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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.

RONALD EDDIE SANCHEZ,

Defendant and Appellant.

E053760

(Super.Ct.No. RIF10001596)

OPINION

APPEAL from the Superior Court of Riverside County. Harry A. Staley, Judge.
(Retired judge of the Kern Super. Ct. assigned by the Chief Justice pursuant to art. VI,
§ 6 of the Cal. Const.) Affirmed.

Carlo A. Spiga for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Garrett Beaumont, and Anthony
Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Ronald Eddie Sanchez, was convicted by a jury of three counts of lewd and lascivious acts upon his niece, a child under the age of 16 (Pen. Code, § 288, subd. (c)(1)), and admitted three prior convictions under the Strikes law. (Pen. Code, §§ 667, subds. (c), (e)(2)(A), 1170.12, subd. (c)(2)(A).) He was sentenced to an aggregate sentence of 75 years to life and appealed.

On appeal, defendant argues that two instructions read to the jury, CALCRIM Nos. 375 and 1191, pertaining to the manner in which the jury should consider evidence of other sexual offenses committed by the defendant (Evid. Code, §§ 1101, subd. (b), 1108), violated his due process rights by relaxing the burden of proof on the charged offenses, requiring reversal as structural error. We affirm.

BACKGROUND

Defendant was married to L. Ruiz between 1996 and 2007. L.'s sister, Giovanna, has a daughter, Jane Doe 1. After L. and defendant were divorced, defendant moved to a Riverside residence that was near L.'s in 2008, to be near the two sons who lived with L. The residence was a two-story home with four bedrooms and a swimming pool. One of his two sons from a prior marriage lived with defendant in this house. Defendant's two sons by L. lived with their mother, and his son from the prior marriage lived with his mother, but his children stayed at the house regularly.

In August 2008, Giovanna and her daughter, Jane Doe 1, and Giovanna's boyfriend Jeff moved into the residence with defendant. Jane Doe 1 was 14 years old at the time. That summer, defendant used the pool with his sons and Jane Doe 1, as well as

other children. When defendant was in the pool, he grabbed the children around their waists and would launch them from the shallow end of the pool to the deep end, launching them shot-put style. The children took turns being tossed, so that defendant threw one after another in rapid succession. This was a regular activity on weekends.

Jane Doe 1, who was 14 years old at the time, participated in the pool sports with her cousins. On one occasion, when the defendant picked her up to launch her, he squeezed his fingers into the bottoms of her two-piece swimsuit. After feeling around her vagina, he threw her. Jane Doe 1 thought it was an accident and went back to be thrown in the water again. He did not touch her inappropriately again on this occasion.

However, there were two other occasions when defendant engaged in the same type of inappropriate touching on separate days. On each separate day, the defendant touched Jane Doe 1 inappropriately when throwing her across the pool only once, launching her without inappropriate touching when she swam back for more launchings, so each time Jane Doe 1 thought it was an accident. She did not tell anyone. Although Jane Doe 1 swam in the pool regularly and defendant was present on many occasions, he touched her inappropriately just the three times. Jane Doe 1 did not indicate that anything had happened so others present were unaware of any inappropriate touching.

However, defendant did make some inappropriate comments to Jane Doe 1. After one of the pool incidents, defendant came into the bathroom where Jane Doe 1 was taking a shower and pulled open the shower curtain. Defendant commented that Jane Doe 1 had nice boobs for a 14 year old. Jane Doe 2, a longtime friend of Jane Doe 1, had been to

Jane Doe 1's house and used the pool, overheard defendant comment that Jane Doe 1's bathing suit looked good on her, which struck her as odd. On another occasion when the family was on an outing to Sea World, defendant told Jane Doe 1 that he had had a vasectomy so he could have sex with her and not get her pregnant.¹

Jane Doe 1 also described an incident in which defendant had put on a glove and used his finger to remove fecal matter from Jane Doe 1's rectum when she was suffering great pain from constipation. On another occasion, defendant showed Jane Doe 1 a video of a girl masturbating and told Jane Doe 1 that was her; he also stated that her father had posted the video online.

Defendant moved out of the house in June or July 2009. During the summer of 2009, after defendant had moved, Jane Doe 1 was at the beach in Oceanside with her aunt (defendant's ex-wife), L., when she disclosed the molestations. In February 2010, a report was made to the Riverside Police Department.

Defendant went to trial on three counts of lewd and lascivious acts against a child under the age of 16.² (Pen. Code, § 288, subd. (c)(1).) It was further alleged that

¹ Defendant's oldest son, Taylor, was present at this outing and sat in the front seat of the vehicle next to Jane Doe 1 when the defendant was reported to have made the comment. He denied that defendant made any statements of this nature to Jane Doe 1, although he was aware that his father had had a vasectomy.

