Filed 5/9/12 P. v. Battle CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DAVID LEE BATTLE, Defendant and Appellant.	B231564 (Los Angeles County Super. Ct. No. BA367048)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Modified with directions.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., Stephanie A. Miyoshi and Colleen Tiedmann, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, David Lee Battle, of continuous sexual abuse of a child (Pen. Code,[1] § 288.5, subd. (a)) (count 1) and lewd act on a child of 14 or 15 years where defendant was at least 10 years older (§ 288, subd. (c)(1)) (count 4). The trial court found defendant had incurred a prior continuous sexual abuse conviction within the meaning of sections 667, subdivisions (a)(1) and (b) through (i), 667.51, subdivisions (a) and (b), 667.6, subdivisions (a) and (e)(6), 667.61, 667.71 and 1170.12. Defendant was sentenced to an indeterminate term of 50 years to life plus a determinate term of 16 years. We modify the judgment with respect to presentence custody credit and remand with directions to strike two enhancements.

II. THE EVIDENCE

A. The Prosecution Case

Nine-year-old T. F. testified that when she was six or seven years old, defendant, her uncle, took her for a ride in his car. He told her to sit in the front seat. T.'s younger sister was in the back seat. During the ride, defendant put his hand under T.'s pajamas and touched her vagina with his fingers. T. told him to stop but he did not. She then told him more firmly to stop and he did. Defendant continued to touch T.'s vagina when they rode in his car until she was eight years old. It happened about 13 times. He also kissed her on the mouth about five times and used his tongue. The sexual abuse stopped when T.'s mother asked about it. T. then admitted what had been occurring.

Twenty-five year old K. J. testified she had a sexual relationship with defendant, her uncle, that started when she was 15. He was a frequent visitor to the house where she lived. Also living in the house were K.'s mother and brother. Defendant took K. to

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

movies and restaurants and to the park. He bought her gifts. At some point defendant started groping K. The groping progressed to fondling and intercourse. They first had sexual intercourse when K. was 15. In the ensuing years, they had sexual intercourse about 100 times. The sexual abuse continued until, when K. was 23 or 24, she told defendant she would not do it anymore. When she was 18 years old, K. told T.'s mother, about the abuse. K. did not tell anyone else until she began to suspect defendant was abusing her cousins. K. reported her suspicions to the police. K. admitted that on March 20, 2007, she was convicted of selling drugs and was on probation.

T.'s sister, 17-year-old C. B., was also molested by defendant. When she was 10 or 11, defendant grabbed her chin and kissed her with his tongue in her mouth. When C. moved away from him, defendant said she would have to learn how to do it one day. Defendant subsequently requested kisses and hugs and brushed up against C. When he hugged her, he held her too long. When C. was 15, she called defendant and asked him to take her to buy balloons for a friend's birthday. On the way home, defendant tried to reach inside her pants. C. told him to stop and she moved his hand away. C. told K. what had happened. At that time, the police became involved. Not long afterward, C. stayed out all night; she got drunk and spent the night with her boyfriend. She was afraid she would get in trouble. So she lied to her mother. C. testified, "I had stayed out overnight, and I told my mom that I had been kidnapped." C. also lied and said she had been raped. At first she lied to the police as well, but eventually she told the truth. Counts 2 and 3 of the information alleged defendant had committed lewd acts upon C. in violation of section 288, subdivisions (a) and (c)(1). But the counts were dismissed after the jury was unable to reach a verdict on them.

The prosecution presented evidence that in 1996, defendant admitted he had sexually abused his then 17-year-old stepdaughter once or twice a month for more than 12 years. Detective Marie DiBernardo interviewed defendant in September 1996. Defendant told Detective DiBernardo the following. Before she was five years old, defendant touched his step-daughter's nipples while she touched the pubic hair on his stomach but not his penis. Once defendant's stepdaughter turned five, he began to rub

her vagina over her clothing. When she was eight, he rubbed her vagina over her clothing while she rubbed lotion on his penis. After she turned 16, defendant had sexual intercourse with her ten times. Defendant told Detective DiBernardo he was sorry for what had happened and it would not happen again.

B. The Defense Case

Defendant denied he ever had any sexual contact with T., C. or K. Defendant admitted he made the statements attributed to him by Detective DiBernardo. He acknowledged he was convicted of continuous sexual abuse as a result. Officer Melchor Oronoz testified he interviewed C. about her kidnap and rape claim and prepared a report. Detective Johnny Durden investigated C.'s claims. He reviewed Officer Oronoz's report and interviewed C. When Detective Durden challenged C.'s truthfulness, she admitted she had lied. She said she had been drinking alcohol and smoking marijuana with her boyfriend and stayed out all night. She lied because she did not want to get into trouble.

III. DISCUSSION

A. Prior Sexual Offense

As noted, the prosecution presented evidence that in 1996, defendant admitted he had sexually abused his then 17-year-old stepdaughter once or twice a month. This had gone on for more than 12 years. In her closing argument, Deputy District Attorney Lynne Smith explained to the jury that: the evidence of prior sexual misconduct did not by itself prove guilt; but the evidence was relevant to defendant's credibility; and if they believed he committed the prior crimes, they could conclude that defendant was inclined to commit sexual offenses, was likely to do so and did do so. Ms. Smith further explained the prior sexual offenses evidence was circumstantial evidence defendant intended to gratify himself sexually.

