Filed 11/13/17 P. v. Valdez CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL VALDEZ, Defendant and Appellant.	2d Crim. No. B275954 (Super. Ct. No. 1471612) (Santa Barbara County)

Miguel Valdez appeals from the judgment after conviction by jury of committing a forcible lewd act upon his five-year-old daughter (Pen. Code, § 288, subd. (b)(1)) and assault with intent to commit a forcible lewd act against her (Pen. Code, § 220, subd. (a)(2)). The jury was unable to reach a verdict on one count of aggravated sexual assault of a child (Pen. Code, § 269, subd. (a)(1)) and that count was dismissed. The trial court sentenced Valdez to 14 years in state prison consisting of consecutive upper terms of eight years for the lewd act and six years for the assault.

Valdez contends the trial court erred when it admitted evidence of seven prior acts of misconduct to prove intent, motive, and propensity (Evid. Code,[1] §§ 1108, 1109, 1101, subd. (b)); when it admitted an entire letter after his attorney referred to part of it (§ 356); and when it did not stay his sentence for assault with intent to commit a forcible lewd act which he contends was based on the same conduct as the conviction for committing a forcible lewd act (Pen. Code, § 654). We agree with his last contention and modify the judgment, but otherwise affirm.

BACKGROUND

In 2006, Valdez sexually assaulted his five-year-old daughter, S.V. She testified that while her mother and brother were at the store, Valdez took her into the bedroom and raped her. He put her on the bed, took off her pants and underwear, and held her arms down beside her head so she would "not get away." He unbuckled his pants and put his "penis in [her] vagina." She did not see his penis, but she felt "something big that brought [her] pain," and a lot of pain in her vagina. He went "back and forth," making "thrusting" movements. She screamed, cried, wiggled, tried to cross her legs, and tried to get away.

It happened only once. She thought she was in trouble and he was punishing her. She had intense pain for more than a week afterward. She did not tell her mother because she was "scared [her] dad was going to do something else to [her]."

A medical examination nine years after the event did not reveal evidence of sexual trauma, and S.V.'s hymen was intact. Defense and prosecution experts disagreed whether this

---

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

was any indication of whether she had been sexually assaulted as a child or if her genitalia had been penetrated.

S.V.'s mother (Mother) testified that she did not know about the sexual assault, but S.V. once complained that Valdez "abused" her. Mother found blood on S.V.'s underwear in 2006 and confronted Valdez, but she believed him when he denied "doing" anything to S.V. She left Valdez that year and took the children to a shelter for women who have been abused.

A defense expert testified that penile penetration of a five-year-old's vagina would result in permanent damage and such a young child would not be able to conceal from her mother the pain that S.V. described. He said most parents can recognize when their child has been sexually abused. A prosecution expert testified that a five-year-old may suppress pain and most child sexual abuse cases involve delayed disclosure.

Evidence of Prior Misconduct

Over defense objection, Mother and Valdez's niece testified to seven prior acts of physical and sexual abuse by Valdez. The court admitted the evidence to prove propensity, intent, and motive. (§§ 1108, 1109, 1101, subd. (b).) It excluded other evidence of prior acts offered by the prosecution, finding they were irrelevant, remote, or unduly prejudicial.

Valdez's niece testified that in 1996 Valdez touched her inner thigh twice while she tried to push his hand away. She said he made annoying sexual calls to her in 1998, when she was 12 or 13 years old. He told her he knew she was alone and he was going to come over and put a banana inside her, among other things.

Mother testified that Valdez "constantly" hurt her "physically, verbally, and sexually." She said in 1998, Valdez

"would make her get naked and he would put [her] up against the wall and he would [p]our water over [her.]" In 2001 (when S.V. was one year old), he pushed Mother and knocked S.V. from her arms onto the floor. Mother awoke once in 2001 to find Valdez holding a knife to her neck. In 2006, Valdez hit S.V.'s brother "hard" in the face with a plastic sword. In 2006, Valdez kicked S.V. through the air five feet because she was not wearing shoes.

In closing, the prosecutor argued the prior incidents showed Valdez was disposed to commit the charged offenses. She also argued they explained S.V.'s fear of Valdez and why she was compelled to conceal her pain from her mother.

CALM Letter

During cross-examination, defense counsel impeached Mother with part of a letter that was written on her behalf by a domestic violence counselor at the Child Abuse Listening and Mediation (CALM) center a few months after she left Valdez. Defense counsel used two sentences from the letter to suggest Mother fabricated the allegations of abuse in order to gain residency. The letter describes Valdez's abuse of the family and concludes, "[Mother's] goal is to become a self-sufficient person and to be able to support her two children who are [U.S.] born citizens. [Mother's] ability to gain legal residence in the United States will facilitate her goal." Counsel quoted the concluding sentences, and asked Mother, "[Y]ou were trying to put together any paperwork or evidence at that time that you could that would help you gain legal residency, right?" "And they explained to you in order to get that U-[v]isa it was required that you be a victim of domestic violence, correct?"