² A fourth count, alleging possession of child pornography (Pen. Code, § 311.11, subd. (a), was dismissed prior to trial pursuant to a motion under Penal Code section 995.

defendant had previously been convicted of three serious or violent felonies, within the meaning of the Strikes law. (Pen. Code, §§ 667, subds. (c), (e)(2), 1170.12, subd. (c)(2)(A).)

During trial, the jury heard evidence from Jane Doe 3, regarding prior sexual offenses committed against her when she was approximately eight years old, pursuant to Evidence Code sections 1101, subdivision (b), and 1108. Jane Doe 3 was the younger sister of Laurie, who, at age 16,³ began dating defendant, who lived across the street from Jane Doe 3's family. Laurie and defendant cohabited for a time, and, during their cohabitation, Jane Doe 3 would visit her older sister and stay overnight, sleeping on a downstairs couch. On more than one occasion, when Jane Doe 3 was 11 years old, defendant came downstairs and began massaging her back, eventually moving his hands on to her breasts, under her clothing, and then down inside her pants. Jane Doe 3 pretended to be asleep. On some occasions, he inserted his fingers in her vagina, but not every time.

The jury convicted him of all three counts, and defendant admitted the three Strikes priors. He was sentenced under the Strikes law to three consecutive terms of 25 years to life, for an aggregate sentence of 75 years to life. Defendant timely appealed.

³ Jane Doe 3 did not indicate when these incidents occurred but she did testify she was born in 1973 and that the offenses occurred when she was 11 years old. From this, we extrapolate that the prior acts occurred in approximately 1984.

DISCUSSION

On appeal, defendant argues that CALCRIM No. 375 and CALCRIM No. 1191 unconstitutionally permit a jury to convict a defendant by relying on facts found only by a preponderance of the evidence. In making this argument, defendant relies on two federal cases which considered the propriety of the 1996 version of CALJIC No. 2.50.01 and CALJIC No. 2.50.1. (*Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812 [overruled on a different point in *Byrd v. Lewis* (9th Cir. 2009) 566 F.3d 855, 866]; *Doe v. Busby* (9th Cir. 2011) 661 F.3d 1001.) The People argue that defendant does not cite relevant California authority assessing the propriety of CALCRIM Nos. 375 and 1191. We agree with the People.

The court admitted evidence of prior sexual offenses against Jane Doe 3 pursuant to Evidence Code section 1101, subdivision (b), to show intent, and pursuant to Evidence Code section 1108, to show propensity. At the close of the evidence, the court instructed the jury using CALCRIM Nos. 375 and 1191, as follows:

“The People presented evidence that the defendant committed other offenses that were not charged in this case. You may consider this evidence only if the People have proved, by a preponderance of the evidence, that the defendant, in fact, committed the uncharged offenses. [¶] Proof by preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide the

defendant committed that uncharged offense, you may but are not required to consider that evidence for the limited purpose of deciding whether or not the defendant acted with the intent of arousing, appealing to, or gratifying the lusts, passions, or sexual desires of himself or the child, (Jane Doe 3). [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offenses and the charged offenses. Do not consider this evidence for any other purpose except for the limited purpose determining propensity as defined in your Instruction No. 1191. [¶] If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence, and it is not sufficient by itself to prove that the defendant is guilty of any of the charged or lesser crimes. The People must still prove each charge beyond a reasonable doubt.”

The court then proceeded to read CALCRIM No. 1191: “Instruction 1191. People presented evidence that the defendant committed the crimes of lewd and lascivious acts on a child under the age of 14, a violation of Penal Code Section 288(a) - - see instruction 1110 - - that were not charged in this case. These crimes are defined for you in these instructions. [¶] You may consider this evidence only if the People have proved, by a preponderance of the evidence, that the defendant in fact committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden, you must disregard this evidence entirely. If you decide that

the defendant committed the uncharged offenses, you may, but are not required to conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that, also conclude that the defendant was likely to commit and did commit the charged or lesser offenses. It would be just the charged offense. [¶] If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider, along with the all the other evidence. It is not sufficient by itself to prove the defendant is guilty of any of the sexual offenses. The People must still prove each charge and lesser offense beyond a reasonable doubt. Do that [*sic*] consider this evidence for any other purpose, other than for intent as defined in Jury Instruction No. 3785 [*sic*].⁴

In addition to the above, the court instructed the jury, “During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and no other.” (CALCRIM No. 303.)

Even though uncharged sex offenses may be proved by a preponderance of the evidence, Evidence Code section 1108 and CALCRIM No. 1191 (and its predecessor) have been repeatedly held to be both constitutional and correct statements of the law. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016; *People v. Cromp* (2007) 153 Cal.App.4th 476, 480.) Defendant does not argue that the instructions were

⁴ It is fair to assume that the court reporter misheard the judge. The written instruction included in the clerk’s transcript, from which the trial court read in instructing the jury, states “Do *not* consider this evidence for any other purpose . . . ,” and closes with a reference to “instruction number 375.” (Italics added.)

impermissibly modified (see *People v. Villatoro* (2011) formerly at 194 Cal.App.4th 241, review granted July 20, 2011, S192531), so we will address only the propriety of the instructions which were given.

