Filed 3/29/18 P. v. Carniglia CA2/6

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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. STEVEN CARNIGLIA, Defendant and Appellant.	2d Crim. No. B279595 (Super. Ct. No. LA080307) (Los Angeles County)

Steven Carniglia appeals a judgment after the jury convicted him of forcible oral copulation (Pen. Code,[1] § 288a, subd. (c)(2); count 1), forcible sodomy (§ 286, subd. (c)(2); count 2), lewd act upon a child (§ 288, subd. (a); count 3), and forcible lewd act upon a child (§ 288, subd. (b)(1); count 4). The trial court sentenced him to eight years in state prison (a six-year term for count 1, a consecutive two-year term for count 2, and sentences for the remaining counts stayed).

[1] Further unspecified statutory references are to the Penal Code.

Carniglia contends (1) the trial court erred by admitting evidence of uncharged sexual offenses because it was unduly prejudicial; (2) the jury should have been instructed on nonforcible oral copulation and sodomy because they were lesser included offenses of counts 1 and 2; and (3) cumulative error. We affirm.

FACTS

Uncharged Sexual Offenses: 2000-April 2005

In 2000, Carniglia, who was 13 years old, moved in across the street from K.J., who was six years old. One day that year, Carniglia dared K.J. to touch Carniglia's penis during a game of truth or dare. K.J. stroked Carniglia's penis.

The next incident occurred when the two played truth or dare at a rocky hiking area near their homes. Carniglia put his hand on the back of K.J.'s head and forced K.J. to orally copulate him. K.J. did not tell anyone about what had happened because Carniglia was "a lot bigger" than him and threatened to harm K.J. and his family if K.J. told anyone. Similar sex offenses occurred at the same location "numerous" times.

A couple of days later at Carniglia's parent's house, Carniglia showed K.J. gay pornography on television before he digitally penetrated and sodomized K.J. K.J. tried to pull away, but Carniglia pushed forward while holding down K.J.'s arms and forced K.J. to orally copulate him. K.J. testified that this sequence of events happened "thousands of times" and on a daily basis until K.J. moved to Northern California in 2003.

After moving away, K.J. visited Southern California every couple of months and saw Carniglia during those visits. K.J. testified that he continued to contact Carniglia because "at that point, [the sexual molestation] was just normal. I didn't

know any different, and I felt like he was my friend, and that's what friends did to each other. . . . It happened so many times, I kind of just got used to it." From 2003 through 2005, Carniglia continued to sexually molest K.J. when he visited.

K.J.'s brother, S.J., testified that Carniglia had K.J. touch Carniglia's penis during a game of truth or dare in the hiking area near their homes. Carniglia threatened to kill S.J. if he told anyone. S.J. testified that he took Carniglia's threats seriously. Carniglia had sometimes choked him and K.J. and gave them "really bad bruises" all over their chests.

S.J. testified regarding several other instances in which Carniglia sexually molested K.J. during 2000 through 2003. He said that the molestations would follow the "same sequence of things . . . the same way every single time." He explained that it would start with a game of hide and seek or truth or dare, and it would end with K.J. masturbating or orally copulating Carniglia.

Charged Sexual Offenses: April 2005-December 2006

In 2005, K.J., who was then 11 years old, visited his grandparents in Southern California. Carniglia picked him up from his grandparents' house and took him to Carniglia's brother's apartment. Carniglia played a gay pornography DVD on the television. Meanwhile, Carniglia pulled down his pants and had K.J. orally copulate him. K.J. said he pulled away when he was unable to breathe, but Carniglia put his hand on the back of his head and pushed it towards him. Carniglia then had K.J. take off his clothes, and he sodomized K.J. K.J. said that he tried to pull away, but Carniglia was holding onto him and thrusting from behind.

K.J. said that he did not tell anyone what had happened because he was scared that Carniglia was going to hurt him or his parents.

K.J. testified regarding several more instances from April 2005 through 2006 in which Carniglia sexually molested him. During that period, he and Carniglia engaged in the same type of sexual activity each time they saw each other. He said he stayed at Carniglia's parent's home for multiple days, and he "got oral[ly] copulated[,] or masturbated him or got sodomized" every day during his stay.

DISCUSSION

Prior Uncharged Sexual Misconduct Evidence

Carniglia contends the trial court erred in admitting evidence of his uncharged sexual misconduct (before April of 2005) with K.J. (Evid. Code, § 1108, subd. (a)) because it was unduly prejudicial and should have been excluded under Evidence Code section 352. The Attorney General claims forfeiture, but the record reflects that Carniglia objected to the prejudicial nature of the uncharged sexual misconduct evidence at the trial court. Although the claim was not forfeited, it lacks merit.

Evidence of prior uncharged acts is generally inadmissible to show a defendant's bad character or propensity to commit a crime. (Evid. Code, § 1101, subd. (a).) As an exception to this rule, Evidence Code section 1108 permits admission of "another sexual offense or offenses" in a sex crime case to show a defendant's propensity to commit similar crimes. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1013; *People v. Falsetta* (1999) 21 Cal.4th 903, 915 (*Falsetta*).)

Evidence that is otherwise admissible under Evidence Code section 1108 is subject to exclusion under Evidence Code section 352 if the probative value of the evidence is substantially outweighed by its undue prejudice. (*Falsetta*, *supra*, 21 Cal.4th at p. 917.) We review the court's ruling on the admission of evidence under Evidence Code sections 1108 and 352 for an abuse of discretion. The ruling will not be disturbed unless the court acted in an arbitrary or capricious manner. (*People v Branch* (2001) 91 Cal.App.4th 274, 281-282; *People v. Fitch* (1997) 55 Cal.App.4th 172, 183.)

