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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.

RUBEN DEJESUS FRANCO,

Defendant and Appellant.

E055308

(Super.Ct.No. INF1100806)

OPINION

APPEAL from the Superior Court of Riverside County. Jeffrey L. Gunther, Judge. (Retired judge of the Sacramento Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Nancy L. Tetreault, 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, Senior Assistant Attorney General, and Michael T. Murphy and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

According to the daughter and stepdaughter of defendant Ruben Dejesus Franco, he sexually molested each of them when they were under 14. He started by playing a “tickling game” with them; during this “game,” he would touch their breasts, buttocks, or pubic area. In the case of his stepdaughter, his conduct eventually escalated to oral copulation.

At trial, defendant admitted that he orally copulated his stepdaughter once, and she orally copulated him once. However, he claimed that she “enticed” him. He also claimed that the first incident took place in Mexico and the second took place after she had already turned 14. He claimed that, if he touched his own daughter’s breasts or pubic area at all, he did so only while trying to cover her up after her clothing became disarranged during the “tickling game.” Otherwise, he denied all the alleged sex acts.

After hearing testimony for three days, a jury took only one hour to find defendant guilty on seven counts of a nonforcible lewd act on a child under 14. (Pen. Code, § 288, subd. (a).) A multiple-victim allegation for purposes of the one strike law was found true. (Pen. Code, § 667.61, subd. (e)(5).) Defendant was sentenced to a total of 46 years to life, plus the usual fines and fees.

Defendant now contends:

1. The statements that defendant made during an interview by the police while he was in custody should have been excluded because he was not properly *Mirandized*.
2. Evidence Code section 1108, which allows the admission of prior sexual offenses as propensity evidence, is unconstitutional.

We find no reversible error. Hence, we will affirm.

I

FACTUAL BACKGROUND

A. *Uncharged Prior Acts in Mexico.*

When defendant started dating his wife-to-be, she was pregnant by another man. Thus, in 1990, she gave birth to defendant's stepdaughter, Jane Doe 1.¹ Defendant was the only father figure that Doe 1 ever knew. Defendant and his wife went on to have more daughters, including Jane Doe 2, born in 1998.

Doe 1 testified to a number of uncharged sexual acts that took place when the family lived in Mexico. The first occurred when Doe 1 was 10. She and defendant were in bed, "playing tickling," and he grabbed her "butt" over her clothing.

The next day, again during a "tickling game," defendant grabbed her "vagina" over her clothing. He told her "that [she] couldn't tell [her] mom."

After that, it "bec[a]me a regular thing" for defendant to grab Doe 1's vagina. He progressed to rubbing her vagina over her clothing for 10 minutes or so.

¹ As far as we can tell, the trial court never issued a formal order that the victims be referred to by fictitious names. (See Pen. Code, § 293.5.) However, it did instruct the jury before trial that certain persons were being referred to as Jane Doe to protect their privacy. (CALCRIM No. 123.) We construe this as a de facto order under Penal Code section 293.5. In any event, the record does not contain the victims' true names, so we could not use them even if we felt required to.

Finally, defendant progressed to oral sex. He would take off her clothes, tell her to lie down in bed, and orally copulate her.

Defendant told her “he was the only thing [her] mom had,” so if she ever told her mother, “[her] mom wasn’t going to believe [her]” and “[her] sisters would hate [her].”

B. Charged Acts in Indio.

In 2002, when Doe 1 was 12, the family moved to Indio. For a couple of months, defendant stopped molesting her. Then, however, he started grabbing her breasts or “butt,” over her clothes, whenever they passed in the hallway.

One time, when Doe 1 was in sixth grade, defendant came into her room and told her to put her mouth on his penis. She complied, but only for about 30 seconds.

(Count 1.)

Defendant then got on top of Doe 1, put his tongue in her mouth, and rubbed his body against hers. He told Doe 1 to take off her clothes. She was “on [her] period.” When she told him this, “[he] just said that it was okay, that he knew what he was doing”

Once she was naked, he told her to get down on her hands and knees on the floor. He rubbed the outside of her vagina, first with his finger, then with his penis. (Counts 2 and 3.) Afterwards, he told her not to tell her mother.

C. Doe 1’s Disclosure.

When Doe 1 was 15, she got pregnant by another man. After that, defendant stopped molesting her. When she was 17 or 18, she had a second child. When she was

20, however, defendant started tickling her again. Sometimes he would try to take off her pants.

One time, when Doe 1 needed defendant's permission to go on a trip to Knott's Berry Farm, he indicated that he would let her go if she would let him grab her breast. She did. As he was dropping her off to go on the trip, he told her that he wanted to have intercourse with her. He explained that "before he didn't want to because [she] was a virgin and didn't have any experience, but '[n]ow you have two kids and you ha[ve] been with two guys, so now you have more experience.'" "

After the trip, Doe 1 never went back home. She told a girlfriend about the molestation. She heard that defendant was threatening to try to get custody of her youngest child if she did not come back home. She then told her mother that defendant had molested her. Her mother took defendant's side and stopped talking to her. Doe 2 told Doe 1 that she hated her.

