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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

SANTIAGO CARDENAS-VASQUEZ,

Defendant and Appellant.

E051983

(Super.Ct.No. RIF133409)

OPINION

APPEAL from the Superior Court of Riverside County. Eric G. Helgesen, Judge.
(Retired judge of the Tulare County Mun. Ct. assigned by the Chief Justice pursuant to
art. VI, § 6 of the Cal. Const.) Affirmed.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Karl T. Terp,
Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Santiago Cardenas-Vasquez, of rape (Pen. Code, § 261, subd. (a)(2)), three counts of forcible lewd and lascivious acts on a child (Pen. Code, § 288, subd. (b)(1)) and found that more than one victim was involved (Pen. Code, § 667.61, subd. (e)(5)). He was sentenced to prison for 15 years to life, plus 24 years and appeals, claiming evidence was improperly admitted and there is insufficient evidence to support his convictions of committing forcible lewd and lascivious acts. We reject his contentions and affirm.

FACTS

Defendant raped his 14-year-old niece at his home. He returned her to her home, where she tearfully told her mother what had happened. The mother yelled at and hit defendant in the presence of defendant's wife, his nine-year-old stepdaughter and other family members. The stepdaughter then said that defendant had inappropriately touched her also.

The stepdaughter testified at trial that defendant began inappropriately touching her about one year into her mother's marriage to defendant and defendant continued to touch her most of the marriage. When asked how often he would touch her, she said "most of the week [¶] . . . not every day, but . . . close to that[.]" She testified that she was afraid to sleep in her own room, so her mother would bring her into the bed the mother shared with defendant and after the mother left for work, defendant would touch her. Defendant would remove her clothing. He touched her breasts and butt. At one or more times, he had his penis out. On one or more occasions, he touched her butt with his penis, her butt with his hands, her breasts with his hands, her breasts with his mouth, and

her vagina with his hand. On one or more occasions, warm white stuff came out of his penis and got onto her when he touched her. She told a police officer and another person who interviewed her that defendant had raped her and she testified that rape was when a guy over 18 touches a minor inappropriately. On one occasion, she screamed at defendant to stop. In response to the question whether defendant ever told her not to say anything, the stepdaughter responded, “No. But I thought . . . from his eyes, how he would look at me, I was afraid.” The following colloquy immediately occurred between the prosecutor and the stepdaughter,

“Q. [THE PROSECUTOR]: So he would look at you, like, scary?

“A [THE STEPDAUGHTER]: Yes.

“Q. [THE PROSECUTOR]: And it would make you afraid?

“A [THE STEPDAUGHTER]: Yes.

“Q. [THE PROSECUTOR]: Did you ever want him to touch you?

“A [THE STEPDAUGHTER]: No”

1. *Admission of Evidence Code section 1108¹ Evidence*

Before trial began, the People sought permission under section 1108² to introduce evidence that defendant’s niece had been digitally penetrated by him in Mexico when she

¹ All further statutory references are to the Evidence Code unless otherwise indicated.

² Subdivision (a) of section 1108 reads, “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.”

was between 6 and 8 years old, ten or eleven years before the trial. Defense counsel objected to the evidence under section 352 on the basis of its age and the fact that it occurred in a different country “with no reports, no way to investigate it” and “sketchy details[.]” The trial court ruled that the evidence was admissible under section 1108 and rejected defendant’s argument that the fact that the act occurred in another country was relevant to section 352. Later, during trial, defendant’s niece was asked during her testimony what she thought was happening when defendant, before he raped her, had told her to get face down on his bed, then he touched her. She replied that she thought the same thing was going to happen as what happened in Mexico when defendant touched her “private part” sexually when she was under 10 years of age.

Defendant here contends that the trial court abused its discretion in admitting this evidence because the evidence was more prejudicial than probative. We disagree.

Defendant asserts that the trial court “failed to take into account” the remoteness of the prior incident. However, the fact that it was 10 to 11 years old at the time of trial was brought to the trial court’s attention by both counsel, therefore, there is no basis for defendant’s assertion. Moreover, as the People correctly point out, prior acts more remote than 10 or 11 years have been properly admitted. (*People v. Ewolt* (1994) 7 Cal.4th 380, 405 [12 years]; *People v. Branch* (2001) 91 Cal.App.4th 274, 284, 285 [30 years]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1393-1395 [15-20 years].)

Defendant also asserts that the niece’s allegation concerning the prior is unreliable because there were no reports of it. However, it is common for years of sexual abuse of children to go unreported (for example, the stepdaughter’s) and the fact that there were

no reports did not, in itself, make her claim unreliable. The fact that the jury concluded that her report of the charged offense was reliable reinforces this.