The trial court acted within its discretion in admitting the uncharged sexual misconduct evidence because its probative value was not outweighed by its prejudicial impact. The evidence, which included a history of repeated sexual offenses that began when K.J. was six years old, was highly probative. It showed that Carniglia groomed K.J. at a young age, which gave context to the nature of their relationship and explained why K.J. submitted to acts of sexual molestation when he was older. The evidence was not unduly prejudicial because the nature of the uncharged offenses were similar to, and not more severe than, the charged offenses.

The trial court also provided a limiting instruction that the evidence of the uncharged offenses "is not sufficient by itself to prove that [Carniglia] is guilty of any of the charged offenses." We presume that the jury understood and followed the instructions. (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1336.) In light of the limiting instruction and because none of the uncharged offenses were more egregious than the charged offenses, it is unlikely that a jury would have punished Carniglia

for the uncharged offenses. (See *People v. Hernandez* (2011) 200 Cal.App.4th 953, 969.)

Jury Instructions on Lesser Included Offenses

Carniglia contends the court erred by refusing to give jury instructions on nonforcible oral copulation and sodomy with a minor because they were lesser included offenses. We disagree.

A trial court has a sua sponte duty to instruct on a lesser included offense if there is substantial evidence the defendant is guilty of the lesser, but not the greater, offense. (*People v Shockley* (2013) 58 Cal.4th 400, 403 (*Shockley*).) Whether the trial court erred by failing to instruct on a lesser included offense is determined by de novo review. (*People v. Souza* (2012) 54 Cal.4th 90, 113.)

To determine whether an offense is a lesser included offense, we apply either the elements test or the accusatory pleading test. (*Shockley*, *supra*, 58 Cal.4th at p. 404.) "'Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former.' [Citation.]" (*Ibid*.)

In instances where, as here, the information charging the defendant tracks the language of the statute under which he was charged, and does not provide any additional factual allegations, we apply the elements test. (*Shockley*, *supra*, 58 Cal.4th at p. 404; see also *People v. Anderson* (1975) 15 Cal.3d 806, 809 ["where the accusatory pleading is couched in terms of the statutory definition of the greater crime and no additional

factual allegations are included therein, the courts necessarily must rely solely upon the statutory definition"].)

Applying the elements test, nonforcible oral copulation and sodomy are not lesser included offenses here. Carniglia was charged with sections 288a, subdivision (c)(2)(A) and 286, subdivision (c)(2)(A), which prohibit oral copulation and sodomy "when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury." (§§ 288a, subd. (c)(2), 286, subd. (c)(2).) He alleges that sections 288a, subdivision (b)(1) and 286, subdivision (b)(1), which prohibit nonforcible oral copulation and sodomy with "another person who is under 18 years of age," are lesser included offenses. But the requirement that the victim be younger than 18 years old is not an element of the charged offenses. Thus, nonforcible oral copulation and sodomy are not lesser included offenses of the charged offenses. (See *People v. Scott* (2000) 83 Cal.App.4th 784, 794.)

Carniglia contends we should apply the accusatory pleading test. We are not persuaded, but even if we applied the pleading test, we reach the same conclusion. Here, the relevant counts do not allege the victim was under the age of 18. Therefore, nonforcible oral copulation and sodomy under sections 288a, subdivision (b)(1) and 286, subdivision (b)(1) are not lesser included offenses under the pleading test.

Carniglia argues that because the information contained other counts that alleged the dates of the crime and K.J.'s age on those dates, the facts alleged included all the elements of the nonforcible sex offenses. But he cites to no cases which state that when applying the pleading test, a court should

consider the pleading as a whole rather than consider each count separately.

Carniglia also contends the pleading test includes evidence adduced at the preliminary hearing, which here established that K.J. was under 14 years old when the acts occurred. (*People v. Ortega* (2015) 240 Cal.App.4th 956, 967.) Carniglia relies on *Ortega*, in which the trial court applied an expanded accusatory pleading test by considering evidence adduced from the preliminary hearing. (*Ibid.*) But *Ortega* is an exception to the general principle that a court does not look beyond the face of a pleading, and it has not been followed by any published case thus far. (See *People v. Montoya* (2004) 33 Cal.4th 1031, 1036 ["to determine whether a defendant is entitled to instruction on a lesser uncharged offense—we consider *only* the pleading for the greater offense"]; see also *People v. Smith* (2013) 57 Cal.4th 232, 244 [trial court only needs to examine accusatory pleading and not the evidence adduced at trial].)

In any event, we need not decide whether *Ortega* was correctly decided because any error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Breverman* (1998) 19 Cal.4th 142, 178.) Based on the same underlying conduct supporting the convictions on counts 1 and 2, the jury found Carniglia guilty of forcible lewd acts upon a child in count 4 (§ 288, subd. (b)(1)) and rejected the lesser offense of nonforcible lewd acts. In light of the jury's finding that the sexual conduct was forcible in count 4, there is no reasonable probability of a more favorable result even if the court instructed on nonforcible oral copulation and sodomy in counts 1 and 2.

Cumulative Error

Carniglia claims cumulative error. Because we have determined that all his claims are meritless and that error, if any was harmless, there is no cumulative error. (*People v. Avila* (2006) 38 Cal.4th 491, 608.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Martin Larry Herscovitz, Judge

Superior Court County of Los Angeles

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