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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.

CHRISTOPHER SEAN CARDER,

Defendant and Appellant.

E062736

(Super.Ct.No. BAF1300085)

OPINION

APPEAL from the Superior Court of Riverside County. David A. Gunn, Judge.

Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Andrew Mestman and Allison V. Hawley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Christopher Sean Carder began sexually assaulting his daughter Jane Doe 1 (JD1) when she was eight years old, when they lived in Missouri. They moved to California in 2011, and he continued to molest her until the summer of 2012, when JD1 finally disclosed the abuse. Jane Doe 2 (JD2), who lived in Missouri, testified that he had also molested her.

Defendant was convicted of four counts of committing lewd and lascivious acts upon JD1 between March 27, 2011, and August 12, 2012 (Pen. Code, § 288, subd. (a)). Defendant was sentenced to a total state prison sentence of 12 years.

Defendant now claims on appeal as follows: (1) JD2's testimony was improperly admitted pursuant to Evidence Code section 1108¹ because its probative value was outweighed by the prejudice, and the disproportionate focus on the character and propensity evidence deprived him of due process and a fair trial; (2) section 1108 is unconstitutional on its face; and (3) the trial court erred by giving CALCRIM No. 362, the consciousness of guilt instruction, over defense objection, because the instruction embodies an irrational permissive inference in violation of his due process rights. We reject defendant's claims and affirm the judgment in its entirety.

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

FACTUAL AND PROCEDURAL HISTORY

A. PEOPLE'S CASE-IN-CHIEF

1. *JD1'S TESTIMONY*

JD1 was 15 years old at the time of trial. JD1 and her family lived in Missouri when she was growing up. They moved to Beaumont, California when she had just finished the fifth grade. JD2 was her cousin and lived near her while they were in Missouri.

At trial, JD1 testified that the molestation started when she was eight years old when they still lived in Missouri. The first memory she had was that defendant grabbed her vagina with his hand. She had on clothes. He held his hand on her vagina for a few minutes. After the first time, defendant touched her vagina almost every day. He progressed to putting his hand inside her underwear and rubbing her vagina. It made her very uncomfortable. Defendant told her not to tell anyone.

On another occasion, JD1 was in her bedroom. Defendant grabbed and rubbed her vagina over and under her clothes. She told him to stop but he told her to be quiet. In addition, he put his mouth on her vagina about 15 times. She told him to stop and would kick him.

One day, JD1 asked defendant for some Play-Doh. He told her she could have some if she sucked his penis. She put his penis in her mouth. Defendant pulled her head towards him. JD1 was crying. JD1 slept in the bed with defendant because she was scared. He rubbed his penis on her vagina over her pajamas. She felt something wet on her clothes when he stopped.

JD1 was questioned by police in Missouri when she about 10 years old. She denied that she was being molested by defendant. She did not want to break up the family.

When they moved to California in 2011, defendant touched her vagina with his hand three to four times a week. He touched her both under and over her clothes. He also put his hands in her shirt and touched her bare breasts two or three times. He also squeezed her butt. On one occasion, he took off his underwear and rubbed his penis on her vagina. JD1 kicked him in the penis and he stopped. Defendant was angry with her for kicking him in the penis and called her a “bitch.”

For the first time at trial, JD1 said defendant put his mouth on her vagina a “couple of times” when they lived in California while she was in her bedroom. She was 12 or 13 years old at the time. Defendant would put his tongue inside the lips of her vagina; JD1 felt uncomfortable. Defendant exposed his penis to her several times while they were sitting on the couch watching television. She also saw him watching pornography on his computer.

JD1, her older brother S.C. (Brother), and her mother E.C. (Mother), went to the Philippines to visit Mother’s family in 2012. While there, JD1 told her two cousins that defendant had been molesting her. She then told Brother. Mother found out about the molestations when they returned from the Philippines and she immediately took JD1 to the police.

JD1 was interviewed several times and had disclosed different acts of abuse each time. Defendant moved to California from Missouri before the rest of the family. JD1

sent him emails telling him that she wanted to move to California and that she loved him. This was around the same time that he was molesting her. She never saw defendant touch JD2. JD1 had called out to Mother on occasions when defendant was grabbing her vagina but Mother would not come to her aid. Defendant would tell Mother that he was just playing with JD1 and that JD1 was hitting him.

