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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLIE ROSE ATTEBURY,

Defendant and Appellant.

G044900

(Super. Ct. No. 08CF3103)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Reversed.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Carlie Rose Attebury of one count of unlawful intercourse with a minor (Pen. Code, § 261.5, subd. (c)), two counts of oral copulation of a minor (Pen. Code, § 288a, subd. (b)(1)), and one count of sexual penetration of a minor by a foreign object (Pen. Code, § 289, subd. (h)), but found her not guilty of a lewd act upon a 15-year-old child by a person at least 10 years older (Pen. Code, § 288, subd. (c)(1)) and dissuading a witness (Pen. Code, § 136.1, subd. (b)(1)). After denying her motion for new trial based on juror misconduct, the court sentenced her to 16 months for unlawful sexual intercourse and imposed concurrent 16-month terms for each of the other three counts.

Defendant contends the court prejudicially erred in admitting evidence of her prior sexual relationships with former students, all over the age of 18. We agree and reverse the judgment on that basis. In light of that, we do not address defendant's additional claims the court erred in denying her new trial motion and admitting evidence of extortion attempts.

FACTS

1. Prosecution Case

When A. R. was 15 years old and a sophomore at El Modena High School, he told defendant, his music teacher and band director, he had a crush on her. In November 2007 during homecoming, they French kissed and “made out” for about a minute while alone in defendant's office until defendant pushed him away and said “no.”

Soon afterwards, defendant moved into a house down the street from A.'s residence. A. visited often and the two would engage in kissing, touching, and “dry humping,” described as “the act of intercourse but without penetration,” which they sometimes did while naked. They dry humped on two occasions, with the shaft of A.'s penis rubbing against defendant's bare vagina until he ejaculated. A. put his finger in

defendant's vagina several times and performed oral sex on her once, defendant orally copulated him twice. They told one another they loved each other.

In June 2008, defendant and three staff members chose A. over several other contenders to be the drum major to conduct and lead the marching band on the field the following school year. A. did not tell anyone about his sexual relationship with defendant throughout the summer.

When school started in October, the principal asked him about his relationship with defendant. A. admitted they had one kiss but denied having a sexual relationship with defendant because he was scared and did not want to get himself or anyone else in trouble. For the same reason, he did not initially disclose the extent of their relationship to police, stating they had kissed and hugged six to seven times, usually to say goodbye or hello, but did not have sex or touch each other's genitals because defendant said "no" due to his age. He indicated he loved defendant and wanted to marry her, and told the officer defendant had never run her hands through his hair, although she had done so at a sporting event. A. told both his mother and Emily Rivera, his closest and only friend to whom did not want to lie, about kissing defendant but claimed he had no other sexual contact with her.

A. later admitted the sexual relationship with defendant, describing it in detail to a second detective. He was thereafter harassed by other students, who yelled obscenities and threw wet condoms at him.

During the course of A. and defendant's relationship, several parents observed them interacting together. Roberta Lee, the mother of one of the students not chosen to be drum major often saw A. sitting in defendant's office as early as 6:45 a.m., believed there was "flirtatious behavior going on that needed to stop," and complained defendant showed "inappropriate and unprofessional" favoritism to A. She and Francis (Rick) Manzano, the father of another band member who's friend was not picked for drum major, witnessed defendant run her hand through A.'s hair while he was seated

between her legs on the floor of a lower bleacher. Manzano also frequently saw defendant and A. alone in the band room watching movies “lying down on the floor together within very close proximity, sometimes even touching” or in defendant’s office with the door closed. Around that same time, the mother of another band member observed defendant holding hands with A. for about three blocks as they left a carnival fundraiser.

2. Defense Case

Several parents testified they never noticed any inappropriate, provocative, sexual, or seductive behavior by defendant with A. or any other student, despite frequent visits to the school, band room, and band activities. Various teachers who had the opportunity to witness defendant interact with her students testified to the same effect, as did former students and nonstudent members of the drum line, as well as a color guard instructor defendant had hired.

Although one mother saw A. alone with defendant in her office, she did not perceive any favoritism towards him or any improper conduct. The office door was never closed or locked, as the band room had an open door policy allowing parents and students, both current and former, to enter and leave at will. Former students and other parents confirmed the open door policy to the band room and defendant’s office. There was also testimony defendant did not show favoritism, although she was close to many students and treated them like family.

Rivera, defendant’s former student and A.’s close friend, never saw any public signs of affection or unusual physical touching between him and defendant, which is something she would have noticed. Band members including A. watched movies in the band room during which everyone engaged in friendly playful conduct and treated each other like family. Rivera never saw A. and defendant alone and in October 2008, A. texted Rivera he had not had sexual contact with defendant. Another student testified to

mild flirtatious behavior by defendant, but claimed it was “[n]othing really severe” and explained “that’s kind of the way the band is[, w]e’re all very close” and there was nothing inappropriate, overbearing, or seductive. Several people noted students not chosen as the drum major were very upset, including the daughters of Lee and Manzano and their families.

