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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.

DAVID RAY MILLS,

Defendant and Appellant.

E053902

(Super.Ct.No. FSB1001914)

OPINION

APPEAL from the Superior Court of San Bernardino County. Kyle S. Brodie, Judge. Affirmed.

Mark Yanis, 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, Quisteen S. Shum and Lilia E. Garcia, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant is serving ten years in prison after a jury convicted him of two counts of committing a lewd act upon a child under age 14 (Pen. Code, § 288, subd. (a)).

Defendant argues the trial court committed reversible error when it admitted into evidence his 1994 misdemeanor conviction for indecent exposure. As discussed below, we find no error. In any case, the evidence of defendant's guilt is so strong that any error would have been harmless.

FACTS AND PROCEDURE

On May 8, 2010, defendant took his girlfriend's eight-year-old daughter fishing at Lake Gregory while his girlfriend stayed behind at a mountain cabin where the three were spending the weekend. While on and near the beach at the lake, and in full view of two separate couples who were enjoying the lake nearby, defendant at first tickled and played with the child and applied sunscreen to her. Defendant then touched and licked the child's genitals and took suggestively posed pictures of her in her swimsuit. One of the nearby couples called 911. Defendant then took the child to his truck in the parking lot, where he had her lay back in the passenger seat with her feet up in the air while he licked her and rubbed her genitals, again in full view of those nearby. The responding sheriff's deputy found defendant near the truck with an erection. The child was in the front passenger seat and appeared to be scared, nervous and upset. The child later told a detective that defendant had licked her and pointed to her upper thigh near her genitals. At trial, the child denied that defendant had done anything that made her feel funny or uncomfortable and was not sure he had done anything bad to her.

Prior to trial, the prosecution moved to admit defendant's 1994 misdemeanor conviction for indecent exposure (Pen. Code, § 314.1). The People sought admission of

the conviction under Evidence Code section 1108¹ as propensity evidence. Defense counsel objected to the admission of the conviction. The trial court ruled that the conviction was admissible. The parties stipulated to the jury that defendant was “convicted of violating Penal Code Section 314(1), indecent exposure, a misdemeanor, on August 9, 1994.”

On September 8, 2010, a jury found defendant guilty of two counts of committing lewd acts upon a child under age 14. On October 18, 2010, the trial court sentenced defendant to a total of ten years in prison as follows: the upper term of eight years on one count and a consecutive term of two years on the other count. This appeal followed.

DISCUSSION

Defendant contends the court abused its discretion in admitting his 1994 misdemeanor conviction for indecent exposure because: 1) it was not sufficiently similar to the current charged offenses; 2) it was too remote in time; and 3) it was unduly prejudicial under section 352. We conclude there was no abuse of discretion.

As a general rule, evidence of a defendant’s conduct is not admissible to show disposition or propensity, but is admissible to prove identity, plan, intent, knowledge, or opportunity. (§ 1101.) Section 1108 provides a statutory exception, allowing propensity evidence to be admitted in sex offense cases to show a defendant is more likely to have committed the charged offense. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911.) Therefore, if the uncharged conduct is a sex offense, it is admissible subject to section

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

352. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1315.) The trial court weighs the probative value against the potential risk of prejudice, confusion, and undue consumption of time. (*Ibid.*) On appeal, we review the trial court’s ruling for an abuse of discretion. (*Ibid.*)

Defendant claims the court erred in admitting the prior conviction because of the dissimilar nature of the past and current occurrences. We disagree. As the People point out, both indecent exposure and lewd acts upon a child require lewd intent.² Defendant’s intent in touching the child, whether lewd or innocent, was an issue at trial, and therefore the lewd intent inherent in the prior conviction was similar enough to allow admission. Moreover, the past and current offenses were all ones defined as qualifying “sexual offenses” under section 1108, subdivision (d). Both a violation of Penal Code section 288 and indecent exposure under Penal Code section 314 are “sexual offenses” as defined in section 1108. (§ 1108, subd. (d)(1)(A).) Therefore, under that section, the evidence of defendant’s indecent exposure was admissible on the lewd act charges, unless it was insufficiently probative or unduly prejudicial under section 352.