2. *POLICE INVESTIGATION AND PRETEXT PHONE CALL*

Beaumont Police Officer Grant Zemel spoke with JD1 on August 12, 2012. Officer Zemel had JD1 call defendant. The telephone call was recorded. JD1 asked defendant why he touched her in inappropriate places. He at first denied that he touched her. She threatened to tell Mother if he did not admit it. Defendant then said that he may have touched her when they were roughhousing but it was not on purpose. He claimed he only would shake her to wake her up some mornings; he did not come in her room and molest her. JD1 accused him of touching her vagina and boobs. He responded, “W-w-when? Sweetie, honestly I do not remember doing that. I know when we’re messin’ around I grab you and flip you over.”

Defendant claimed that he just wanted to play and wrestle with her. He said he was sorry that made her uncomfortable. He told her that she should have come to him and talked about it. JD1 then asked, “Dad, but what about when I was younger you showed me your penis and you were trying to get me to do stuff with you?” Defendant responded, “Um, that was a long time ago. That was when I was takin’ all kind of weird painkillers and I’m off of them now ‘cause they screwed me up.” JD1 told him that he was still touching her. He claimed if he touched her inappropriately he did not know or

did not mean to. She confronted him that she would scream and tell him to stop, and he said that he would walk away.

JD1 then told him that she wanted to talk to Mother about it. He told her that if she told Mother, he would go to jail. He then repeated over and over to her, “Is that what you want?” JD1 told him that she was older and realized what he was doing was wrong. She again asked him why he did these things to her.

He responded, “I’m telling you why. I didn’t realize it. I didn’t realize it.” JD1 then told him that it made her feel gross when he would touch her. He responded, “I understand now. It would make anyone. I’m sorry. So what—you do not want me around.” She again told defendant she was going to tell Mother. He told her that he would be gone if she told on him. He wished she had talked to him about being too “rough.”

3. *ADDITIONAL TESTIMONY*

Brother recalled that he, Mother and JD1 went to the Philippines in 2012. While there, JD1, who was 12 or 13 years old at the time, confided in Brother that defendant had been molesting her. When JD1 told him, she was crying, shaking and very distressed.

When JD1 was seven or eight years old, she started isolating herself away from defendant and the rest of the family. She was very introverted. When JD1 was eight or nine, Brother walked into her bedroom. Defendant was in the room and was “just playing” with JD1; it appeared that JD1 was “recoiling” from defendant and “it didn’t look right.” Defendant was physically and verbally abusive to Brother growing up.

Brother recalled when they were in Missouri, that all of the family would get together for barbecues and swimming at their aunt's house next door. JD2 would be at the family events. Brother recalled defendant roughhousing with JD1 and other kids in the pool. In 2009, JD2 accused defendant of molesting her. Three-fourths of the family did not believe JD2, that defendant had molested her.

4. JD2'S SECTION 1108 TESTIMONY

JD2 was 19 years old at the time of trial and lived in Missouri. JD2 and defendant would see each other at family functions while he and the family lived in Missouri. JD2 last saw defendant in 2009. JD2 cried while testifying. JD2 went to the Missouri police in 2009, a year after she was molested.

In 2008, defendant first touched her. She was 13 years old and was at her aunt's house. JD2 was swimming with her cousins Michele, Madison, and JD1. Defendant was wrestling with them in the pool. He touched JD2's breasts several times over her bathing suit under the water. JD2 did not think it was an accident. He also grabbed her vagina and butt. JD2 got out of the pool and went inside the house with Madison and Michelle. They discussed that defendant had done the same thing to Madison. They did not tell anyone.

On another day, JD2 and Michelle were playing in the pool. Defendant walked by the pool from his house. Michelle was facing away from defendant. Defendant pulled his pants down and showed JD2 "everything." He grabbed his "balls" and then pulled his pants back up. JD2 told Michelle.

On another occasion, defendant had grabbed JD2's butt and said to her, "Hey, cutie." During one Fourth of July holiday, she was sitting next to him at a big table. She reached across him to get something and he put his hand down her shirt. He touched her breasts over her bra. No one else at the table saw what he did.

JD2 eventually told her stepmother. The police were called and investigated her allegations. Some of her family members did not believe her. No charges were filed against defendant.