Defendant testified she had an open door policy while she was in her office from 6:15 a.m. until she left around 5:00 p.m. and was never alone with a student with the door locked. She was close to her students and hugged them but kept a professional distance. When band members acted flirtatious, she sometimes joked with them “but it was never anything sexual or provocative.” She never acted inappropriately, provocatively, sexually or seductively with any student, including A., either on or off campus, flirted with, kissed or showed A. any favoritism or unusual affection, had any sexual interest in him, or had sex with him. Nor had she ever held his hand as they walked, although once while walking back to her car he reached for her car keys in an funny way and she “told him ‘knock it off.’” She believed A. had a “schoolboy crush” on her, which she figured he would “get over.”

When she bought her house, she did not know where A. lived although after she moved in she paid him to mow her lawn every few weeks. She might have patted a student’s head but she did not do that to A. and would not have described it like petting a dog. The bleachers were sometimes crowded but A. never sat between her legs. Lee and Manzano were the only people who told her she was too close to her students, showed favoritism, and behaved inappropriately with A. Defendant was “pretty shocked” and said she did not “‘know what . . . [they were] talking about.’” Although the choice of A. to be drum major by defendant and three of her staff members was based on merit, not favoritism, the Lee and Manzano families were upset and angry that he was selected.

Additional relevant facts are set forth in the discussion.

DISCUSSION

Over objection, the court allowed the prosecutor to present evidence two former students had sexual relations with defendant. Oscar Mejia and Travis Settle both testified they had sex twice with defendant, their former band director at El Modena High School, within a year or two after they graduated in 2006, when they were at least 18 years old. After a third former member of defendant's band, Carlos Ramos, was introduced during defense cross-examination of another witness, the defense called Ramos to testify in its case-in chief, during which he confirmed he had sex with defendant the summer after he had graduated in 2007, when he was 19 years old. Defendant contends the court abused its discretion in admitting the evidence. We agree.

Under Evidence Code section 1101, subdivisions (a) and (b) (all further statutory references are to this code), “[e]vidence of other crimes is not admissible merely to show criminal propensity, but it may be admitted if relevant to show a material fact such as intent” (*People v. Jones* (2011) 51 Cal.4th 346, 371) or “common design or plan” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402). The trial court found the evidence admissible to show both intent and common design and that its probative value outweighed any prejudicial effect under section 352. We review the court's evidentiary rulings for abuse of discretion.

“To be admissible, there must be some degree of similarity between the charged crime and the other crime, but the degree of similarity depends on the purpose for which the evidence was presented.” (*People v. Jones, supra*, 51 Cal.4th at p. 371.) “The least degree of similarity . . . is required in order to prove intent” and admissibility for this purpose depends if the uncharged conduct is “sufficiently similar to support the inference that the defendant “probably harbor[ed] the same intent in each instance.” [Citations.]” [Citation.]’ [Citation.]” (*People v. Foster* (2010) 50 Cal.4th 1301, 1328.) The Attorney General argues the evidence of defendant having sex with persons over the

age of 18 “had a strong tendency to prove . . . [defendant] harbored criminal intent in her actions with A.” But she does not explain, nor do we see, how engaging in legal conduct tends to prove an intent to commit illegal acts.

She also offers no analysis to support her assertion the evidence was properly admitted to show a common scheme or plan. The evidence for that requires “[a] greater degree of similarity [than intent and] . . . must demonstrate “not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations.” [Citation.]” (*People v. Foster, supra*, 50 Cal.4th at p. 1328.) “[T]he common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual.” (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403.) Having legal sex with 18- and 19-year-olds does not show a “plan” to have illegal sex with a minor. Nor was A., the current student and underage prosecuting witness, similar to the adult teenagers who had graduated from high school, aside from them being teenage boys. (*Id.* at p. 397 [common plan requires other conduct to be “similar to the offense charged, and . . . committed upon persons similar to the prosecuting witness”].)

The Attorney General maintains defendant’s “intent was highly material to the case” and placed at issue by her not guilty plea. (See *People v. Rowland* (1992) 4 Cal.4th 238, 260 [“a fact—like defendant’s intent—generally becomes ‘disputed’ when it is raised by a plea of not guilty or a denial of an allegation”].) “Evidence of intent is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. ‘In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.’ [Citation.]” (*People v. Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2, italics omitted.) But here, the acts alleged, French kissing and having sexual relations with A., were not conceded or assumed but rather strenuously denied by defendant. And if she had

“committed the alleged conduct, [her sexual] intent in doing so could not reasonably be disputed—there could be no innocent explanation for that act.” (*People v. Lopez* (2011) 198 Cal.App.4th 698, 714-715 [error in admitting uncharged misconduct to show intent where alleged burglary “not conceded or assumed,” and identity “highly contested”].)

