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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. GILBERT ALLEN WOLLMAN, Defendant and Appellant.	E052333 (Super.Ct.No. INF064483) OPINION

APPEAL from the Superior Court of Riverside County. John G. Evans, Judge. Affirmed in part; reversed in part.

Jennifer Peabody, 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, Lise S. Jacobson, and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION[1]

Defendant Gilbert Allen Wollman, who was over 70 years of age, sexually abused the grandson of defendant's friend and neighbor for almost a year when the victim was about 12 or 13 years old.[2]

A jury convicted defendant of three sexual offenses: count 3, oral copulation with a child under 14 (§ 288, subd. (c)); count 4, continuous sexual abuse of a child under 14 (§ 288.5, subd. (a)); and count 5, exhibiting lewd material to a minor (§ 288.2, subd. (b).) The court sentenced defendant to a six-year prison term on count 4, including two concurrent two-year terms on counts 3 and 5.

On appeal, defendant seeks reversal of his conviction on count 3 and challenges the admission of evidence of defendant's prior misdemeanor conviction in 1999. Defendant also argues the court erred by imposing a prison sentence instead of probation. Defendant makes a generalized claim of ineffective assistance of counsel (IAC).

The parties agree defendant should not have been convicted of both count 3 and count 4 because the two offenses overlap temporally and they were not charged in the alternative. (§ 288.5, subd. (c); *People v. Johnson* (2002) 28 Cal.4th 240, 248; *People v. Torres* (2002) 102 Cal.App.4th 1053, 1055-1056.)

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[1] All statutory references are to the Penal Code unless stated otherwise.

[2] There is some confusion in the record about whether John Doe lived with his grandfather in 2003 and 2004 or 2004 and 2005 and whether he was 12 or 13 years old. But the correct dates appear to be 2003 and 2004, making him 12 years old during most of the time he was being molested.

We reverse defendant's conviction on count 3. We reject defendant's claims of evidentiary error and IAC and affirm the judgment and sentence on counts 4 and 5.

II

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was born in 1932. John Doe was born in April 1991. John Doe suffered a troubled childhood, marred by physical, emotional, and verbal abuse. John Doe engaged in self-mutilation and had attempted suicide. In April 2003 when John Doe was 12 or 13, he moved from Florida to his grandfather's residence in a mobile home park in Desert Hot Springs. About two months later, John Doe first met defendant, his grandfather's friend, when walking past defendant's residence. Defendant taught John Doe tennis and John Doe played with defendant's dogs. About a month after they met, defendant began hugging John Doe. Defendant progressed to playing with John Doe's ear and kissing his ear or cheek.

A. September 2003

On one occasion in September 2003, John Doe visited defendant and walked his dogs, after which they sat on a couch and watched an hour-long video depicting oral and anal sex between two men. Defendant whispered to John Doe about "stuff" he wanted to do. Defendant told John Doe he was beautiful and he talked about masturbation and oral sex. Defendant took John Doe into the bedroom and showed him condoms, lubricants, and sex toys. Defendant continued to play the video and undressed John Doe, while rubbing the boy's testicles and penis. Defendant removed his shirt and began to orally

copulate John Doe. Then defendant masturbated John Doe until he ejaculated. Defendant also ejaculated.

Defendant warned John Doe that if he said anything defendant would be in trouble and his dogs would be out on the streets alone. John Doe felt weird and in shock. John Doe was afraid to tell his grandfather what had happened.

B. Subsequent Incidents

A few weeks later, they were inside defendant's mobile home and defendant began hugging and licking John Doe and touching his penis.

A third time in defendant's bedroom, John Doe was naked and defendant played a pornographic video while kissing John Doe on the neck, stroking his penis and testicles, and performing oral sex. Defendant masturbated and pressed his penis against John Doe's buttocks before he ejaculated. Defendant also masturbated John Doe until he ejaculated. John Doe did not report what had happened because he was concerned about defendant's dogs.

After a break of a couple of months, defendant resumed touching and masturbating John Doe regularly. During the same time, defendant was teaching John Doe how to play tennis. The sexual incidents occurred once or twice a week for about half an hour. John Doe could not estimate the number of sexual incidents, except there were more than 10.

The sexual activity stopped before John Doe returned to Florida in May 2004. Between January and May 2004, defendant increased the instances of oral copulation. On the last occasion, they watched a video in defendant's bedroom and defendant

masturbated John Doe and himself. Defendant gave John Doe a birthday present of two walkie-talkies.

