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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JONATHAN MICHAEL HARRIS,<br><br>Defendant and Appellant. | B283929<br><br>(Los Angeles County Super. Ct. No. MA070508) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Frank Tavelman, Judge. Affirmed.

Vanessa Place, 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, Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

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Jonathan Michael Harris appeals the judgment following his conviction for sodomy of a child and related counts when his then-girlfriend caught him sodomizing her eight-year-old daughter, B.H. He contends his due process rights were violated when the trial court instructed the jury it could also consider B.H.'s testimony that he committed uncharged sexual offenses against her in order to infer he had a predisposition to commit the charged crimes. We find no violation of his rights. Even if we did, we find no prejudice. We affirm.

## PROCEDURAL BACKGROUND

A jury convicted appellant of sodomy with a child 10 years old or younger (Pen. Code, § 288.7, subd. (a)),[1] sexual penetration of a child 10 years old or younger (§ 288.7, subd. (b)), and a lewd or lascivious act with a child under 14 (§ 288, subd. (a)). The trial court sentenced him to 48 years to life.

## FACTUAL BACKGROUND

The victim B.H. was eight years old at the time of the incident and when she testified at trial. She lived with her mother Maribel and her older sister M.H. in a one-bedroom apartment. Appellant was Maribel's boyfriend and had lived with them for about three years before his arrest. B.H. and M.H. usually slept in the one bed in the bedroom while Maribel and appellant usually slept on the couch in the living room.

One day, while Maribel was asleep in the living room, appellant came into the bedroom where B.H. and M.H. were sleeping and gave them each a cookie and water. He got into the bed. M.H. fell back asleep.

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[1] All undesignated statutory citations are to the Penal Code unless noted otherwise.

B.H. was wearing one-piece pajamas and appellant touched her on top of her clothing in her "front part" in "the area where pee pee comes out." Appellant told B.H. to go change. He did not tell her what to wear, but she understood she was supposed to put on shorts and a tank top because she "usually wore that when he did it." She changed into shorts and a tank top and got back into bed.

Appellant began touching her in her front over and then under her clothes. He pulled down her shorts and panties. He spit on his hand and touched her in her front and "butthole." He did not put his finger inside her "butthole" but put his finger inside her front part. He put spit on his private part and inserted it into her "butthole." She tried to pull away, but he kept pulling her back.

B.H. knew her mother was in the living room but did not call out for her because she was afraid appellant would try to hit her or her sister. Maribel eventually came into the bedroom and pulled the blanket off B.H. She lay still while appellant acted like he was sleeping. Maribel told B.H. to put on pants, woke up M.H., and said they were going to the police station.

B.H. testified appellant had put his private part and finger in her anus and his finger in her front part probably 10 times since she was seven years old. She had not told her mother about those incidents until they were on their way to the police station.

B.H.'s sister M.H. testified she woke up when she heard Maribel scream. Maribel took the blanket from the bed and M.H. saw B.H.'s pants and underwear were down. Maribel said, "Why would you do that?" Appellant responded, "You're crazy."

Maribel testified she woke up in the living room about 10:30 a.m. on the day of the incident. She looked into the

bedroom and saw appellant asleep in the bed with M.H. and B.H. She returned to the living room. About an hour later, she got up and looked into the bedroom again. M.H. was asleep. Under the covers, appellant made a "motion like somebody pulling up their pants." She "heard a slapping sound, like to a waistband hitting the skin."

She panicked and said, "What the fuck is going on?" Nobody answered. B.H. lay there with her eyes open in shock. Maribel pulled off the covers and saw B.H.'s pants and underwear were down. "Her top half was laying straight up but her hips were slightly turned towards" appellant. Maribel kicked appellant and told B.H. to get up. Appellant acted like he was asleep. At that point B.H. told Maribel what happened. By the time Maribel and the girls left the apartment, appellant was in the kitchen drinking vodka. B.H. had never told Maribel about any abuse before then.

At the hospital, a forensic nurse examined B.H. She observed abnormal redness, tenderness, and a stringy yellow discharge in B.H.'s genital area. The examination was consistent with the history B.H. reported to her. The condition could have been caused by a bacterial infection or sexually transmitted disease. B.H.'s hymen was intact, which was not necessarily inconsistent with digital penetration.

DNA analysis identified appellant's DNA on B.H.'s buttocks, anus, and underwear, and B.H.'s DNA on appellant's penis shaft, glans penis, and right hand.

