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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.

JULIAN MAYA DOMINGUEZ,

Defendant and Appellant.

E053443

(Super.Ct.No. RIF152781)

OPINION

APPEAL from the Superior Court of Riverside County. Robert E. Law, Judge.

(Retired judge of the Orange Super. 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, Julie L. Garland, Assistant Attorney General, Lise S. Jacobson and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant of eight counts of committing lewd and lascivious acts on the minor first victim (Pen. Code, § 288, subd. (a)) and three counts of committing lewd and lascivious acts on the minor second victim, the first victim's older brother. He was sentenced to prison for three consecutive 15 years to life terms. He appeals contending the trial court erred in admitting evidence of prior incidents of abuse perpetrated by him and his sentence constitutes cruel and unusual punishment. We reject his contentions and affirm.

FACTS

Defendant was the victims' next door neighbor, and he babysat the brothers. Once in 1998 and then, beginning at the end of 1999 until the beginning of 2001, defendant molested the first victim every time he babysat the boys. The acts defendant perpetrated on the first victim included touching, directed mutual touching, 10 or more acts of having the victim hold defendant's penis, touching while masturbating himself six or more times, spooning while both were naked from the waist down more than seven times, oral copulation over the clothes, and three or four acts of sodomy, which resulted in defendant ejaculating into the toilet. Defendant molested the second victim "over 90 percent" of the once weekly occasions defendant babysat the brothers for two years, including exposing his penis and trying to grab the second victim's, taking out the second victim's penis and having him rub defendant's penis, having the second victim masturbate him to ejaculation, removing the second victim's pants and fondling his penis while the second victim masturbated defendant, and at least seven acts of sodomy.

When interviewed by the police, defendant admitted engaging in four to five acts of mutual fondling with the first victim. Although he could not remember it, he allowed that it could have happened that he fondled the first victim's penis while he masturbated himself to ejaculation into the toilet and engaged in anal intercourse with him. Defendant admitted engaging in five or six acts of mutual fondling with the second victim. He thought he had the second victim masturbate him one or two times. He allowed that he might have sodomized the second victim once. On several occasions, he fondled the brothers' penises and they fondled him. He knew these acts were wrong and illegal when he committed them. He admitted engaging in similar conduct with another victim years earlier, who was also a neighbor.

The People also introduced evidence that defendant molested this other neighbor, referred to herein as "the third victim," before committing the charged acts. This evidence will be described in greater detail in connection with the discussion of the issues in this case.

Defendant took the stand and gave wildly contradictory and illogical testimony, admitting some acts involving all three victims, denying others, admitting to lying about some of his statement to the police, being unable to explain others in which he conceded guilt and admitting to lying to the jury in some of his testimony.

ISSUES AND DISCUSSION

1. *Admission of Prior Incidents*

a. *Abuse of Discretion*

Before trial began, the People sought permission to introduce evidence, under Evidence Code section 1108,¹ of prior acts of sexual misconduct by defendant with the third victim to show his propensity to commit the charged acts with the first and second victim. In their moving papers, the People asserted that between 1992—1993 and 1997—1998, defendant would visit the third victim, also a neighbor, while the latter's parents were not home and touch the third victim's bare penis, have the third victim touch his bare penis, perform oral sex on the third victim and have the third victim perform oral sex on him "twice a week and every other week." On one occasion, defendant sodomized the third victim. The third victim was five or six years old when the abuse began. In 2002, defendant admitted, during a police interrogation, to mutual touching of the bare penis by himself and the third victim beginning in about 1992 and mutual masturbation. He also admitted engaging in oral sex with the third victim "an unknown number of times" during one of which times defendant ejaculated into a napkin. Defendant also said he was not sure if he sodomized the third victim, but he "thought" it happened. He said his sexual encounters with the third victim happened once every

¹ That section provides in pertinent part, "(a) 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."

two weeks for approximately two to four years until he entered high school and learned about sexually transmitted diseases and AIDS.

According to the People, the first incident between the first victim and defendant occurred in about 1999 when the first victim was 9 and defendant was about 17. During this incident, defendant, who was the first victim's next door neighbor, held the first victim's penis while the latter urinated. About a year later, defendant began babysitting the first victim, and his older brother, the second victim, stopping about a year later, in 2001. Almost every time defendant babysat the brothers, he would take the first victim into the bathroom and touch the latter's penis and have the latter touch his penis. Defendant touched the first victim's penis at least 10 times and defendant had the first victim touch the defendant's penis at least five but less than 10 times. During some of the incidents, defendant removed his clothes, had the first victim remove his, and the two would lie down together in a spoon position. At least twice, defendant masturbated while he touched the first victim's penis. On three occasions, defendant sodomized the first victim in the bathroom. On one occasion, defendant asked the first victim to orally copulate him, but the first victim refused.