Even if admissible under section 1101, “[e]vidence of uncharged offenses ‘is so prejudicial that its admission requires extremely careful analysis’” (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404) and must be excluded if its prejudicial effect substantially outweighs its probative value (*ibid.*). The evidence of defendant’s legal trysts with her former students after they reached adulthood had limited probative value in establishing either a scheme to seduce a current, underage student or her intent to commit a crime. Moreover, if an issue is “beyond dispute,” evidence of uncharged conduct to prove it “would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value.” (*Id.* at p. 406.) That is the case here with the issue of intent because defendant either did not commit the acts alleged or her intent in committing them was not disputable.

The evidence was also extremely prejudicial as it suggested she was sexually promiscuous and enjoyed short sexual encounters with teenagers of all ages. ““Evidence is prejudicial within the meaning of . . . section 352 if it ““uniquely tends to evoke an emotional bias against a party as an individual”” [citation] or if it would cause the jury to ““prejudg[e]” a person or cause on the basis of extraneous factors.”” [Citation.]’ [Citation.]” (*People v. Foster, supra*, 50 Cal.4th at p. 1331.) The jury could have found defendant guilty of the charged crimes merely because they believed she was “““a likely person to do such acts.” [Citation.]”” (*Ibid.*) Or it could have found her character offensive and, for that reason alone “““disbelieve[d] the evidence in [her] favor.” [Citation.]’ [Citation.]” (*Ibid.*)

The prosecutor also improperly argued the evidence to the jury during her closing, stating, “What do [Settle, Mejia, and Ramos] have in common with A.? Teenage

boys, sex acts that occur at her house, and students and former students.” She further pointed out she had “specifically asked [defendant]: so you weren’t attracted to them at 17, but somehow they became attractive at 18? . . . This is her turf. They’re coming to her house. They’re sleeping with her in her bed So to say that they did all the pursuing . . . does not make sense.”

The Attorney General contends any error in admitting the evidence was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836, which requires reversal only if “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” Although we agree that is the correct standard (*People v. Memory* (2010) 182 Cal.App.4th 835, 862), the prosecutor’s heavy reliance on the erroneously admitted evidence makes it difficult to find the error harmless (*ibid*).

According to the Attorney General, there was “overwhelming evidence” to support defendant’s convictions, consisting of A.’s testimony, the “flirtatious behavior” observed by parents, defendant’s “consciousness of guilt” shown when she gave in to an extortionist’s demands she give him naked photographs of herself, and photographs of A. found at defendant’s home. But flirtatious behavior alone does not prove defendant committed the charged offenses and the photographs found in her residence were all non-provocative, mostly showing A. seated on a stage or performing in a show wearing a Dr. Seuss costume. None were found depicting A. and defendant together.

As for the nude photographs she sent to the extortionist, Miguel Lopez, the evidence shows Lopez demanded either the photographs or \$20,000 or he would inform school authorities of her sexual activities with former students, including divulging a video of her having sexual relations with Settle. He also stated he wanted her to have sex with former students at her house while he watched. He later mentioned A. in two e-mails. The first one related to his personal observation of her with “her arms and legs around A.” and stated: “If you really like your job, I heard about you and A. at the drum

line championships. I also heard that there's a parent that's willing to go talk to the administration now.'" In the second e-mail, Lopez mentioned how defendant had chosen A. as the drum major. But neither of those e-mails suggested anything sexual between A. and defendant and the sex with the former students was legal. This evidence thus does not support the Attorney General's contention the error in admitting evidence of other conduct was harmless. Given our conclusion, we need not address defendant's claim the court erred in allowing "extensive testimony" regarding Lopez's attempted extortion.

That leaves the testimony of A., a teenager whose crush on a teacher may have been rebuffed, and a classic "he said/she said" situation in which the admission of other conduct evidence might have tipped the balance in the prosecution's favor given the credibility contest between prosecution and defense witnesses. The case against defendant was reasonably close as shown by the jury's 11 hours of deliberation over three days, requests for rereading of testimony, and acquittal of defendant on two of the six counts charged. (See, e.g., *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [questions and requests for rereading of testimony indicated close case]; *People v. Perry* (1985) 166 Cal.App.3d 924, 933 [close case suggested by deliberation over four days and acquittal on some counts].) We conclude it reasonably likely a result more favorable to defendant would have been reached had the lurid details of the legal sexual encounters with former students not been admitted. The prejudicial effect was not cured by the court's instruction the evidence was admitted solely to show defendant's sexual intent and common scheme or plan because the evidence was not admissible for those purposes.

DISPOSITION

The judgment is reversed.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.