On redirect, the court admitted the letter over defense objection, to "explain what the goal was." The court

redacted a reference to Valdez's previously excluded 1997 arrest and court-ordered anger management treatment, but otherwise admitted the entire letter.

In closing, the prosecutor argued that the CALM letter corroborated Mother's testimony about Valdez's abuse. She argued, "this wasn't about a [v]isa . . . she was a woman who had suffered significant humiliation, physical, verbal, sexual abuse by [Valdez], and she was trying to get out of that cycle of violence, and that her son at the time was suffering from it, and she was seeking counseling, not that she was seeking a [v]isa to stay in the United States. She wanted to be able to be a self-sufficient person. A woman who did not have to rely on him to take care of her children and to keep her in the United States."

Sentencing

In closing argument, the prosecutor asked the jury to convict Valdez of both the assault and lewd act charges based on evidence that Valdez held S.V. down, removed her clothes, and thrust his penis toward her vagina. At sentencing, Valdez's counsel urged the court to stay his sentence on the assault conviction because it was based on the same conduct as the lewd act. (Pen. Code, § 654.) The trial court declined, finding the offenses were "separate and distinct acts" which should be punished separately because the assault was accomplished by "the thrusting of the penis towards the victim's genitals," while the lewd act was "all the preparatory actions, all the other actions that took place before that." The court stated its intention "to give him the maximum sentence allowable by law."

DISCUSSION

Evidence of Prior Misconduct (§§ 1108, 1109, 1101, subd. (b), 352)

Valdez contends that his prior acts of misconduct were not sufficiently similar to the charged sexual assault of S.V. to be probative of his propensity to commit the charged offenses and they were therefore inadmissible under sections 1108, 1109, or 1101, subdivision (b). We disagree.

Generally, evidence of uncharged misconduct is not admissible to prove a defendant's predisposition to commit such conduct, except as allowed by statutory exceptions. (§ 1101, subd. (a).) Section 1108 allows evidence of the defendant's other uncharged sexual offenses to prove his propensity to commit a charged sexual offense. (§ 1108, subd. (d)(1)(A) & (B).) And section 1109 allows evidence of his uncharged acts of domestic violence to prove propensity to commit a charged act of domestic violence, such as the charged abuse of Valdez's daughter. (§ 1109, subds. (a)(1), (d)(3); Fam. Code, §§ 6211, 6203.) Section 1101, subdivision (b) allows evidence of other acts to prove relevant facts other than propensity, such as motive or intent. All of these statutes are subject to section 352, which precludes admission of unduly prejudicial evidence. Uncharged offenses are admissible only if they have substantial probative value, because their substantial prejudicial effect is inherent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404, superseded by statute in *People v. Robertson* (2012) 208 Cal.App.4th 965, 991 (*Robertson*).)

The trial court did not abuse its discretion when it concluded Valdez's three prior sexual offenses and four prior acts of domestic violence were substantially probative of his predisposition to commit the charged lewd conduct and sexual

assault under sections 1108 and 1109. (*People v. Mills* (2010) 48 Cal.4th 158, 195.) Valdez violated and humiliated his family members when he (1) poured water over Mother and made her stand all night, naked and wet; (2) touched his niece's inner thigh; (3) made sexual phone calls to his niece; (4) pushed Mother and knocked S.V. to the floor; (5) held a knife to Mother's neck; (6) hit his son hard with a plastic sword; and (7) kicked S.V. across the room. Each of these offenses had a substantial tendency in reason to prove Valdez was predisposed to assert power and control over the members of his family through violent and humiliating acts without any regard for their suffering. The evidence also tended to disprove his defense that it was "absurd" to believe he would rape his daughter and that a five-year-old child would never conceal the pain of such abuse.

Valdez contends his prior offenses are too dissimilar to show he was predisposed to engage in conduct of the type charged and any inference of predisposition to sexually assault his daughter would be wholly speculative. (*People v. Earle* (2009) 172 Cal.App.4th 372, 397 (*Earle*).) Similarity impacts the probative value of prior offenses. If they are admitted under section 1108 they "must have some tendency in reason to show that the defendant is predisposed to engage in conduct of the type charged." (*Ibid*.) Similarity is but one of many factors to consider. (*Robertson*, *supra*, 208 Cal.App.4th at p. 991.) And, ""'[t]he principle factor affecting the probative value of an uncharged act [of domestic violence offered under section 1109] is its similarity to the charged offense.'" [Citation.]" (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531, italics omitted.) But the crimes need not be identical to be probative. For example, in a prosecution for rape of a defendant's girlfriend, evidence that he

shoved a prior girlfriend and pulled out her hair and that he slammed another girlfriend into a wall, putting a hole in it, was admissible because "rape is a higher level of domestic violence, a similar act of control." (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1135, 1139.)