According to the People, defendant touched the second victim's bare penis five or six times and he had the second victim masturbate him the same number of times. Defendant had anal intercourse with the second victim one time. During a 2009 interview with police, defendant admitted that he had touched the penises of both brothers and they had touched his. Citing a learning disability, defendant did not

specifically recall several of the incidents involving masturbation and anal sex, but said it was possible they had occurred.

The People argued in their moving papers that the incidents involving the third victim were similar to those involving the brothers, they were not remote, as they ended one or a few years before the incidents involving the brothers began, they were no more inflammatory than the charged offenses and defendant had been adjudicated guilty of them, thereby eliminating the possibility that the jury would convict defendant of the charged crimes in order to punish him also for the acts involving the third victim. The People also asserted that they anticipated testimony concerning the incidents involving the third victim to consume, at most, three hours of trial time and confusion would not result because the charged crimes were simple and straightforward and a limiting instruction would assure that the jury would make a true finding as to the multiple victim allegation based only on acts involving the brothers and not the third victim.

At a hearing on the admissibility of the evidence, the trial court concluded that the similarities between the acts involving the third victim and those involving the brothers were sufficient to admit evidence of the former under Evidence Code section 1108. Defendant objected to admission on the basis of Evidence Code section 352, asserting that the evidence would “confuse issues.” The trial court ruled that the evidence would be admitted. Defendant here claims that the trial court abused its discretion in so ruling. We disagree.

Defendant asserts that the evidence of the incidents involving the third victim were more inflammatory than evidence of the charged offenses because the former began when

the third victim was five or six, while the first incident involving the first victim began when he was nine and the first involving the second victim when he was at least 11. We do not see this as a significant difference. Defendant asserts that a 9 year old and an 11 year old would be “old enough to realize the significance of the sexual acts in which [they were] taking part.” We agree, and that is what makes the crimes involving them more inflammatory—because they realized what was being performed on them were sexual acts, with all the shame and confusion that brings. Additionally, as the People correctly point out, the fact that defendant was himself a minor when he committed the acts with the third victim, but an adult when he committed the acts with the brothers, and had already been adjudicated to be a child molester, makes the latter more inflammatory than the former.

Next, defendant asserts that the evidence involving the third victim was inflammatory because there was a high likelihood that the jury was distracted by it and used it for an improper purpose. What defendant cites as reasons for the likelihood that the jury would be distracted by this evidence are the same reasons that made it so probative, i.e., the similarity of the acts involving the third victim and their circumstances to the charged acts and their circumstances. As to the likelihood that the jury would use the evidence for an improper purpose, we cannot imagine a purpose more prejudicial to the defendant than as propensity evidence. The fact that the jury could find that the acts involving the third victim by only a preponderance of the evidence, while having to find the charged acts beyond a reasonable doubt is not a reason for excluding the evidence. If this were the case, no prior acts would ever be admissible.

Defendant also contends that the evidence was prejudicial because the jury was not informed that defendant had been convicted in connection with the acts involving the third victim, therefore, the jury would be inclined to convict defendant of the charged offenses in order to punish him for the former. However, at the time the trial court ruled the evidence was admissible, the prosecutor stated his intent to introduce evidence of defendant's adjudication(s) involving the third victim specifically for the purpose of avoiding this and defendant did not renew his objection to the evidence once it was apparent at trial that such evidence would not be introduced. In reviewing a trial court's order, we can hold it accountable only for the information it had at the time it ruled, and not for developments that arise afterward.

The same is true of defendant's next assertion, i.e., that the evidence of the acts involving the third victim were overly time consuming. The People correctly note that it took up significantly less time in the People's case in chief than the predicted three hours. Additional time, however, was taken up during cross-examination of defendant concerning it, but defendant failed to renew his objection to the evidence during trial.