B. DEFENSE

Defendant's sister, mother, and an uncle, all testified that defendant and JD1 had a close relationship while JD1 was growing up. They never saw defendant do anything sexually inappropriate with JD1. Further, JD2's accusations were false. Madison testified that JD2 never told her at her house that defendant was molesting her. She first became aware of the accusations in 2009 when the police investigated the matter.

Defendant testified on his own behalf. When asked if he had molested JD1, he initially responded, "Not to my knowledge." When asked to clarify, he stated he did not do anything to JD1. Defendant always had consistent employment. He denied he molested JD2. He did not like to look at pornography. JD1 and defendant were very close when they lived in Missouri. He would oftentimes wrestle with her and tickle her. He could have accidentally touched her breast and vagina while doing this. He never hurt Brother although they had a tough relationship.

Several weeks prior to JD1 going to the Philippines, she started to spend more time in her room and was distant. Defendant claimed that just before JD1, Mother and

Brother were leaving for the Philippines, defendant accidentally touched JD1's breast as he was hugging her goodbye. Mother saw it and asked him what he was doing. Mother was angry with defendant. His marriage with Mother was in trouble.

Defendant explained his statement on the pretext call regarding showing her his penis and getting to her to do stuff as follows: Defendant had been taking Oxycodone for pain. He came out of the shower and was naked. JD1 and Mother were in the room. JD1 yelled at him for being naked in front of her. Defendant then put on his underwear. JD1 was seven or eight years old at the time. He did not try to do anything sexual with JD1.

When defendant was interviewed by Officer Zemel he tried to explain how JD1 could come up with the claim that he rubbed his penis on her vagina. All he could think of was when she was four or five years old she would sit on his lap in the bathtub when he washed her hair. He also took showers with her to wash her hair. His penis may have contacted her during this time but it was not intentional.

He admitted it was possible with roughhousing in the pool and wrestling he could have accidentally touched JD2 on the breast or vagina. He did not recall ever sitting by JD2 during a Fourth of July celebration. He never called JD2 "cutie." He never exposed himself to JD2.

DISCUSSION

A. SECTION 1108

Defendant claims that JD2's testimony was improperly admitted propensity evidence, which should have been excluded as more prejudicial than probative pursuant

to section 352. Defendant also insists that the People put a disproportionate focus on the character and propensity evidence in violation of his right to a fair trial.

1. *ADDITIONAL FACTUAL BACKGROUND*

Prior to trial, the People sought to introduce testimony from JD2 pursuant to section 1108. JD2 had reported the touching in the pool and defendant exposing himself to her, as set forth *ante*. The People argued that this evidence showed defendant's propensity to commit child molestation.

At the hearing on the admission of the evidence, defendant's counsel admitted that JD2's testimony was probably admissible under section 1108 but did not concede that it was admissible under section 352. The trial court engaged in a section 352 analysis. The trial court believed it was highly probative evidence. While recognizing "there is a prejudicial nature to all 1108 evidence," it noted that the acts were similar and that JD2 was similar in age to JD1 at the time of the incidents. The incidents involving JD2 were not remote and were not more aggravating. The trial court ruled as to JD2, "[I] don't think it is overly prejudicial, and I think the probative value clearly outweighs any prejudice."

At the close of evidence, the jury was instructed that it may consider the crimes committed against JD2 if the People had proved them by a preponderance of the evidence. It was then instructed, "If you conclude the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all of the other evidence. It [is] not sufficient by itself to prove the defendant guilty of lewd or lascivious acts on a child under the age of 14 years as charged in Counts 1 through 4."

2. ADMISSION OF SECTION 1108 TESTIMONY

We first address defendant's claim that JD2's testimony was improperly admitted as its probative value was outweighed by prejudice pursuant to section 352. Section 1108 provides, in relevant 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." Section 1108 permits the introduction of this evidence as propensity evidence. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911-912 (*Falsetta*).

The *Falsetta* court determined that section 1108 does not unduly burden the defendant because it does not allow unrestricted admission of the defendant's bad acts, character or reputation, but "is limited to the defendant's sex offenses, and it applies only when he is charged with committing another sex offense." (*Falsetta, supra*, 21 Cal.4th at p. 916.) Further, the admission of the evidence is subject to exclusion under section 352. (*Falsetta*, at pp. 916-917.)