Defendant also argues that the indecent exposure offense was too remote in time. However, the cases he cites do not support his claim that this trial court abused its discretion when it found the conviction was not too remote. In *People v. Burns* (1987) 189 Cal.App.3d 734, the appellate court reversed the burglary conviction and remanded

² Penal Code section 314, subdivision (1) reads in part: “Every person who willfully and lewdly, either: (1) exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby . . . is guilty of a misdemeanor.”

the matter to the trial court to consider the remoteness in time of the prior burglary conviction for impeachment purposes. The appellate court did this because the trial court mistakenly believed that it had no choice but to admit the prior conviction. In doing so, the appellate court indicated that the trial court, in the exercise of its discretion could easily find that the 20-year-old conviction was too remote in time, but it also noted “There is no consensus among courts as to how remote a conviction must be before it is too remote. [Citation.] . . . [T]here may be no conviction that is per se too remote to be used for impeachment.” (*Id.* at p. 738.) This case simply stands for the proposition that a trial court must exercise its discretion to determine whether a prior conviction is too remote in time, but does not set any threshold at all for when a trial court must find a conviction is too old.

The other case that defendant cites in support of his claim that the trial court could only have exercised its discretion to find the 1994 conviction too remote in time is *People v. Abilez* (2007) 41 Cal.4th 472. In that case the defendant argued the trial court abused its discretion when it *failed to admit* a 20-year-old sex crime conviction committed by a codefendant. Our Supreme Court simply upheld the trial court’s exercise of its discretion that a 20-year-old conviction was too remote in time.

On the other hand, the People cite to several cases upholding the trial court’s decision to admit into evidence sexual offenses committed 15 or 16 years prior (*People v. Frazier* (2001) 89 Cal.App.4th 30) and more than 20 years prior (*People v. Waples* (2000) 79 Cal.App.4th 1389). This, combined with the fact that defendant committed the current offense in a curiously public manner and the prior offense was by its nature

committed in a public place, neutralizes defendant's argument that the trial court abused its discretion in admitting the prior conviction based on its staleness and remoteness in time.

Defendant's final argument is that the indecent exposure evidence was unduly prejudicial under section 352. "The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice" (*People v. Kipp* (1998) 18 Cal.4th 349, 371.) "The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. "[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.' The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues.*" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.)

The bare fact of the 1994 conviction for indecent exposure was mild compared to the evidence presented on the current lewd act charges, which showed defendant sexually touched an eight-year-old girl over an extended period of time in a very public place. There was no reasonable likelihood the additional admission of the indecent exposure evidence would inflame the jury against defendant.

Even if we could agree with defendant that the trial court had somehow abused its discretion in admitting his prior conviction, such an error would not have been prejudicial

under any standard. Despite defendant's assertions that the case was a close one based on "the witnesses' ability to perceive what was happening, as well as some witnesses' biases," we conclude that the evidence of defendant's guilt was clear even without the admission of his prior conviction. This is because *four* people testified unequivocally that they saw defendant committing lewd acts on the child in a public place at remarkably close range. Ms. Varela testified that she saw defendant commit the lewd acts "about two cars" away from her. Mr. Serrano testified that he saw defendant from not "more than a hundred feet, maybe probably closer than that" and that he could clearly see what was happening. Ms. Williams testified that defendant was "ten feet" away from her on the beach when he first began to touch the child inappropriately, and that later she saw them from about 15 feet away when defendant and the child were in his truck. Mr. Rogers testified that defendant and the child were about 20 or 30 feet away when he saw defendant licking the child's inner thighs and about the same distance when they were in defendant's truck with the child's legs in the air.

We conclude the trial court properly admitted evidence of defendant's prior conviction for indecent exposure pursuant to sections 1108 and 352. The probative value of the propensity evidence outweighed any prejudicial effect of such evidence.

DISPOSITION

The judgment of conviction is affirmed.

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RAMIREZ
P. J.

We concur:

KING
J.

MILLER
J.