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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.

DERREK CLINTON HOLMES,

Defendant and Appellant.

E054753

(Super.Ct.No. RIF10003435)

OPINION

APPEAL from the Superior Court of Riverside County. Thomas Kelly, Judge.

(Retired judge of the Santa Cruz Super. Ct. assigned by the Chief Justice pursuant to art.

VI, § 6 of the Cal. Const.) Affirmed.

Brett Harding Duxbury, 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, Peter Quon, Jr. and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Derrek Holmes, of two counts of engaging in sexual intercourse with a child 10 years old or younger (Pen. Code, § 288.7, subd. (a)). He was sentenced to prison for 25 years to life and appeals, claiming evidence was improperly admitted and the jury was improperly instructed. We reject his contentions and affirm.

FACTS

The victim was the four-year-old daughter of defendant's stepdaughter and had something of a grandfather/granddaughter relationship with him, although she had not been to the house he shared with his wife and two children for some time before her May, 2010 weekend with them. That month, the victim reported to her mother that defendant had kissed her on the lips during the weekend. The mother forbade the victim to go to the house again. In July 2010, the victim told her mother that about four or five months before the kiss, defendant had put his penis in her "coo coo" and it had hurt and the sexual contact between them had occurred twice. In a pretextual call set up by the police between the mother and defendant, defendant admitted to molesting the victim, as will be described in greater detail elsewhere in this opinion. In an interview with the police, defendant admitted to rubbing his penis on the "lips of [the victim's] vagina" and on the slit and masturbating to ejaculation one time. He wrote letters of apology, which were introduced into evidence. The victim testified at trial that defendant touched her "coo coo" with his penis on two occasions—the first time did not hurt, but the second time did. The first time, he ejaculated. She made other statements during her Riverside County Child Assessment Team (RCAT) interview, which will be described elsewhere in this opinion.

ISSUES AND DISCUSSION

1. *Admission of Evidence Code section 1108 Evidence*

As part of their written motions in limine, the People sought permission to introduce evidence, pursuant to Evidence Code section 1108,¹ that between 1991 and 1995, defendant had sexual intercourse with his then 6-10 year old stepdaughter, who is victim's mother. At the hearing on this motion, defense counsel represented to the trial court that the mother had said² that defendant had "done various acts to her and molested her. . . . [H]e ejaculated inside of her. It was almost every day, some type of contact." Defense counsel argued that since the issue in this trial was whether the victim's labia had been manipulated by defendant, having the mother testify that defendant "actually penetrate[d] her and had intercourse with her and ejaculated inside her" was highly prejudicial and was not similar in nature to the acts the victim alleged defendant had perpetrated on her. Counsel argued that hearing this evidence "would cause the jurors to believe there was penetration [with the victim] even though there's not actual evidence of it" Contradicting defense counsel's representation as to the mother's prior statements, the prosecutor said that the mother reported that defendant "never fully penetrated her, but, . . . because she was so young and small, . . . he wouldn't put [his

¹ That section provides in pertinent part, "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." (Evid. Code, § 1108, subd. (a).)

² The mother did not testify at the preliminary hearing, so, we assume that the parties are referring to statements she made in her pretext phone interview with defendant.

penis] in all the way. [¶] . . . [¶] S[he s]ays it would not hurt her or leave any injury, and she also indicated that he would ejaculate either or her or in her.” The trial court ruled that the evidence would be admitted because it was highly relevant and “[there’s] a clear preference on the part of the Legislature for this sort of information to come in. It closely parallels what’s charged here. [¶] The degree of penetration I don’t see as that significant . . . because . . . we’re talking about two episodes with [the victim], and the mother has a multi-year relationship. Who’s to say what would have happened if the [victim] had had more time with defendant? It could have easily gone as far as the conduct [the] mother experienced. In any event, I suspect at the beginning of [the] mother’s involvement, it was similar behavior.” The court added that the evidence would not unduly consume time, there was insufficient prejudice to exclude it, it was similar to the behavior alleged by the victim, it was no more inflammatory than the current charges and it would not mislead the jury.