## DISCUSSION

Appellant contends the trial court violated his due process rights by giving former CALCRIM No. 1191 (currently CALCRIM No. 1191A),[2] which stated:

"The People presented evidence that the defendant committed the crime of sodomy with a child 10 years of age or younger and engaging in sexual penetration of a child 10 years of age or younger that were not charged in this case. These crimes are described for in the instructions.

"You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

"If the People have not met this burden of proof, you must disregard this evidence entirely.

"If you decide the defendant committed the charged 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 the defendant was likely to commit sodomy with a child 10 years old or younger, in count 1, and sexual penetration with a child 10 years old or younger, count 2, as charged here. If you conclude 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

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[2] The current CALCRIM No. 1191A is identical to former CALCRIM No. 1191.

sodomy with a child 10 years of age or younger in count 1 and sexual penetration with a child 10 years or younger in count 2. The People must still prove each charge beyond a reasonable doubt."

Former CALCRIM No. 1191 guides a jury in applying Evidence Code section 1108: "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." (Evid. Code, § 1108, subd. (a).) In this case, the instruction essentially told the jury that, if it determined appellant committed prior sex offenses against B.H., it could infer appellant had a disposition to commit sex offenses. From that, the jury could—but was not required to—infer appellant likely committed the charged offenses. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1013 (*Reliford*).)

Our high court has rejected a due process challenge to Evidence Code section 1108, given it preserves the trial court's ability to exclude evidence pursuant to Evidence Code section 352.[3] (*People v. Falsetta* (1999) 21 Cal.4th 903, 917 (*Falsetta*).) It has also held the substantially similar predecessor to former CALCRIM No. 1191 correctly stated the law. (*Reliford, supra,* 29 Cal.4th at pp. 1012, 1016 [CALJIC No. 2.50.01].) And it has permitted the jury to consider charged sexual crimes involving

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[3] Evidence Code section 352 states, "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."

other victims as evidence of a defendant's propensity to commit other charged crimes. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1162.)

Our high court has not considered whether a jury may consider a victim's testimony of uncharged crimes by a defendant to infer the defendant had a propensity to commit the charged crimes against that same victim. But the Court of Appeal in *People v. Gonzales* (2017) 16 Cal.App.5th 494 (*Gonzales*) rejected that contention. The facts were materially identical to the facts here: the defendant was charged with multiple sexual crimes against a child victim, who at trial testified to additional uncharged sexual crimes the defendant had committed against her. (*Id.* at pp. 496-498.) The jury was instructed with former CALCRIM No. 1191, which defendant claimed was erroneous because the instruction "improperly allowed [the victim] to corroborate her own testimony." (*Gonzales, supra*, at p. 500.)

The court disagreed, noting the defendant's challenge related to the "admissibility of the victim's evidence of uncharged misconduct, not the instruction." (*Gonzales, supra,* 16 Cal.App.5th at p. 501.) Further, "[n]othing in Evidence Code section 1108 limits its effect to the testimony of third parties. Instead, the statute allows the admission of evidence of uncharged sexual offenses from any witness subject to Evidence Code section 352." (*Id.* at p. 502.) The court also rejected the defendant's claim that the propensity inference is "irrational" when the victim testifies to prior sexual offenses. That evidence "is not as probative as similar testimony from a third party. But it is still probative." (*Ibid.*)

Here, appellant asserts essentially the same argument, though he takes it a step further to argue allowing B.H. to testify

to uncharged sexual offenses precluded a "constitutionally meaningful application of [Evidence Code] section 352 to self-corroborating disposition evidence . . . ." He also contends similar considerations prevent us from effectively reviewing the admission of this evidence for abuse of discretion.

As in *Gonzales*, his contention is in essence a challenge to the application of Evidence Code section 352 to B.H.'s testimony, not a challenge to the propriety of former CALCRIM No. 1191. Yet, he never objected to the admission of B.H.'s testimony in the trial court, so he forfeited any evidentiary challenge. (*People v. Valdez* (2012) 55 Cal.4th 82, 138.)

To the extent he argues former CALCRIM No. 1191 was erroneous because the jury can *never* properly consider this type of evidence, we are not persuaded. He has not identified any characteristic peculiar to this type of evidence that would have *categorically* prevented the trial court from properly applying Evidence Code section 352. Though he claims this evidence is "circular" and "self-serving," the "careful weighing process under [Evidence Code] section 352" would take that into account, requiring the trial court to 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 from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta, supra,* 21 Cal.4th at p. 917.)

