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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOSE ANTONIO OSORNO, JR., Defendant and Appellant.	2d Crim. No. B279094 (Super. Ct. No. 2015023687) (Ventura County)

Jose Antonio Osorno, Jr. appeals his conviction by jury of two counts of sexual intercourse with a child 10 years of age or younger (counts 1 & 3; Pen. Code, § 288.7, subd. (a))[1] and three counts of lewd or lascivious act on a child under 14 years of age (counts 2, 4, & 5; § 288, subd. (a)). Appellant admitted two prior strike convictions (§§ 667, subds. (b) - (i), 1170.12, subds. (a) - (d)) and two prior serious felony convictions (§ 667, subd. (a)(1)), and was sentenced to 385 years to life state prison. Appellant

[1] All statutory references are to the Penal Code unless otherwise stated.

contends that the admission of uncharged acts of sexual misconduct pursuant to Evidence Code section 1108 denied him a fair trial and violated his right to due process and equal protection. We affirm.

Facts

On July 17, 2015, Irene R. found her eight-year old niece, N.B., and appellant on the floor, under a blanket in the middle of the night. N.B.'s father ordered appellant to leave. Appellant, a family friend, had been staying on and off at the house. After appellant left, the family found appellant's backpack in the closet. The backpack had photos of appellant kissing N.B.

Scared, N.B. said that appellant "'put it in me,'" that "'[h]e used to touch it and lick it,'" and that he "put his private in her private." N.B. agreed to a medical legal exam and told a sexual assault nurse examiner that appellant digitally penetrated her, that he put his penis in her private, and that he orally copulated her. N.B. complained of genital pain and said it hurt to pee after appellant rubbed his private on her private.

In a videotaped interview, N.B. told Oxnard Police Detective Terrance Dobrosky that "Junior" was the "[t]he one who did it to me," and that the sexual abuse started when she was seven years old. Appellant would wake her in the middle of the night and take her to the living room. N.B. said that appellant would kiss her and get on top and "hump me" with his "private." Five or six days before the police interview, appellant removed N.B.'s pants and had vaginal intercourse with her. N.B. said it hurt and "[h]e did it to me" on at least two occasions. N.B. described other incidents in which appellant put his penis in her mouth and orally copulated her.

In February 2016, N.B. complained of bumps and pain in her rectal area. N.B. was treated at an urgent care facility for a cluster of open sores that tested positive for HSV-1, commonly known as herpes, a sexually transmitted disease. Appellant also tested positive for HSV-1.

Doctor Todd Flosi, a pediatrician, testified that it is rare to see children with herpes lesions and sores in the anogenital area. The doctor opined that an eight-year-old girl who had sexual contact in July 2015 could suffer an outbreak of herpes in February 2016. The doctor stated that herpes is for life, and that herpes blisters and sores can reappear "weeks later, months later, years later."

Prior Uncharged Sexual Misconduct

Pursuant to Evidence Code section 1108, evidence was received that appellant lived with 10-year-old A.T. and A.T.'s mother in 1999. Appellant babysat A.T. and her sister, eight-year-old D.T., when their mother was at work. A.T. testified that appellant would "play with" and tickle the girls. Multiple times a week, appellant grabbed A.T.'s hand and touched it to his penis until he ejaculated. Appellant made A.T.'s younger sister, D.T., touch and rub his penis until he ejaculated. On other occasions, appellant sat D.T. on his lap and moved D.T. back and forth against his erect penis. D.T. said "it was a daily thing."

Evidence Code Section 1108

Appellant contends that the prior sexual misconduct evidence (i.e., the prior molestations of A.T. and D.T.) denied him a fair trial and violated his right to due process. Evidence Code section 1108, subdivision (a) provides: "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." Our State Supreme Court has held that the admission of uncharged acts of sexual misconduct pursuant to Evidence Code section 1108 is constitutional and does not violate due process. (*People v. Falsetta* (1999) 21 Cal.4th 903, 920-922 (*Falsetta*); *People v. Loy* (2011) 52 Cal.4th 46, 60-61.) "When a defendant is accused of a sex offense, Evidence Code section 1108 permits the court to admit evidence of the defendant's commission of other sex offenses, thus allowing the jury to learn of the defendant's possible disposition to commit sex crimes. [Citation.] The court has discretion under Evidence Code section 352 to exclude the evidence if it is unduly prejudicial. [Citation.] The evidence is presumed admissible and is to be excluded only if its prejudicial effect substantially outweighs its probative value in showing the defendant's disposition to commit the charged sex offenses or other relevant matters. [Citation.]" (*People v. Cordova* (2015) 62 Cal.4th 104, 132.)

