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' " (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

Here, absent the five photographs, the evidence of Cusio's guilt was overwhelming. E. spontaneously reported the molestation by waking up her mother in the middle of the night. E. was crying hysterically. E.'s mother testified that E. had no

reason to fabricate the molestation to get away from Cusio because her last contact with him had been more than a year earlier. Further, E. physically demonstrated the molestation to her mother without any prompting.

During the initial few weeks after Elizabeth reported the molestation to the Naval Family Advocacy Program, E. was interviewed on three separate occasions by three different interviewers. Each interviewer was alone with E. and exercised caution to ask open-ended questions and not suggest anything. During each interview, E. was consistent in her version of how Cusio had digitally penetrated her vagina with both of his hands on two separate occasions, once in her mother's bed and once in her own bed. Additionally, at both the preliminary hearing and trial, E. testified consistently about the molestation.

Cusio argues E.'s initial denial of ever being inappropriately touched shows she fabricated the molestation. This argument is unpersuasive. At trial, child abuse expert Catherine McClennan testified most child sex abuse victims do not report their abuse. In addition, McClennan explained because most child sex abuse victims know their abuser, a conflict of loyalty occurs which makes the victims reluctant to report their abuser and causes a delay in reporting. Moreover, Cusio's claim that E. did not report the abuse immediately is not supported by the record, which shows E. did report the abuse to her friend T. the day after it occurred. According to T., E. told her not to tell anyone and T. kept the abuse a secret.

The record reflects the People presented other computer evidence showing Cusio's sexual proclivity for prepubescent females like E. The evidence showed Cusio was the

primary user of the computer and used a password to lock access to the computer.

Elizabeth testified Cusio was a frequent computer user and would play games on it every night, all night. The jury considered evidence of Cusio's use of a file-sharing program to search for and download various files using explicit child pornography search terms.

Further, defense computer expert Timothy Latulippe testified that on September 13, 2009, immediately after activity for the game "Counter-Strike," the user of the computer accessed websites with identifiers suggesting they contained child pornography. The computer was seized from Cusio's possession more than a year after the molestation occurred, and two file-deleting programs were found on it. Oceanside Police Detective Michael Provence, a computer forensic examiner, testified a common use of file-deleting programs on home computers is to allow a user to keep the content he or she views on the computer undetected by other users. Notwithstanding the five photographs, the jury was able to weigh other computer evidence showing Cusio's sexual proclivity for prepubescent females like E.

Based on this evidence, it is not reasonably probable Cusio would have received a more favorable result had the court excluded the photographs.

DISPOSITION

The judgment is affirmed.

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O'ROURKE, J.

WE CONCUR:

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NARES, Acting P. J.

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HALLER, J.