A trial court could readily apply these considerations to evaluate the admissibility of a victim's testimony recounting uncharged sex offenses committed by the defendant against him or her. In *People v. Ennis* (2010) 190 Cal.App.4th 721 (*Ennis*), the court did just that. The defendant was charged with various crimes alleging sexual molestation of his daughter and step-daughter. (*Id.* at p. 724.) He argued the trial court erred in allowing the jury to hear testimony from one victim that he committed additional uncharged acts of sexual abuse against her. (*Id.* at p. 732.) The court opined that "when such evidence comes in a child molestation case, from the same witnesses who supplied the evidence of the charged crimes, and amounts to evidence that the defendant molested the child even more times than he was charged with, it wouldn't seem to advance the ball in any meaningful way." (*Id.* at p. 733.) But the defendant experienced little undue prejudice because nothing about the prior crimes made the defendant look "significantly worse, or made his alleged [charged crimes] appear significantly more egregious, than it already did." (*Id.* at p. 734.) Nor did anything about the prior crimes evidence make the evidence of the charged crimes "look substantially more credible than it would have otherwise," and if the jury was inclined to disbelieve the witnesses about the charged crimes, "it's difficult to imagine how hearing additional evidence from the same sources, about similar crimes committed against the [victim], would change anything." (*Ibid.*)

*Ennis* demonstrates that, had appellant objected in the trial court, no obstacle prevented the court from undertaking the weighing process under Evidence Code section 352. B.H., her sister, and her mother gave detailed, consistent accounts of the

charged sexual abuse. In contrast, B.H.'s brief testimony gave few details of appellant's uncharged abuse, apart from saying he had put his private part and finger in her anus and his finger in her private part probably 10 times before. Whether or not this testimony "advance[d] the ball in any meaningful way" (*Ennis, supra*, 190 Cal.App.4th at p. 734), it posed little risk of prejudice because it lacked the detail of B.H.'s testimony on the charged offenses and did not make appellant's charged crimes look significantly worse. And if the jury disbelieved B.H.'s account of appellant's charged abuse, it almost certainly would not have believed her less detailed account of the uncharged abuse.

Appellant also contends former CALCRIM No. 1191 lowers the prosecution's burden of proof when the evidence of uncharged crimes comes from the victim. He is referring to the portion of the instruction allowing the jury to consider uncharged crimes as propensity evidence when those crimes are established by a preponderance of the evidence. The court in *Gonzales* rejected the same argument, noting "CALCRIM No. 1191 also instructs that the uncharged offenses are only one factor to consider; that they are not sufficient to prove by themselves that the defendant is guilty of the charged offenses; and that the People must still prove the charged offenses beyond a reasonable doubt." (*Gonzales, supra,* 16 Cal.App.5th at p. 502.) In other words, even if the jury credited B.H.'s accounts of appellant's prior crimes against her and concluded by a preponderance of evidence those acts occurred, the jury was told that was only one factor in addition to all the other evidence—including B.H.'s testimony about the charged offenses—that it could consider in finding

appellant guilty beyond a reasonable doubt.[4] (See *Reliford, supra,* 29 Cal.4th at p. 1016 [substantively similar instruction did not "authorize[] the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed a prior sexual offense"]; *Falsetta, supra,* 21 Cal.4th at p. 920 [" 'While the admission of evidence of the uncharged sex offense may have added to the evidence the jury could consider as to defendant's guilt, it did not lessen the prosecution's burden to prove his guilt beyond a reasonable doubt.' "].)

In any case, any potential error in admitting B.H.'s testimony was harmless under any standard. As we have discussed, B.H.'s testimony on the uncharged crimes was brief and lacked the detail of the current crimes. Had the jury disbelieved this testimony, it would have likely disbelieved B.H.'s recounting of the charged crimes. On the other hand, the evidence of the charged crimes was all but conclusive. B.H.'s detailed account of appellant's abuse was corroborated by her sister and Maribel, who walked into the bedroom and caught appellant in the act of sodomizing B.H. A forensic nurse observed abnormal redness, tenderness, and a stringy yellow discharge in B.H.'s genital area, consistent with sexual abuse. Perhaps most incriminating, appellant's DNA was found on B.H.'s buttocks, anus, and underwear, and B.H.'s DNA was found on appellant's penis and right hand. On this record, no reasonable jury would have rendered a more favorable verdict for appellant in the

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[4] We express no opinion on the propriety of former CALCRIM No. 1191 as applied to a victim's testimony of uncharged crimes when the *only* evidence of the charged sexual crimes is the testimony of the same victim.

absence of B.H.'s testimony of his uncharged sexual crimes against her.

**DISPOSITION**

We affirm the judgment.

HALL, J.*

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.