Appellant argues that *Falsetta* was wrongly decided in view of *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769 (*Garceau*) which states that where there is a permissible inference that the jury could draw from the other crimes evidence, the defendant's due process rights are violated if the jury is "expressly invited to draw the *additional* inference of criminal propensity." (*Id.* at p. 775, reversed on other grounds in *Woodford v. Garceau* (2003) 538 U.S. 202.) Appellant's reliance on *Garceau* is unpersuasive because the case deals with the failure to give a limiting instruction in a murder trial. It has nothing to do with the admissibility of prior sexual misconduct in a child molestation case. In *Garceau*, defendant was charged

with murder and the prosecution introduced evidence that defendant manufactured illegal drugs and had previously committed murder. (*Id.* at p. 773.) The jury was instructed that it could consider the other crimes evidence for any purpose, including but not limited to defendant's character or his conduct on a specific occasion. (*Ibid.*) The trial court refused to give a limiting instruction that the others crimes evidence could not be considered to prove bad character or disposition to commit crimes. (*Id.* at p. 773.) The Ninth Circuit concluded that the failure to give a limiting instruction violated defendant's due process rights. "Even worse than failing to give such an instruction is what the trial court did in this case: affirmatively inviting the jury to draw the propensity inference." (*Id.* at p. 776.)

In *Falsetta*, our Supreme Court held that the trial court must give, when requested, a limiting instruction on the correct use of propensity evidence. (*Falsetta*, *supra*, 21 Cal.4th at pp. 923-924.) That is what happened here. The jury was instructed that, with respect to the uncharged sex offenses, "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 the crimes charged in this case. If you conclude that the defendant committed the uncharged offenses, that conclusion 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 crimes charged. The People must still prove each charge and allegation beyond a reasonable doubt. [¶] Do not consider this evidence for any other purpose except for the limited purpose of intent, absence of accident or mistake, or

common scheme or plan, as set forth elsewhere in these instructions." (CALCRIM No. 1191A.)

In another instruction, the jury was instructed "[i]n evaluating this evidence, consider the similarity or lack of similarity between the uncharged offenses and the charged offenses. [¶] Do not consider this evidence for any other purpose except for the limited purpose of determining whether the defendant was disposed or inclined to commit sexual offenses. . . . [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime." (CALCRIM No. 375.)

We presume that the jury understood and followed the court's instructions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.) It is not reasonably probable that the result would have been different had the challenged testimony been excluded. (See *People v. Fields* (2009) 175 Cal.App.4th 1001, 1018 [erroneous admission of evidence reviewed for harmless error under *People v. Watson* (1956) 46 Cal.2d 818, 836].)

Garceau does not address the admissibility of prior sex crimes evidence under Evidence Code section 1108 or even consider *Falsetta.* Rule 414 of the Federal Rules of Evidence is analogous to Evidence Code section 1108 and permits the introduction of uncharged acts of child molestation to show a defendant's propensity.[2] In *United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1026-1028 the Ninth Circuit upheld rule

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[2] Rule 414(a) of the Federal Rules of Evidence (28 U.S.C.) provides: "In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant." (*Ibid.*)

414 against due process and equal protection challenges. "[E]vidence that a defendant has committed similar crimes in the past is routinely admitted in criminal prosecutions under Rule 404(b) to prove preparation, identity, intent, motive, absence of mistake or accident, and for a variety of other purposes. [Citation.]" (*Id.* at p. 1026.)

Appellant makes no showing that Evidence Code section 1108 violated his due process rights or that *Falsetta* was wrongly decided. Pursuant to the doctrine of stare decisis, we are bound by our Supreme Court's decision. (*Auto Equity Sales*, *Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Equal Protection

Appellant claims that Evidence Code section 1108 violates the equal protection clause and is discriminatory because the recidivism rate for sex offenders is lower than that of other criminal offenders such as robbers or murderers. Appellant forfeited the claim by not objecting at trial. (*People v. Burgener* (2003) 29 Cal.4th 833, 860, fn. 3.)

On the merits, the equal protection argument fails for the reasons set forth in *People v. Fitch* (1997) 55 Cal.App.4th 172, 184 (*Fitch*) and *People v. Waples* (2000) 79 Cal.App.4th 1389, 1394-1395. Although Evidence Code section 1108 creates two classifications of accused or convicted defendants, it is subject to rational-basis scrutiny. (*Fitch*, *supra*, 55 Cal.App.4th at p. 184.) "The Legislature determined that the nature of sex offenses, both their seriousness and their secretive commission which results in trials that are primarily credibility contests, justified the admission of relevant evidence of a defendant's commission of other sex offenses. This reasoning provides a rational basis for the law." (*Ibid.*) In *Falsetta*, our Supreme Court cited with

approval *Fitch*, *supra*, and quoted language from *Fitch's* equal protection analysis. (*Falsetta*, *supra*, 21 Cal.4th at p. 918.) We follow *Falsetta* and *Fitch* and reject appellant's constitutional challenges to Evidence Code section 1108.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Matthew Guasco, Judge

Superior Court County of Ventura

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

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