Filed 7/26/19 P. v. Martin CA4/3

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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. RAUL MARIN MARTIN, Defendant and Appellant.	G056276 (Super. Ct. No. 15CF2779) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed in part and reversed in part. Remanded with directions.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Lynne G. McGinnis and Adrian R. Contreras, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Raul Marin Martin touched an eight-year-old girl's body over her clothes. A jury found Martin guilty of committing a lewd and lascivious act upon a child under 14 years of age. The trial court imposed an 11-year prison sentence.

Martin claims the court abused its discretion by admitting evidence of a prior sex offense. (Evid. Code, § 1108.)[1] We disagree. The evidence was probative of Martin's sexual intent. Martin also claims that section 1108 violates due process, but he acknowledges that the California Supreme Court has repeatedly upheld section 1108 under similar claims. (See, e.g., *People v. Williams* (2016) 1 Cal.5th 1166, 1196.) We are bound by this precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Therefore, we will not be reviewing Martin's due process claim.

Martin also argues that the trial court improperly found true a prior sex offense sentencing allegation. (Pen. Code, § 667.51, subd. (a).) Martin further argues that his case should be remanded so the court can exercise its (now existing) discretion to dismiss a five-year sentence enhancement for a prior serious felony conviction. (Pen. Code, § 667, subd. (a).) On these arguments we agree.

Thus, we reverse in part and order a limited remand with directions. In all other respects, the judgment is affirmed.

I

FACTS AND PROCEDURAL HISTORY

On a Saturday morning in December 2015, an association held an event at a Santa Ana elementary school. The association was giving away Christmas gifts, food, and toys. A mother was outside of the school, standing in a line with her eight-year-old daughter Kimberly, and her 10-year-old son. Kimberly was cold, so her mother went to

[1] Further undesignated statutory references will be to the Evidence Code.

the car to get her a sweater. Kimberly was sitting on a curb; her brother was nearby in the line.

Martin sat next to Kimberly on the curb. Kimberly said that Martin "put his hand under my bottom." Kimberly had never seen Martin before. Martin touched Kimberly three or four times. Kimberly tried moving away, but Martin kept trying to put his fingers on Kimberly's buttocks. Martin began asking Kimberly questions such as her name, age, where she lived, and her phone number. Martin touched applique "diamonds" on Kimberly's shirt. Martin pulled the shirt away from Kimberly's body at the neckline; he looked underneath Kimberly's shirt, purportedly to find more "diamonds." Martin rubbed Kimberly's vaginal area over her jeans for about 20 or 30 seconds.

Kimberly's brother and a stranger in the line saw some of what Martin was doing. The stranger could see that Kimberly was uncomfortable; the stranger intervened, and then she helped Kimberly and her brother find their mother. The stranger told Kimberly's mother what she saw; Kimberly's mother called the police.

A jury found Martin guilty of committing a lewd act upon a child under 14 years of age. The jury also found true an allegation that Martin was a stranger attempting to make friends with Kimberly for the purpose of committing a sexual offense. In a bifurcated proceeding, the court found true several allegations, including a "strike" prior and a prior serious felony conviction. The court imposed an 11-year prison sentence: low term doubled (six years), plus a prior serious felony enhancement (five years).

II

DISCUSSION

Martin argues the trial court abused its discretion by admitting evidence of a prior sexual offense under section 1108, the court improperly found true a prior sex offense allegation, and his case should be remanded so the court can exercise its discretion to dismiss the five-year sentence enhancement.

A. Admission of Section 1108 Evidence

A trial court's ruling authorizing the admission of evidence of a defendant's prior sex offense under section 1108 is reviewed for an abuse of discretion. (*People v. Shorts* (2017) 9 Cal.App.5th 350, 356.) As such, "we will not disturb the trial court's ruling 'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266.)

1. General Legal Principles

Generally, evidence "of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of *specific instances of his or her conduct*) is inadmissible when offered to prove his or her conduct on a specified occasion." (§ 1101, subd. (a), italics added.) However, when a "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." (§ 1108, subd. (a), italics added.)

"The court in its discretion may 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." (§ 352, italics added.) "'The prejudice which . . . section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 958.)