The mother testified at trial that between the time she was four or five to the time she was nine or ten, while living with her mother, who was married to defendant, twenty to forty times, defendant put his penis in her vagina as far as it would go without hurting her, rubbed her with it and masturbated, and ejaculated on her. During the mother’s pretext call with defendant, a recording of which was played for the jury, he did not deny molesting her when she was young. At one point, the mother said to defendant, “You did it to me. Why would you do it to my child, though? . . . That’s not right.” Defendant responded, “You know, it’s not.” At another point, the mother said, “. . . I know you did it to me, I just never thought this would happen to my child like, . . . I just can’t trust no

one no more.” Defendant responded, “Yeah, you know.” Later, defendant said, “I’m confessing to you because you already know the situation.” He also said, “[N]ever in my wildest dreams would I ever thought I would be going that route again.” He then said, “. . . I have a sickness. . . . [¶] . . . [¶] And, you know, the thing about it is it was just y’all two. [¶] . . . [¶] Just y’all two. I mean, it has never been nobody else.” The mother then asked defendant, “. . . [D]id [the victim] remind you of me or something?” to which defendant responded, “It’s a possibility.”

Similarly, in his recorded interview with the police, which was also played for the jury, defendant, after admitting that he rubbed his penis on the victim’s genital lips and “on the slit” while masturbating to ejaculation, agreed with the interviewer that “this has happened with [the mother] also” when the latter was around six years old. He admitted engaging in the same type of activity with the mother, i.e., “rubbing [his penis] on the slit of her vagina.” In explaining to the interviewer the nature of his problem, defendant said, “. . . I don’t have urges with no one else. [¶] Just [the victim] and . . . [¶] . . . [¶] [the mother]. [¶] [I]t just happened this time with them, um, prior with her and . . . this period with her. . . . [T]here’s really no urges, I don’t know why them two. . . . [M]aybe it’s . . . their resemblance to my ex-wife.³ . . . [¶] . . . [¶] [T]here’s a strong resemblance between . . . them two, and, my ex-wife. . . . [M]aybe that’s the reason.” He said during his phone call with the mother, he apologized to her for molesting her and the victim.

³ He was referring to the mother’s mother.

Defendant here claims that the trial court's ruling violated his federal due process rights because the evidence he had molested the mother was inadmissible under Evidence Code section 352. He acknowledged that he did not specifically object below on the basis of the federal constitution, but he asserts that such an objection is implied because Evidence Code section 1108 refers to Evidence Code section 352, citing *People v. Partida* (2005) 37 Cal.4th 428, 435. Actually, *Partida* holds, "If the [trial] court overrules [the defendant's] objection, [defendant] may argue on appeal that the evidence should have been excluded *for the reason asserted at trial*, but [the defendant] may not argue on appeal that the [trial] court should have excluded the evidence for a reason different from the one stated at trial. [The defendant] cannot argue the [trial] court erred in failing to conduct an analysis it was not asked to conduct. ¶ . . . If [the defendant] had believed at trial . . . that the trial court should engage in some sort of due process analysis that was different from the . . . 352 analysis, he could have, and should have, made this clear as part of his trial objection. . . . [H]e may not argue on appeal that due process required exclusion of the evidence for reasons other than those articulated in his . . . 352 argument. ¶ . . . [A] defendant may make a very narrow due process argument on appeal. He may argue that the asserted error in admitting the evidence over his . . . 352 objection had the additional legal consequence of violating due process. . . . ¶ . . . ¶ . . . [T]he admission of evidence, even if error under state law, violates due process only if it makes the trial fundamentally unfair. . . . To the extent, if any, that [the] defendant may be understood to argue that due process required exclusion of the evidence for a reason different from his trial objection, that claim is forfeited. . . . ¶