Defendant also asserts that the prior was more inflammatory than the charged offense because the niece was a young child when it occurred. However, this jury also heard evidence that defendant molested his stepdaughter when she was between the ages of seven and nine—not substantially different than the age range of the niece during this prior incident. Moreover, the charged rape was far more serious than the prior incident. Although, as defendant points out, the fact that there was no evidence that defendant was tried for the prior offense, thus leaving this jury to possibly convict him of the charged offense in order to also punish him for the prior, as already stated, non-reporting and underreporting of child abuse is quite common. For this fact alone to swing the balance of factors in favor of this evidence would render section 1108 meaningless.

Next, defendant attacks the constitutionality of section 1108, claiming that his failure to do so below should not foreclose his claim now because California Supreme Court cases upholding the constitutionality of section 1108 (*People v. Loy* (2011) 52 Cal.4th 46, 60-61; *People v. Falsetta* (1999) 21 Cal.4th 903, 910-922) made such an objection pointless. However, we are bound by those cases.

2. *Sufficiency of the Evidence*

Defendant asserts that there is insufficient evidence to support the jury's findings that the molestations of his stepdaughter were forcible. We agree that there was

insufficient evidence of force or violence,³ but the jury could have relied on fear of immediate bodily injury or duress, which is what the prosecutor argued to the jury.

Defendant asserts that the stepdaughter's fear was purely subjective and was not the result of something he did to engender or exploit her subjective fear. He cites no authority to support his assertion that this is insufficient to constitute fear or duress. Moreover, we disagree with his premise. The stepdaughter testified that defendant would look at her in a scary fashion and this would make her afraid.

The question is whether this record contains evidence from which a reasonable trier of fact could conclude that defendant accomplished the touching through duress or fear of immediate bodily injury. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1289.) As to this, the jury was instructed, "Duress means a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do or submit to something that she would not otherwise do or submit to. [¶] . . . [¶] An act is accomplished by fear if the child is actually and reasonably afraid or she is actually but unreasonably afraid and the defendant knows of her fear and takes advantage of it."

The position of dominance and authority by the defendant over the victim and his continuous exploitations of the victim and their relative ages and sizes may be considered

³ We find nothing in the two pages the People cite of *People v. Soto* (2011) 51 Cal.4th 229, 243, 244, including footnote eight, to support their assertion that defendant's removal of the victim's clothes "and position[ing] her body" (the latter of which there was no evidence at trial) constitutes the force necessary for Penal Code section 288, subdivision (b).

in determining fear or duress. (*People v. Cardenas* (1994) 21 Cal.App.4th 927, 940; *People v. Senior* (1992) 3 Cal.App.4th 765, 775.) All of these factors existed here.

In *People v. Veale* (2008) 160 Cal.App.4th 40 (*Veale*) [Fourth Dist., Div. Two], the victim was afraid something might happen to her or her mother if she told about her stepfather molesting her. (*Id.* at p. 44.) “She feared defendant would hurt her if she told, *although he never said he would.* ¶ . . . ¶ [The victim] was seven years old at the time of the molestation. When defendant molested [her], she was normally alone with defendant in his or [her] bedroom. On at least one occasion, the bedroom door was locked. And, as [the victim’s] stepfather, defendant was an authority figure in the household. In addition, [the victim] feared defendant and feared that if she told anyone defendant was molesting her, defendant would kill her or [her] mother.” (*Id.* at pp. 44, 46-47, italics added.) This court concluded that this constituted sufficient evidence of fear or duress thusly, “A reasonable inference could be made that defendant made an implied threat sufficient to support a finding of duress, based on evidence that [the victim] feared defendant and was afraid that if she told anyone about the molestation, defendant would harm or kill [her], her mother or someone else. Additional factors supporting a finding of duress include [the victim’s] young age when she was molested; the disparity between [the victim] and defendant’s age and size; and defendant’s position of authority in the family.” (*Id.* at p. 47.)

We find more commonality between the facts here and those in *Veale* than divergence.⁴ Additional facts here that were missing in *Veale* is the length of time over which the acts were committed, the frequency of acts committed, and the fact that the victim once screamed at defendant to stop. Even if the jury reached the unlikely conclusion that this occurred during what became the *last* incident of molestation perpetrated by defendant on the stepdaughter, the fact remains that he was involuntarily stopped from continuing the abuse by the revelations of his niece and the stepdaughter and not by the latter's request that he stop. The stepdaughter was such a fearful child that she was unable to sleep in her own bed. Defendant was aware of this and exploited her fear by looking at her in a way that made her fearful of him.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P.J.

We concur:

RICHLI
J.

MILLER
J.

⁴ We find the fact that at least on one occasion in *Veale*, the door was locked to not be a distinguishing feature between that case and this one because, here, there was no reason to lock a door, as the molestations only occurred when the stepdaughter and defendant were alone in the house. Although the stepdaughter did not specifically testify, as did the victim in *Veale*, that she feared defendant would harm or kill her or her mother, there is no appreciable difference between a young child making such a claim or, as the stepdaughter did here, just expressing fear of the defendant.