Valdez relies on *Earle*, in which evidence of indecent exposure was not admissible under section 1108 to prove propensity to commit sexual assault, "in the absence of [any] foundational evidence" that would support an inference that exhibitionists tend to commit sexual assaults. (*Earle*, *supra*, 172 Cal.App.4th at p. 379.) "For all the jury could know," reasoned the court, "criminal exhibitionists as a class might be characterized by an unusual inhibition against physical contact, and a particular inability to commit sexual assault. They might thus be less likely than randomly selected members of the public to commit such a crime, or form the intent to do so." (*Id.* at pp. 389-390, italics omitted.)

But here, expert testimony supported an inference that the prior acts demonstrated predisposition to commit the charged offenses. The prosecution's domestic violence expert testified that domestic abuse includes physical violence, sexual violence, psychological or emotional abuse, and verbal abuse. He testified that those who engage in violence against their partners are more likely to engage in similar violence perpetrated against their children, "and that violence doesn't necessarily have to be physical violence. It can be verbal abuse, emotional, psychological abuse, [or] sexual abuse." He testified that abusers use a variety of tools to maintain power and control, including economic abuse, coercion and threats, intimidation, emotional

abuse, isolation, minimization, denial and blame, "us[ing] the children," and male privilege.

This case is thus unlike *Earle*, in which the only information available to the trial court on the subject was a declaration from a defense expert that exhibitionist behavior is not indicative of a predisposition to commit sexual assault and "it is more likely exhibitionists will only engage in exhibitionistic behavior rather than to progress to acts of hands-on sexual assault." (*Earle*, *supra*, 172 Cal.App.4th at p. 385.)

Valdez contends the 1998 water-pouring incident was too remote to be admitted under section 1109 because it occurred more than five years before the charged offense. (§ 1109, subd. (d)(3).) But even if that limit applies, the evidence was independently admissible as a sex offense under section 1108, which has no such limit. (§ 1108.) Here, the court admitted the evidence under both sections 1109 and 1108.

All of the prior offenses had a tendency in reason to prove that Valdez was predisposed to engage in conduct of the type charged and the trial court did not abuse its discretion when it determined their probative value outweighed their potential prejudicial effect. Because these acts were admissible under sections 1108 and 1109, we do not reach Valdez's contention that they were not admissible to prove intent and motive under section 1101, subdivision (b).

Admission of the Entire CALM Letter

(§ 356)

Valdez contends the trial court erred when it admitted the entire CALM letter because much of the letter was not on the same subject as that referred to by his attorney when he cross-examined Mother. (*People v. Riccardi* (2012) 54 Cal.4th

758, 803 (*Riccardi*), disapproved on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) We disagree.

Where part of a writing is given in evidence by one party, "the whole on the same subject may be inquired into by [the] adverse party," and when a "detached . . . writing" is given in evidence, "any other . . . writing which is necessary to make it understood may also be given in evidence." (§ 356.) The purpose of section 356 is to avoid creating a misleading impression. (*Riccardi*, *supra*, 54 Cal.4th at p. 803.)

In *Riccardi*, *supra*, 54 Cal.4th 758, the trial court erred in admitting a full two-hour recording of a witness's police interview because only portions were relevant to rehabilitate the witness and those portions did not create a misleading impression that would make it necessary to play the rest. But this case is unlike *Riccardi*, because defense counsel here used portions of the CALM letter to create an impression that its purpose was to obtain a visa by fabricating abuse reports. The whole of the letter demonstrated its purpose was to help Valdez's family recover from his abuse. The whole letter was necessary to make its actual purpose understood. In contrast, the two-hour recording in *Riccardi* included speculation and opinions about things that "had little relation to" the parts used by defense counsel and they were not necessary to correct any misimpression. (*Id.* at p. 803.) The trial court did not abuse its discretion when it admitted the entire letter.

Sentencing

(Pen. Code, § 654)

Valdez contends that under Penal Code section 654, which prohibits multiple punishment for the same act or omission, he cannot be sentenced for both assault with intent to

commit a forcible lewd act (Pen. Code, § 220, subd. (a)(2)) and committing that forcible lewd act (Pen. Code, § 288, subd. (b)(1)) because the prosecutor used the same facts to prove both offenses. We agree.