To determine whether section 1108 evidence is admissible, courts must engage in a "careful weighing process" under section 352. (*People v. Falsetta* (1999) 21 Cal.4th 903, 916-917.) "Rather than admit or exclude every sex offense a defendant

commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors . . . , its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense . . . ." (*Ibid*.) An appellate court will "normally review a trial court's ruling based on the facts known to the trial court at the time of the ruling." (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 176.)

2. Relevant Proceedings

Before trial, the prosecution filed a motion to admit evidence of Martin's prior sexual offense under section 1108. The prosecution summarized the facts that it intended to introduce at trial regarding Martin's charged sex offense. The prosecution also summarized the facts regarding Martin's prior sex offense:

"On September 13, 2014, police were contacted by several civilians who made a startling observation. As these people happened down Fairview at Garden Grove Blvd in the city of Garden Grove, they observed a woman unconscious on a bus bench. She caught their attention because her bare breasts were completely exposed and a man, later identified as [Martin], was on top of her foundling her breasts and digitally penetrating her. One such civilian, Sam [F.], had to physically interject. This was observed by several individuals including Alejandra [C.], Dennis [L.] and Colin [M.]

"On November 12, 2015, [Martin] entered a guilty plea to violations of Penal Code §§ 289(d), 220(a)(1) and 243.4(e)(1) . . . . At page four of the plea form, [Martin] signed under penalty of perjury, the following factual basis: '9/13/14 while Jane Doe was unconscious I unlawfully assaulted her by touching her breasts with my hands (skin to skin) and inserting my finger into her vagina all while she remained unconscious.' [Martin] was sentenced to five years supervised probation, 365 days in custody, PC § 290 registration and consistent terms and conditions of probation."

Martin filed a motion seeking to exclude the prosecution's proffered evidence. At a pretrial hearing, after considering the parties' moving papers, the trial court found "under Evidence Code section 1108 that the evidence would be admissible." The court said "that it's more probative than prejudicial." The court told the prosecutor: "Now, it's a matter of how you want to introduce that . . . ." The prosecutor said, "I would like to introduce it via certified court documents as well as the testimony of two live witnesses that I anticipate will take less than 30 minutes." The trial court cautioned the prosecutor to be "mindful of the fact under 352 that we're not going to -- this should not necessitate an undue consumption of time . . . and just let it serve its limited purpose."

During the trial, one percipient witness and an investigating officer testified consistent with the prosecution's proffered evidence. The court also admitted into evidence Martin's 2015 plea form and related documents.

3. Analysis and Application

Martin's prior sex offense was similar to the charged sex offense. Both offenses involved Martin touching a female victim's chest and vaginal area. In each incident, Martin committed the sex offenses in a public setting against a vulnerable victim (an unconscious person and a child). The prior sex offense also occurred relatively close in time to the charged sex offense (about 15 months apart). Thus, the prior offense was probative of Martin's sexual intent in the charged offense.

Martin pleaded guilty to the prior sex offense and signed a plea form stating the factual basis for his plea. Therefore, Martin bore no new burden of defending against the prior crime. Further, because of the prior conviction, the jury would not have been likely to convict Martin of the charged crime simply in order to punish him for an earlier, unpunished crime. The evidence of the prior sex offense was relatively brief, consisting of the testimony of only two witnesses and the related documents. In short, we find that

the trial court weighed the appropriate factors under sections 1108 and 352, and came to a reasoned decision. Thus, we find no abuse of discretion.

Martin argues that *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*), compels a different result. We disagree. In *Harris*, the prosecution charged defendant, a mental health nurse, with sex offenses against two patients in 1995. (*Id*. at pp. 731-732.) One of the victims engaged in consensual sex with defendant; the other was incapacitated when defendant was alleged to have fondled her. (*Ibid*.) In 1972, defendant had been charged with an attack on a female victim in which he had entered her apartment at night, beat her unconscious, and inflicted extensive injuries to her vagina and rectum with a sharp instrument. (*Id*. at p. 733.) Defendant had been convicted of first degree burglary with infliction of great bodily injury. (*Id*. at p. 735.) During defendant's trial on the 1995 sex offense charges, the court admitted into evidence a redacted description of defendants' prior 1972 crimes. (*Id*. at pp. 733-734.)