Defendant's arguments, and the authorities on which he relies, are incorrectly premised on the notion that the 1996 version of CALJIC Nos. 2.50.01 and 2.50.1, are "identical in all relevant respects to the CALCRIM instructions that are at issue here." This is an incorrect premise. The instructions are materially different from the relevant CALCRIM instructions; in fact, they differed materially from the 1999 versions of CALJIC instructions which were found to pass constitutional muster in *People v. Reliford*, *supra* 29 Cal.4th 1007. Defendant does not challenge the language of the current version of the instructions which differs from the 1996 version.

Gibson v. Ortiz, *supra*, 387 F.3d at page 822, found no defect in the language of CALJIC No. 2.50.01. (*Ibid.*) That court only found error in the then current language of CALJIC No. 2.50.1, which outlined the applicable burden of proof for the prior sexual offenses: "Within the meaning of the preceding instructions the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed sexual offenses and/or domestic violence other than those for which he is on trial." (*Ibid.*) The court concluded that the interplay of this language with language of CALJIC Nos. 2.50.01 as it was then worded allowed the jury to find the defendant committed the uncharged offenses by a preponderance of the evidence and thus infer he had committed

the *charged* acts based upon facts found not beyond a reasonable doubt. (*Gibson*, at p. 822.)

In 1999, CALJIC No. 2.50.01 was modified so that it informed the jurors that “they may - - but are not required to - - infer from this predisposition that the defendant was likely to commit and did commit the charged offense.” (*People v. Reliford, supra*, 29 Cal.4th at p. 1013.) It further stated that ““if you find by a preponderance of the evidence that the defendant committed a prior sexual offense . . . , that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime.”” (*Ibid.*) The Supreme Court concluded that the language of the 1999 instructions precluded an interpretation which would authorize a guilty verdict based solely on proof of uncharged conduct. (*Ibid.*)

Although the instruction considered in *People v. Reliford, supra*, 29 Cal.4th 1007 was the 1999 version of CALJIC No. 2.50.01 (*id.* at p. 1013), the current instructions are not materially different from the instructions approved by the Supreme Court. (*People v. Cromp, supra*, 153 Cal.App.4th at p. 480.) CALCRIM No. 1191, as given here, cautions the jury that it is not required to draw these conclusions and, in any event, such a conclusion is insufficient, alone, to support a conviction. (*Cromp*, at p. 480.)

Defendant does not cite *Reliford* and has pointed to no authority showing that the 1999 version of CALJIC No. 2.50.01, or CALCRIM No. 1191, at issue in this case, has been criticized or found unconstitutional by any state or federal court. (See *People v. Schnabel* (2007) 150 Cal.App.4th 83, 87 [writ of habeas corpus denied, and certificate of

appealability denied in *Schnabel v. Evans* (E.D. Cal. 2010) 2010 U.S. Dist. LEXIS 105457.) To the contrary, the decisional authorities that have reviewed CALCRIM No. 1191 have found it to pass constitutional muster. (*People v. Loy* (2011) 52 Cal.4th 46, 71-74; *People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1103; *People v. Wilson* (2008) 166 Cal.App.4th 1034, 1049; *People v. Johnson* (2008) 164 Cal.App.4th 731, 739-740; *People v. Reyes* (2008) 160 Cal.App.4th 246, 253.) Based on *Reliford* and its progeny, defendant's challenge to CALCRIM No. 1191 is not well taken.

Similarly, with respect to CALCRIM No. 375, our Supreme Court has rejected a similar argument regarding CALJIC No. 2.50.1. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 383.) Defendant does not cite or address the holding of *Carpenter*. The version of CALJIC No. 2.50.1 considered in *Carpenter* is similar in all material respects to CALCRIM No. 375 as given here in its explanation of the burden of proof. Each of the instructions allows the jury to conclude from the prior conduct evidence that defendant was the person who committed the offenses alleged in this case and/or that defendant had the intent, motive, or a plan or scheme to commit the offenses alleged.

However, CALCRIM No. 375 cautions the jury that it is not *required* to draw these conclusions and, in any event, that such a conclusion is insufficient, alone, to support a conviction. Based on *Carpenter*, we therefore reject defendant's contention that CALCRIM No. 375 violated his due process rights. (Cf. *People v. Cromp, supra*, 153 Cal.App.4th at p. 480; see also *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

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RAMIREZ

P.J.

We concur:

HOLLENHORST

J.

KING

J.