John Doe did not want to tell his grandfather. John Doe had been stealing and trying to commit suicide. John Doe acknowledged that his trial testimony was either different or more detailed than his recorded statement to the police or his testimony at the preliminary hearing. During his police interview, John Doe stated that defendant did not make him perform oral sex or masturbation on defendant. John Doe also repeatedly said in the interview that defendant asked him not tell anyone because the police had a file on him and would be "extra hard" on him.

C. Disclosure

When John Doe returned to Florida, he was institutionalized. In 2008, he was molested again and he finally disclosed to a therapist what had happened with defendant. He also talked to his grandfather who cautioned that defendant could go to prison for the rest of his life.

The police interviewed John Doe who described defendant's sexual conduct toward him. The Florida police arranged for John Doe to make a pretext telephone call to defendant. During their conversation, John Doe asked defendant if he remembered "play[ing] around with each other" and "experimenting." Defendant commented ambiguously that those were "good times."

At one point, John Doe considered suing defendant.

D. Defense Evidence

The V. family, father and daughter, came from Florida and testified they had offered John Doe a place to stay while he attended high school. John Doe misbehaved and stole things until the family asked him to leave.

John Doe's grandfather testified that he knew defendant was a gay man and he had asked John Doe to tell him if anything "abnormal" occurred. His grandfather said John Doe often lied and stole.

III

PROPENSITY EVIDENCE

The jury was informed by stipulation that defendant was convicted in 1999 of one misdemeanor count for violation of section 311.11, subdivision (a), for possession of child pornography. In January 1998, defendant had a photo album with pictures of naked, prepubescent boys, which defendant admitted he used for masturbation. The trial court in the present case found the evidence of defendant's previous offense was admissible because it was probative and not cumulative, remote, uncertain, misleading, distracting, time consuming, or unduly prejudicial.

Sections 352 and 1108 provide that evidence of past sexual misconduct may be admissible if its probative value outweighs its prejudicial effect. (*People v. Falsetta* (1999) 21 Cal.4th 903, 916.) The factors bearing on admissibility include the similarity of the charged and uncharged offense, whether the source of the evidence is independent, whether defendant suffered a criminal conviction for the uncharged offense, whether the uncharged offense is more or less inflammatory then the charged crimes, whether the

offenses are close in time, and whether the evidence proves an issue in dispute or is cumulative. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) The trial court's ruling will be upheld unless it displays a manifest abuse of discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; *Falsetta,* at pp. 917-918.)

Defendant contends the trial court prejudicially erred in allowing such evidence under Evidence Code sections 352, 1101, and 1108. We conclude the propensity evidence of defendant's sexual misconduct was properly admitted under sections 352 and 1108.

Defendant argues the uncharged and charged offenses are not similar enough to be admissible. We disagree. It is not required that sexual offenses be similar. (*People v. Falsetta, supra,* 21 Cal.4th at p. 912; *People v. Soto* (1998) 64 Cal.App.4th 966, 984.) In the present case, however, there was a similarity because defendant consistently used visual pornography involving young males to commit his crimes. The prior crimes also corroborated the victim's testimony that defendant showed him pornographic movies with young males engaged in sexual acts.

Another factor favoring admissibility is that the sources of evidence for the present and former offenses were different. Additionally, defendant was convicted of the former offense, which was certainly less inflammatory then the charged crimes because it did not involve an actual victim. The former offense, occurring in 1998, was not so remote in time as to make it irrelevant to offenses occurring in 2003 and 2004. Further, the evidence by stipulation of the prior offense was not cumulative and tended to prove the present offenses occurred without the danger of confusing the jury or consuming too

much time at trial. In sum, the trial court did not commit a manifest abuse of discretion by admitting evidence of the 1999 misdemeanor conviction for possession of child pornography. (*People v. Rodrigues, supra,* 8 Cal.4th at p. 1124; *People v. Falsetta, supra,* 21 Cal.4th at pp. 917-918.)

Furthermore, any error was harmless because a more favorable outcome for defendant was not reasonably probable if the evidence had been excluded. (*People v. Falsetta, supra,* 21 Cal.4th at pp. 924-925.) Although John Doe's testimony at trial may have been more detailed, it did not materially contradict his earlier statements. Defendant's claims of federal constitutional error were resolved by the California Supreme Court in 1999 in *Falsetta,* at page 917.

IV

DENIAL OF PROBATION

At the time of sentencing, defendant was 77 years old. Defendant asked for probation, citing his age and health as factors in imposing custody and offered assurances that he would not pose a threat to the community and he would comply with any conditions. His risk of reoffending was evaluated as low-moderate.