Next, defendant asserts that the acts involving the third victim were remote in time. Not true. As already stated, according to the People, they occurred over a four or five year period, beginning in 1992 or 1993, which meant that they ended in 1997 or 1998. According to the People, the acts involving the brothers occurred in 1991 and ended in 2001. Therefore, there was only a two or three year gap between the two sets of acts. Defendant concedes that remoteness becomes an issue only when a legally blameless life had been led in the interim. Defendant cites no case holding that a two or

three year interim is sufficient for this purpose. Defendant also fails to point to any other witnesses to the acts involving the third victim that he asserts might have been lost with the passage of time. Neither defendant nor the third victim testified that anyone other than the two of them were present when any of these acts occurred, therefore, there were no other witnesses to be lost.

Finally, even if this evidence was improperly admitted, we would not reverse defendant's convictions under any standard.² This is so because the evidence involving the brothers was very strong, defendant admitted engaging in at least some of the charged/alleged acts with all three victims and defendant lied so often, both before trial and on the stand, that one was required to keep a flow chart to follow all his versions of what happened. Together, these three aspects of this trial made for just about as overwhelming a case as is possible.

2. *Constitutionality of Evidence Code section 1108*

In asserting that Evidence Code section 1108 violates due process, defendant states his disagreement with the contrary holding of the California Supreme Court in *People v. Falsetta* (1999) 21 Cal.4th 903, 915 (*Falsetta*). However, defendant also correctly notes that the trial court was bound by the holding in *Falsetta*. So are we. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.)

² This includes the beyond a reasonable doubt standard defendant urges resulted from the violation of his due process rights occasioned by the admission of this evidence, even though he failed to object on this basis below.

Defendant also asserts that Evidence Code section 1108 violates equal protection, because it treats those charged with sexual offenses different from those who are charged with other offenses. However, we agree with the reasoning of the appellate court in *People v. Fitch* (1997) 55 Cal.App.4th 172, 184, 185, cited with approval in *Falsetta*, *supra*, 21 Cal.4th at page 918 rejecting this argument and adopt it as our own.

3. Sentence

Defendant contends that his sentence of three consecutive terms of 15 years to life is cruel and unusual. We disagree.

A few facts from the probation report illustrate our position. The first victim attempted to kill himself by hanging himself from a beam in his bedroom when he was 12 years old. Fortunately for the first victim, the beam broke. When he was a teenager, he pulled out his eyelashes and was diagnosed as being bipolar. However, he claimed that he was misdiagnosed and his behavior was attributable to the acts defendant committed on him. It took the first victim 10 years to report the abuse because he was ashamed. His shame prevented him from getting counseling for what he endured. The second victim felt that he suffered depression due to what defendant had done to him and that his life has been “ruined.” The probation officer summarized the fate of the brothers as follows, “[T]he boys were forced to live an emotionally painful adolescence, void of the care-free spirit and innocence they should have been entitled to. . . . [¶] . . . [¶] . . . [Defendant] ruined the lives of the victims in fulfilling his own perverted desires. Of particular concern was the fact that [he] worked at an elementary school around the same time he was victimizing the boys. . . . [¶] While defendant stated he was sorry for his

actions . . . , he stated he was eager to move on with his life. The contradiction of statements baffled this officer as it made the defendant's remorse seem insincere. This officer had trouble understanding how the defendant could ruin the life of an innocent child and be so eager and selfish to want to move on with his own life. [¶] . . . Due to the gravity of the offenses and the emotional toll taken on the victims, the defendant deserves nothing less than the maximum term of imprisonment.” In light of the foregoing, we take issue with defendant's assertion that it is unfair to punish him more than a person convicted of committing first degree premeditated murder of a single victim. Additionally, it cannot be forgotten that defendant engaged in an almost identical victimization of another person as a juvenile, for which he suffered an adjudication in Juvenile Court, and, obviously, learned nothing from it. The existence of this prior adjudication causes us to question defendant's current assertion that he “lack[s] any significant criminal history[.]” It, and defendant's concession that he knew at the time he was committing the instant offenses, that they were wrong and illegal also causes us to reject his assertion that, based on the results of the Static-99 testing, “it is questionable whether keeping [defendant] in prison for most, if not all of his life, serves any purpose.” Defendant's relatively young age as a adult at the time of the instant offenses and the fact that he asserted that he had been abused as a child would require a closer look at his sentence had he not had the opportunity, before these crimes were committed, to gain insight into his predatory behavior and not put himself in that position again. But, he did not. Thus, the facts in this case, contrary to defendant's assertion, do not present “that ‘exceedingly rare’ case in which the punishment for the crime is so grossly

disproportionate that it violates the . . . prohibition against cruel and unusual punishment.”

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P.J.

We concur:

RICHLI
J.

KING
J.