Penal Code section 654 prohibits multiple punishment for a single act or indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208, 1216.) The divisibility of a course of conduct depends upon the intent and objective of the actor, and intent and objective are factual questions for the trial court. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) Multiple sex acts close in time may be punished separately if they are divisible, even when sexual gratification is the defendant's single objective, as long as they are not the means of accomplishing, or incidental to, each other. (*People v. Harrison* (1989) 48 Cal.3d 321, 336.) But multiple punishment is not permitted for one act. (*People v. Siko* (1988) 45 Cal.3d 820, 826 (*Siko*).)

The trial court found, based on S.V.'s testimony, that "the 220[] assault with intent to commit rape was accomplished by the thrusting of the penis towards the victim's genitals. That's the 220. And the 288(b) is all the preparatory actions, all the other actions that took place before that, the pinning down, the spreading of the legs, the taking off the underwear, that's all 288(b) conduct. I do find they are separate and distinct acts and I find should be punished separately and distinctly."

But the prosecutor asked the jury to convict Valdez of both offenses based on evidence that he held S.V. down, removed her clothes, and thrust his penis toward her vagina. She argued Valdez committed a forcible lewd act when he "h[e]ld [S.V.] by the arms," "pinned her hands above her head," "took off her pants

and her underwear," "unbuckle[d] his pants," "took his penis out, put it near [S.V.'s] vagina," and moved "his body . . . back and forth and away from her," causing "a lot of pain in her vagina." Likewise, she argued Valdez committed assault with intent to commit a forcible lewd act when he "pinned [S.V.'s] hand above her head," "took off her pants and underwear," "unbuckle[d] his pants," and "his body [moved] back and forth towards her and away from her," causing "a lot of pain in her vagina."

This case is like *Siko*, in which the trial court erred when it did not stay the sentence on a lewd act conviction where "the charging instrument and the verdict both [identified] the lewd conduct as consisting of the rape and sodomy rather than any other act." (*Siko*, *supra*, 45 Cal.3d at p. 826.) Here, before the trial court found the acts were separate, it expressed concern that the prosecutor "did not argue it that way . . . to the jury." But the prosecutor assured the court it did not matter what the jury found as long as "it's possible that they are separate." Similarly, in *Siko*, the People argued there was evidence of other conduct that could support the lewd act conviction, because the defendant had separately twisted a handkerchief around the victim's neck and he took off her underwear. (*Siko*, at p. 825.) But the "claim [was] untenable" because "[t]here [was] no showing that the lewd-conduct count was understood in this fashion at trial" and a "review of the record demonstrate[d] the contrary." (*Id.* at pp. 825-826.) Here, too, review of the record demonstrates that the assault and lewd-conduct counts were understood by the jury to be based on identical conduct.

We reject the People's argument that Penal Code section 667.6, subdivision (c) operates as an exception to Penal Code section 654 here because lewd conduct is an enumerated sex

offense. Penal Code section 667.6, subdivision (c), permits imposition of consecutive full-term sentences for each violation of an enumerated sex offense, including Penal Code section 288, upon one victim on one occasion. And it operates as an exception to Penal Code section 654 when the offenses are based on "separate act[s]" that are indivisible. (*People v. Hicks* (1993) 6 Cal.4th 784, 792 [defendant entered a bakery with the single criminal objective of sexually assaulting the victim, but could be punished for each separate act: entering the bakery, raping her, sodomizing her, and digitally penetrating her].) But subdivision (c) of section 667.6 of the Penal Code does not operate as an exception to section 654 of the Penal Code when the offenses are based on the "'same act[s].'" (*Siko*, *supra*, 45 Cal.3d at pp. 824, 826 [convictions for lewd act based on the same acts as rape and sodomy were subject to Penal Code section 654 notwithstanding Penal Code section 667.6, subdivision (c)].) Here, the prosecutor sought convictions for both offenses based on the same acts and therefore Valdez may be punished for only one. Our Supreme Court explained that, in enacting Penal Code section 667.6, subdivision (c), "[w]hatever the Legislature's intent may have been with respect to the 'single' or 'indivisible transaction' rule, it is clear to us it did not intend . . . to repeal or amend the prohibition of double punishment for multiple violations of the Penal Code based on the 'same act or omission.'" (*Siko*, at p. 826.)

DISPOSITION

The judgment is modified to stay the sentence on count three, assault with intent to commit a lewd act in violation of Penal Code section 220, subdivision (a)(2) pursuant to Penal Code section 654. The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting the modified

sentence and forward a certified copy to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Michael J. Carrozzo, Judge

Superior Court County of Santa Barbara

Doris M. LeRoy, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, David E. Madeo, Deputy Attorney General, for Plaintiff and Respondent.