"[S]ection 352 gives a [trial] court the discretion to 'exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1116.) Factors that a trial court should consider when deciding whether to allow the presentation of prior sexual offense evidence are: "(1) whether the propensity evidence has probative value, e.g., whether the uncharged conduct is similar enough to the charged behavior to tend to show defendant did in fact commit the charged

offense; (2) whether the propensity evidence is stronger and more inflammatory than evidence of the defendant's charged acts; (3) whether the uncharged conduct is remote or stale; (4) whether the propensity evidence is likely to confuse or distract the jurors from their main inquiry, e.g., whether the jury might be tempted to punish the defendant for his uncharged, unpunished conduct; and (5) whether admission of the propensity evidence will require an undue consumption of time." (*Id.* at p. 1117.)

"This court reviews the admissibility of evidence of prior sex offenses under an abuse of discretion standard. [Citation.] A trial court abuses its discretion when its ruling 'falls outside the bounds of reason.'" (*People v. Wesson* (2006) 138 Cal.App.4th 959, 969.) The trial court need not detail the weighing process on the record to comply with the requirements of section 352. (*People v. Williams* (1997) 16 Cal.4th 153, 213-214.)

Here, the trial court engaged in a weighing of the factors pursuant to section 352, and properly determined that JD2's testimony was admissible. Here, the offenses were not remote, as they were committed around the same time that defendant was molesting JD1, and certainly were not more inflammatory than the charged offenses. Defendant touched JD2's breasts and exposed himself to her as opposed to forcing JD1 to orally copulate him, and orally copulating her on numerous occasions. Moreover, the evidence did not involve an undue consumption of time or confuse the issue. The prosecutor presented only JD2's testimony in its case-in-chief, and brief statements by Brother and JD1 that they knew JD2 accused defendant of molesting her. Defendant chose to present

additional evidence to contradict JD2's testimony. The evidence was properly admitted pursuant to section 1108.

Moreover, we disagree with defendant that the evidence of the prior uncharged crimes rendered the trial fundamentally unfair based on the disproportionate focus on character and propensity evidence. Defendant has not cited a case to support his claim that once section 1108 evidence is admitted, the People are limited in the amount of evidence that he or she can present. Defendant appears to contend that once the section 1108 evidence was admitted, the prosecutor was limited in its ability to cross-examine the defense witnesses on the evidence, or could not question more than one of his or her own witness regarding the evidence. Defendant simply provides no support for such a claim.

Additionally, any conceivable error in admitting JD2's testimony was harmless. The erroneous admission of prior uncharged offenses is prejudicial if it is reasonably probable a result more favorable to defendant would have been reached if the evidence had not been admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Jandres* (2014) 226 Cal.App.4th 340, 357 [applying the *Watson* standard to a section 1108 error].)

Initially, the jury was instructed that it could not find defendant guilty solely on the basis of the uncharged offenses. Further, the evidence that JD1 was molested by defendant was strong. JD1 presented compelling testimony that defendant repeatedly molested her. This was corroborated by defendant's own statements in the pretext phone call that he had exposed his penis to her in Missouri and claimed he was on medication. Further, Brother testified it was evident that JD1 had changed her personality, spending time alone and not wanting to be with defendant, starting when she was eight years old.

He also observed an unusual incident between defendant and JD1. Based on the foregoing, even without JD2's testimony regarding the uncharged offenses, it is not reasonably probable that a more favorable verdict for defendant would have been reached.

B. CONSTITUTIONALITY OF SECTION 1108

Defendant further contends that consideration of the uncharged offenses as propensity evidence under section 1108 deprived him of equal protection and his due process right to a fair trial. While he acknowledges that this question has long been settled in California, he nevertheless raises it in order to preserve it for federal review. Bound by our Supreme Court's rulings, and finding it unnecessary to engage in a lengthy discussion on this issue, we reject his argument. (*Falsetta, supra*, 21 Cal.4th at pp. 915, 918 [rejecting due process challenge to section 1108 and noting with approval rejection of equal protection challenge in *People v. Fitch* (1997) 55 Cal.App.4th 172, 184-185]; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

C. CONSCIOUSNESS OF GUILT INSTRUCTION (CALCRIM NO. 362)

Defendant contends that the trial court erred by instructing the jury with CALCRIM No. 362 on consciousness of guilt over his objection because the instruction embodies an irrational permissive inference of his guilt in violation of due process.