D. First, Noncustodial Police Interview of Defendant.

On October 26, 2010, the police interviewed defendant. He went to the police station voluntarily and was not under arrest.

At first, he denied any inappropriate touching. He claimed that Doe 1 was angry because he and his wife were going to seek custody of her youngest child. However, after the police said they were going to give him a lie detector test, defendant said, "I'm extremely ashamed, but [Doe 1] told you the truth." He admitted molesting her twice in Mexico and twice in the United States.

Defendant claimed that, in Mexico, Doe 1 told him to touch her, then took his hand and put it on herself; he could not resist.

He also orally copulated her once or twice in Mexico, again at her request.

He orally copulated her once in the United States, when she was 12 or 13. (Count 4.) She also orally copulated him once or twice.

Defendant insisted, “I didn’t want this to happen,” adding, “It’s because the devil doesn’t sleep”

E. *Forensic Interview of Doe 2.*

On October 27, 2010, a social worker conducted a forensic interview of Doe 2. At the time, Doe 2 was 11.

Doe 2 said that she believed Doe 1 because defendant “did the same thing to me” She and defendant would play; defendant would tickle her. Then he would touch her breasts under her bra. He would also touch her pubic area under her clothes. This had occurred three separate times in the preceding two months. (Counts 5, 6, and 7.)

At trial, Doe 2 testified that defendant had touched her breast and pubic area, but only accidentally, while tickling her. She claimed that she lied during the forensic interview because she “panicked.”

F. *Second, Custodial Police Interview of Defendant.*

On October 28, 2010, when defendant was in custody, the police interviewed him again. Because his statements in this second interview are pertinent to his *Miranda* claim (see part II, *post*), we discuss them in some detail.

The interview was almost entirely concerning Doe 2. The police started by telling defendant that Doe 2 was claiming that he had touched her breasts and vagina “several times.”

Defendant was insistent that he did not “do anything” to Doe 2. He explained that he and Doe 2 would “play”; he would tickle her. While they were playing, her pants and panties would come down. He told her to pull them up. He then pulled her panties up himself. He pointed out to her that she already had pubic hair, and he warned her that “[t]he boys are going to notice it.” He told Doe 2 he was not going to play with her anymore.

Similarly, while they were playing, her bra would slide up (or down) and her breast would come out. He told her to cover up. He then pulled her bra down himself. He told her she was “turning into a woman” and warned her that “[t]hey are going to want to grab you here.” Again, he told Doe 2 he was not going to play with her anymore.

This had all happened two or three months earlier, while they were living in La Quinta.

Defendant repeatedly asked the police to give him a lie detector test, because it would show that he had no intention of “molesting” Doe 2. He also repeatedly asked them to give Doe 2 a lie detector test.

Defendant did not clearly state whether he actually touched Doe 2's breasts or genitals.² At one point, he stated flatly, ". . . I never touched her there." At other times, however, he seemed to concede that he did. For example, when asked, "[T]he time you touched the breast, . . . how exactly did it happen?," he answered, "We were playing." Likewise, when asked, "When was the first time that you . . . touched her down under?," he answered, "[I]t was when we were living at that apartment."

The single statement by defendant that perhaps best summarizes the entire interview was, ". . . I may have touched, but just touched, not touched in a malicious way."

G. *Defendant's Trial Testimony.*

At trial, defendant admitted touching Doe 1 inappropriately while in Mexico, but only once, and only because she made him do it. He was playing with her and tickling her. She grabbed his hand and put it "here," over her clothes. He immediately withdrew his hand.

He also admitted orally copulating Doe 1 in Mexico, but again, only once and at her instance. She pulled down his shorts, "and she sucked [him] twice . . ." He asked, "Who showed you how to do that?" She replied, "[I]f you do it to me, I'll tell you." He

² Defendant's statements — at trial, as well as in the interviews — were elliptical, rambling, and choppy to an extent that is hard to describe without setting them forth at length.

“did it twice with the tongue,” then stopped. She was angry, and said, “[Y]ou didn’t do it. . . . I’m not going to tell you.”

Defendant claimed there was only one “inappropriate” incident in the United States. Moreover, when it occurred, Doe 1 was 14. She told defendant, “. . . I want to do you with the mouth.” She then took off his shorts. He did not have time to react. She “managed to suck [him] twice” before he “removed [him]self.”

Doe 1 then got naked, got down on all fours, and said, “[D]o me then with your mouth, or put your thing there.” He realized that she had her period. He refused and left the room.

Defendant denied ever orally copulating Doe 1 in the United States. When he told the police that he did, he was confused, because he had a bad headache.

Defendant also testified that, when he tickled Doe 2, sometimes her breast or pubic hair became visible. However, he denied touching her inappropriately. He admitted that he pulled up her bra, and “my nail, my finger perhaps touched her bust.” He denied pulling up her panties.