The probation officer offered his view that "defendant is now exactly the person who used his position of trust to manipulate and sexual[ly] abuse a 13 year old boy. . . . The defendant knew the victim was vulnerable and took advantage of his fragile state. . . . The defendant befriended the victim and lavished him with gifts, attention, and affection. The victim was appreciative of his new friend and trusted him . . . . The defendant took advantage of that trust. . . . This officer believes the remorse the defendant feels is not for

the victim, rather for the fact that he got caught. . . . [¶] . . . [¶] This officer finds an escalation of criminality in the defendant's actions along with a recurrence of minimizing his culpability. The defendant obviously did not learn the lesson the justice system tried to teach him in 1999. It was only one year after his previous grant of probation that the defendant began sexually abusing the victim. This officer is not willing to allow the defendant the freedom to reoffend yet again. This officer recognizes the defendant is technically eligible for a grant of probation. However, due to the emotional trauma the victim has suffered, the criminal sophistication demonstrated by defendant in carrying out the crime, and the fact a previous attempt at rehabilitation has failed . . . the defendant is not suitable for a grant of probation."

The probation report included a psychiatrist's recommendation for probation and numerous letters from defendant's supporters. There were also two negative letters, one urging that he receive the maximum sentence and one accusing defendant of trolling for homeless boys on Santa Monica Boulevard. The probation officer recommended a collective sentence of six years. The prosecutor asked for a sentence of 12 years.

The court announced it was "convinced that confinement to the prison is the correct punishment." It considered six years the appropriate term because of defendant's age and the years of freedom defendant enjoyed while the victim suffered. Defendant used his position of trust to manipulate the victim. The victim endured serious lifelong psychological damage and trauma. The court made findings that defendant was a threat to society and placing him in prison would prevent similar conduct against minors.

A denial of probation is within the court's broad discretion unless the court acts "in an arbitrary or capricious manner." (*People v. Edwards* (1976) 18 Cal.3d 796, 807.) The probation decision is rooted in the facts and circumstances of each case, including the nature and circumstances of the crime and the history and character of the offender. Probation should be the sentence unless the sentencing court finds that confinement is necessary to protect the public from further criminal activity by the offender or it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed. (*Id.* at p. 801, fn. 6.)

California Rules of Court, rule 4.414, provides the criteria affecting the decision to grant or deny probation include: the nature, seriousness, and circumstances of the crime as compared to other instances of the same crime; the vulnerability of the victim; whether the defendant inflicted physical or emotional injury; whether the defendant was an active or a passive participant; whether the manner in which the crime was carried out demonstrated criminal sophistication on the part of the defendant; whether the defendant took advantage of a position of trust or confidence to commit the crime; defendant's prior record of criminal conduct, including the recency and frequency of prior crimes; whether the prior record indicates a pattern of regular or increasingly serious criminal conduct; defendant's willingness and ability to comply with reasonable terms of probation; the likely effect of imprisonment on the defendant; the adverse collateral consequences on the defendant's life resulting from the felony conviction; whether the defendant is remorseful; and the likelihood that if not imprisoned the defendant will be a danger to others.

The denial of probation was not arbitrary or capricious based on the nature and circumstances of the crime and defendant's history and character. The trial court expressly found defendant's confinement was necessary to prevent his further criminal activity. Furthermore, it would certainly "unduly depreciate the seriousness of the offense" if defendant received probation in this case. More particularly, we conclude the crime was serious when compared to other instances of the same crime. John was a highly vulnerable young teenager, on whom defendant inflicted significant emotional injury. Defendant was an extremely active participant, who carried out his crimes with sophistication by befriending John Doe, taking advantage of their friendship, and grooming him to be receptive to molestation. Defendant's criminal record indicates a pattern of increasingly serious conduct. One letter offered at his sentencing suggests there may have been other victims like John Doe.

The court recognized defendant's willingness and ability to comply with probation and that his age would aggravate the effect of imprisonment on defendant and his life. But the court concluded defendant was not genuinely remorseful and there was a likelihood that, if not imprisoned, defendant would pose a danger to other minors.

V

DISPOSITION

The trial court did not abuse its discretion by admitting defendant's 1999 misdemeanor conviction or by denying probation. Because defense counsel preserved these claims of error by raising them below, defendant's IAC claims cannot be sustained on appeal.

Defendant's conviction on count 3 is reversed. The judgment on counts 4 and 5 is affirmed.

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CODRINGTON
J.

We concur:

HOLLENHORST
Acting P.J.

KING
J.