... ¶ ... Here, the trial court was called upon to decide whether the evidence was more prejudicial than probative. It did so. Whether its ruling was erroneous is for the reviewing court to decide. If the reviewing court finds error, it must also decide the consequences of that error, including ... whether the error was so serious as to violate due process. ... ¶ ... [I]f a defendant who objected on ... 352 grounds argues on appeal that the [trial] court erred in admitting the evidence for a reason different than that it was more prejudicial than probative, an additional trial invocation of due process or some other general principle that did not reasonably apprise the trial court of the analysis it was being asked to undertake would not be sufficient to preserve the argument. ¶ ... ¶ ... [T]o the extent [the] defendant asserts a different theory for exclusion than he asserted at trial, that assertion is not cognizable. ... ¶ ... ¶ The Court of Appeal held that the trial court abused its discretion under ... 352 in admitting some of the ... evidence [at issue]. ... [The d]efendant argues that this error was so serious as to violate due process. But the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*.” (*Id.* at pp. 435-439, fns. omitted, italics added.)

Therefore, we must begin with the question whether the trial court here abused its discretion in admitting evidence of defendant’s molestation of the mother. We cannot agree with defendant that it did. Defendant reasserts the point he made below that because the mother testified that defendant inserted his penis in her vagina, his conduct was dissimilar from the conduct he engaged in with the victim. However, the victim stated repeatedly in her RCAT interview that, on two separate occasions, defendant put

his penis *inside* her, and that he put it *in* her “business,” where she goes potty, or her “coo coo.” It remained for the jury whether to accept these statements as true and to determine whether defendant “penetrate[ed], no matter how slight[ly], . . . the [victim’s] vagina or genitalia.”⁴ Therefore, the mother’s statements were not substantially different from the victim’s. Additionally, according to defendant’s statements to the police interviewer, his conduct with both was identical, i.e., rubbing his penis on the slit of their vaginas. The jury was, of course, free to credit these admissions and to convict defendant on them. If only they had been admitted, and none of the mother’s statements, we cannot imagine in what way defendant would have been less prejudiced. As far as the number of times this occurred with the mother, we agree with the trial court that the difference between this and the number of times it occurred with the victim could easily have been explained by the fact that defendant had very limited access to the victim during the few months that these incidents occurred, and no access before and after, while he had unlimited access to the mother during the years she cohabitated with him and her mother.

Finally, we pause to observe how difficult, if not impossible, it would have been for the trial court to separate defendant’s admissions to the mother and the police interviewer of molesting the mother from his admissions concerning the victim. It is for this reason that we have extensively quoted those statements above.

⁴ A forensic pediatrician testified for the prosecution that the genitalia included the labia majora (the outer genital lips), the labia minora (the inner labial lips), the hymen, which she described as the entrance to the vagina, and the vagina.

Having concluded that the trial court did not abuse its discretion in admitting the evidence concerning defendant's molestation of the mother, we necessarily reject his contention that the trial court committed error which made the trial fundamentally unfair.

2. *Jury Instruction on Evidence Code section 1108 Evidence*

The jury was given the standard instruction (Judicial Council of California Criminal Jury Instructions, CALCRIM No. 1191) on the evidence of defendant's molestation of the mother, including the provision, "*If you decide that the defendant committed [sexual intercourse with the mother, who was 10 years old or younger], 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 decision, also conclude that the defendant was likely to commit and did commit [the] . . . charged [offenses]* [However, this] is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of [the charged offenses]. The People must still prove each charge beyond a reasonable doubt."

Defendant here contends that the italicized portion of this standard instruction violated his federal constitutional right to due process. Defendant appears to concede that in *People v. Falsetta* (1999) 21 Cal.4th 903, 917,⁵ the California Supreme Court concluded that Evidence Code section 1108's provision for the admission of evidence to show propensity is not a violation of due process and that we are bound by that holding.

⁵ Additionally, citing *Falsetta*, the California Supreme Court in *People v. Reliford* (2003) 29 Cal.4th 1007, 1012, 1013, held that the inferences provided for in the instruction are reasonable.

(*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) Therefore, his argument is better addressed to a court that is not bound by *Falsetta*.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

KING
J.