II

MIRANDA

Defendant contends that his statements to the police in his second, custodial interview should have been excluded because the *Miranda*³ warnings he was given were

³ *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

defective, and he did not waive his *Miranda* rights. To the extent that his trial counsel forfeited this contention by failing to object, he contends that he received ineffective assistance of counsel.

A. *Additional Factual and Procedural Background.*

At the beginning of defendant's second, custodial interview, he was given the following by way of *Miranda* warnings (as translated from Spanish by a certified interpreter):

“[OFFICER]: . . . Okay. Look. We came to talk to you about something. So, I have to tell you something first. Okay? Well, you have the right to remain silent. Anything you say can be used against you in court. And you have a right to have an attorney present during this, uh, while we are talking or as to how we are going to talk. And if you cannot pay one, pay this, pay for an attorney, the county will pay one for you. You, if you want one.

“DEFENDANT: I don't have, I don't have the money.

“[OFFICER]: *Just if the county offers you one.* Okay . . . Well, do you understand the rights that I explained to you?” (Italics added.)

The transcript of the interview does not indicate that defendant ever responded to that question or that he ever expressly waived his rights. Defense counsel, however, did not object to the admission of the second interview.

B. *Analysis.*

1. *Forfeiture.*

Defense counsel forfeited defendant's present contention by failing to object at trial. (Evid. Code, § 353, subd. (a); *People v. Polk* (2010) 190 Cal.App.4th 1183, 1194.)

Defendant argues that we have discretion to consider a forfeited claim. That is not true, however, when the claim involves the improper exclusion of evidence; in that event, the claim is statutorily barred by Evidence Code section 353, subdivision (a). (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

2. *Ineffective assistance.*

Defendant therefore contends that his trial counsel rendered ineffective assistance.

““[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citation.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]” [Citation.]’ [Citation.]

““Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a “strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.””

[Citation.] ‘[W]e accord great deference to counsel’s tactical decisions’ [citation], and we have explained that ‘courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight’ [citation]. ‘Tactical errors are generally not deemed reversible, and counsel’s decisionmaking must be evaluated in the context of the available facts.’ [Citation.]

“In the usual case, where counsel’s trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel’s acts or omissions. [Citations.]” (*People v. Weaver* (2001) 26 Cal.4th 876, 925-926.)

Here, defendant’s statements in the second interview were largely exculpatory, not inculpatory. Although he admitted touching Doe 2’s breasts and pubic area, he denied doing so with any sexual intent. Rather, he told the police that he was only trying to help her cover up and to teach her not to display those areas. He claimed that he even told her that he was not going to play the tickling game with her any more. During the interview, he repeatedly asked the police to give both him and Doe 2 a lie detector test.

Given Doe 2’s videotaped statements during her forensic interview, a claim that defendant did touch Doe 2, but without any sexual intent, was more credible than a claim that he never touched her at all. Moreover, had defendant tried to testify at trial that he never touched Doe 2, his statements in the second interview, even if they were obtained in violation of *Miranda*, could have been used to impeach him. (*Harris v. New York* (1971) 401 U.S. 222, 224-226 [91 S.Ct. 643, 28 L.Ed.2d 1]; *People v. Demetrulias* (2006) 39

Cal.4th 1, 29-30.) Accordingly, at trial, defendant testified, consistent with his statements in the second interview, that he touched Doe 2, but he lacked sexual intent. The admission of defendant's statements in his second interview therefore actually helped his defense by showing that he had promptly offered the same explanation to the police.

Defense counsel could have had a reasonable tactical purpose for not objecting to the second interview on *Miranda* grounds. Separately and alternatively, we cannot say that, if defense counsel had objected, and if the second interview had been excluded, there is a reasonable probability that defendant would have enjoyed a more favorable result. We therefore conclude that defendant has not shown ineffective assistance.

III

THE CONSTITUTIONALITY OF EVIDENCE CODE SECTION 1108

Defendant contends that Evidence Code section 1108, which makes prior sexual offenses admissible as propensity evidence, violates due process and equal protection.

Defendant forfeited these contentions because he did not raise them below. (Evid. Code, § 353, subd. (a); *People v. Navarro* (2013) 212 Cal.App.4th 1336, 1347, fn. 9.) He does not assert any theory under which we could consider them despite the forfeiture, and we perceive none.

Separately and alternatively, however, we also reject defendant's constitutional contentions on the merits.

As defendant concedes, the California Supreme Court has held that Evidence Code section 1108 does not violate due process (*People v. Falsetta* (1999) 21 Cal.4th 903, 910, 922), and we are bound by that holding.

As defendant further concedes, this court has held that Evidence Code section 1108 does not violate equal protection. (*People v. Waples* (2000) 79 Cal.App.4th 1389, 1394–1395 [Fourth Dist., Div. Two]; accord, *People v. Fitch* (1997) 55 Cal.App.4th 172, 184-185.) Hence, we reject this claim as a matter of stare decisis.

IV

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.