1. *ADDITIONAL FACTUAL BACKGROUND*

Defendant objected to CALCRIM No. 362 being given to the jury on the ground that he did not make a false or misleading statement prior to trial. The trial court determined that the instruction came down to whether the jury believed or disbelieved his

statements made to police and in the pretext telephone call. If the jury believed that his statements were false or misleading, those statements could amount to consciousness of guilt because he was trying to keep suspicion off of himself. The trial court felt it was a reasonable instruction. Further, “[i]t also protects the defendant in that it tells them they can’t prove guilt by that statement alone.”

Defense counsel argued that CALCRIM No. 362 contemplates a statement that is an obvious lie. He claimed it was “something that is patently false that a defendant acknowledges is a lie later on in the out-of-court conversation or even in court during testimony.” For example, when a defendant denies being at the scene of the crime, but later admits his presence, when it was obvious he was present, constitutes a false statement. Defense counsel argued that the instruction presupposes that the defendant made a false statement. The evidence in the case did not establish that defendant’s statements were false.

The trial court disagreed. It believed the instruction left it up to the jury to determine if there had been a false or misleading statement. The trial court stated, “I am looking primarily at the interview with the Beaumont police detective. If the jury concludes he is making false or misleading statements regarding accidental touching or not touching at all, if the jury concludes that, then, again, they could believe he was trying to avert suspicion and trying to keep [them] from pursuing the matter or pursuing an arrest in the matter. [¶] I think it does go to that. It is certainly a broader scenario, if you look at the case law. I think it protects both parties. Look, this is evidence you can’t

use it by itself to convict.” The trial court found it was a question of fact for the jury to decide whether defendant made any false or misleading statements.

The jury was instructed that it could not convict defendant based on his out-of-court statements alone. They were then instructed with CALCRIM No. 362 as follows: “If the defendant made a false or misleading statement before this trial or relating to the charged crime knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime, and you may consider it in determining his guilt. [¶] If you can conclude the defendant made the statement, it is up to you [to] decide its meaning and importance. However, evidence the defendant made such a statement cannot provide guilt by itself.”

2. ANALYSIS

CALCRIM No. 362 is the successor to CALJIC No. 2.03, which provided as follows: “If you find that before this trial [a] [the] defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which [he] [she] is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.”

Our Supreme Court has previously held that CALJIC No. 2.03 is not an improper “pinpoint” instruction. (*People v. Arias* (1996) 13 Cal.4th 92, 142; *People v. Kelly* (1992) 1 Cal.4th 495, 531-532.) The court explained in *Kelly*, “CALJIC No. 2.03 . . . does not merely pinpoint evidence the jury may consider. It tells the jury it may consider the evidence but it is not sufficient by itself to prove guilt. [Citation.] Defendant

obviously does not quarrel with the emphasized language. If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence. . . . There was no error.” (*Kelly*, at pp. 531-532.) Moreover, our Supreme Court has held, “[t]he cautionary nature of [CALJIC No. 2.03] benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory.” (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224.)

Defendant attempts to distinguish CALCRIM No. 362 from 2.03. He insists that the language in CALCRIM No. 362 impermissibly instructs the jury that it “may consider [the false or misleading statement] in determining his guilt,” language not used in CALJIC No. 2.03. However, the final sentence in CALCRIM No. 362 provides, “[The] evidence that the defendant made such a statement cannot prove guilt by itself.” The language in CALCRIM No. 362 is sufficient to advise the jury, as did CALJIC No. 2.03, that it could consider the defendant’s statements as consciousness of guilt, but could not find him guilty of the charged crime based on the evidence alone.

Moreover, in *People v. McGowan* (2008) 160 Cal.App.4th 1099, that court found, “Although there are minor differences between CALJIC No. 2.03 and CALCRIM No. 362 . . ., none is sufficient to undermine our Supreme Court’s approval of the language of these instructions. Crucially, CALCRIM No. 362 contains nearly identical language to that relied on in [*People v. Kelly*], *supra*: ‘[E]vidence that the defendant made such a statement cannot prove guilt by itself.’ . . . Thus, like CALJIC No. 2.03, CALCRIM No. 362 is not an unlawful ‘pinpoint’ instruction.” (*Id.* at p. 1104.)

There was no error instructing the jury with CALCRIM No. 362.

DISPOSITION

We affirm the judgment.

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MILLER
J.

We concur:

RAMIREZ
P. J.

KING
J.