The Court of Appeal reversed; the court found that evidence of defendant's 1972 first degree burglary crime should have been excluded. (*Harris*, *supra*, 60 Cal.App.4th at pp. 730, 737.) Among the factors it considered, the court noted that there was an incomplete version of the prior offense, which might have triggered unwarranted speculation by jurors as to the true nature of the earlier crime. (*Id*. at p. 738.) Further, the court noted that the "23-year-old act of inexplicable sexual violence . . . was not particularly probative of the defendant's predisposition to commit [the charged] 'breach of trust' sex crimes." (*Id*. at pp. 740-741.)

In this case, unlike *Harris*, the prior and charged sex offenses were similar. Martin molested the two female victims by touching them in a similar manner, and both offenses occurred in public view. The willingness to commit a sex offense in a public setting is not common; therefore, evidence of Martin's prior offense under similar circumstances was particularly probative. (See *People v. Callahan* (1999) 74 Cal.App.4th 356, 367-368.) Further, while the victim in Martin's prior offense was an

adult, and the victim in this case was a child, sex offenders are not "specialists" and may commit a variety of sex offenses that differ in specific character. (See *Id.* at p. 368.) Section 1108 does not require precise equivalence as long as the prior offense is "'rationally probative.'" (*Ibid.*)

In sum, the trial court did not act in an arbitrary or capricious manner in admitting evidence of Martin's prior sex offense under section 1108.

B. Penal Code Section 667.51

Martin argues that the trial court improperly found true a sentence allegation under Penal Code section 667.51. We agree.

Penal Code section 667.51, subdivision (a), provides: "Any person who is convicted of violating Section 288 or 288.5 shall receive a five-year enhancement for a prior conviction of an offense specified in subdivision (b)." Penal Code section 667.51, subdivision (b), lists the following crimes: "Section 261, 262, 264.1, 269, 285, 286, 287, 288, 288.5, or 289, former Section 288a, or any offense committed in another jurisdiction that includes all of the elements of any of the offenses specified in this subdivision."

Here, the information alleged a sentence enhancement under Penal Code section 667.51, subdivision (a), based on a violation of Penal Code section 288, subdivision (a). But the information alleged Martin's prior conviction for a violation of Penal Code section 220, subdivision (a)(1), which is not an eligible offense. (Pen. Code, § 667.51, subd. (b).) The trial court found the Penal Code section 667.51, subdivision (a), allegation to be true (although it did not address the five-year enhancement). Thus, we reverse the trial court's true finding.[2] The prosecution may retry the allegation. (See *People v. Barragan* (2004) 32 Cal.4th 236, 239.) If the court finds the allegation to be true, it is to address the matter at resentencing; however, Martin may not receive an

[2] This disposition resolves Martin's additional claim that the same allegation was used to support the five-year prior serious felony enhancement.

aggregate sentence greater than previously imposed (11 years). (See *People v. Craig* (1998) 66 Cal.App.4th 1444, 1448.)

C. Prior Serious Felony Conviction

Martin contends, in light of Senate Bill No. 1393 (2017-2018 Reg. Sess.) (SB 1393), that his case should be remanded to permit the trial court to consider whether to exercise its discretion to dismiss the five-year sentence enhancement for a prior serious felony conviction under Penal Code section 667, subdivision (a)(1). We agree.

"When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date." (*People v. Brown* (2012) 54 Cal.4th 314, 323, fn. omitted.) Nothing in SB 1393 suggests any intent that the amendments apply prospectively; therefore, "it is appropriate to infer, as a matter of statutory construction, that the Legislature intended [SB] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when [SB] 1393 becomes effective on January 1, 2019." (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.)

"'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' [Citation.] In such circumstances, . . . the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.'" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

Here, although the Attorney General argues otherwise, the record does not "clearly indicate" to us that the trial court would have declined to strike the five-year

sentence enhancement. Thus, a remand is appropriate to allow the court to exercise its sentencing discretion. Of course, we take no position on the merits.

III

DISPOSITION

The trial court's true finding as to Martin's prior sex offense allegation is reversed. (Pen. Code, § 667.51, subd. (a).) The sentence is vacated and the matter is remanded so the trial court can resentence Martin after considering whether to dismiss the five-year prior serious felony conviction. (Pen. Code, § 667, subd. (a)(1).)

In all other respects, the judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

GOETHALS, J.