Defendant argues the probative value of the prior sexual abuse evidence was outweighed by its prejudicial effect. (Evid. Code, §§ 352, 1108.) Our review is for an abuse of the trial court's broad discretion. (*People v. Loy* (2011) 52 Cal.4th 46, 61; *People v. Thomas* (2011) 52 Cal.4th 336, 354-355; *People v. Wilson* (2008) 44 Cal.4th 758, 797.) Our Supreme Court has held, "'Under the abuse of discretion standard, "a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' [Citations.]" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286; accord, *People v. DeSantis* (1992) 2 Cal.4th 1198, 1226 [a trial court's evidentiary ruling under Evidence Code section 352 "will be sustained on review unless it falls outside the bounds of reason"].)

Our Supreme Court has held: "In exercising this [Evidence Code section 352] discretion as to a sexual offense, '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 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.' (*People v. Falsetta* [(1999)] 21 Cal.4th 903, 917.)" (*People v. Loy, supra,* 52 Cal.4th at p. 61.)

Our Supreme Court discussed the "prejudice" aspect of the Evidence Code section 352 determination in *People v. Scott* (2011) 52 Cal.4th 452, 490-491: "A trial court may exclude otherwise relevant evidence when its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. (Evid. Code, § 352; *People v. Riggs* (2008) 44 Cal.4th 248, 290 (*Riggs*).) '"'Prejudice' as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in [an Evidence Code] section 352 context, merely because it undermines the opponent's position or

shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. Unless the dangers of undue prejudice, confusion, or time consumption '"substantially outweigh"' the probative value of relevant evidence, a section 352 objection should fail. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) '"The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying [Evidence Code] section 352, 'prejudicial' is not synonymous with 'damaging.'" [Citation.]' (*People v. Karis* (1988) 46 Cal.3d 612, 638.) [¶] The prejudice that [Evidence Code] 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. [Citation.]" [Citation.]' (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008–1009.)' (*People v. Doolin* (2009) 45 Cal.4th 390, 438–439.)"

We find no abuse of discretion. The probative value of the evidence was strong. The uncharged conduct was substantially similar to defendant's conduct with T. and K. The victims were all family members. The familial relationship gave defendant access to his victims. Beginning when she was younger than five, defendant engaged in sexual acts that escalated as his stepdaughter aged. He refrained from having sexual intercourse with her until she was 16. This pattern was consistent with his conduct in the present case. Defendant sexually abused T. from age six until she turned eight. He repeatedly touched her vagina. Defendant began to rub his stepdaughter's vagina after she turned five and did not escalate the sexual conduct until she was eight. Defendant began having

sexual intercourse with K. when she was 15. Similarly, he did not have sexual intercourse with his stepdaughter until she turned 16. Defendant's conduct with his stepdaughter was sufficiently similar to his conduct with T. and K. to support an inference he harbored the same intent with respect to his current victims. The risk of undue prejudice was minimal. The prior sexual abuse evidence was not more inflammatory than the charged conduct. It had occurred many years earlier and defendant had been punished for it. The jury would not have been confused or distracted by its admission.

Further, the jury was instructed with CALCRIM No. 1191.[2] As the Court of Appeal for the Third Appellate District has explained with respect to an analogous instruction concerning uncharged domestic violence: ". . . CALCRIM No. 852 explains that *if* the jury finds the defendant committed the uncharged acts, it *may* but is not required to conclude defendant was disposed to or inclined to commit domestic violence and may also conclude that the defendant was likely to commit and did commit the crimes charged in [the present case] . . . . CALCRIM No. 852 clarifies that even if the jury concludes defendant committed the uncharged acts, that evidence is only one factor to consider, along with all the other evidence and specifies that such evidence alone is insufficient to prove defendant's guilt on the charged offenses. CALCRIM No. 852 then goes on to state that the People must still prove each element of every charge beyond a reasonable doubt. In this, CALCRIM No. 852 . . . [includes] a clarification which inures to defendant's benefit." (*People v. Reyes* (2008) 160 Cal.App.4th 246, 252.) With respect to the prior sexual offense evidence instruction, our Supreme Court has held:

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[2] The jury was instructed: "If you decide that the defendant committed the uncharged 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 and did commit [the present charged offenses]. If you conclude that defendant committed the uncharged offense, 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 present charged offenses]. The People must still prove each charge and allegation beyond a reasonable doubt."

"This [] instruction will help assure that the defendant will not be convicted of the charged offense merely because the evidence of his other offenses indicates he is a 'bad person' with a criminal disposition. (See [*People v.*] *Fitch* [(1997)] 55 Cal.App.4th [172,] 184.)" (*People v. Falsetta, supra,* 21 Cal.4th at p. 920.) The jury is presumed to have followed the trial court's instructions in this regard. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852; *People v. Fletcher* (1996) 13 Cal.4th 451, 464.) Given the state of the evidence and jury instructions in the present case, the trial court did not abuse its discretion in allowing minimal evidence of prior sex crimes. Even if the trial court had abused its discretion, the evidence of defendant's guilt was very strong. It is not reasonably probable the verdict would have been more favorable to defendant had the prior sexual offense evidence been excluded. (Cal. Const., art. VI, § 13; *People v. Thomas, supra,* 52 Cal.4th at p. 356; *People v. Scott, supra,* 52 Cal.4th at p. 492.)

Defendant raises two related arguments for purposes of future review. First, he contends Evidence Code section 1108 violates his federal due process rights. But, as defendant recognizes, our Supreme Court has repeatedly held Evidence Code section 1108 does not offend due process. (*People v. Loy, supra,* 52 Cal.4th at pp. 60-61; *People v. Lewis, supra,* 46 Cal.4th at p. 1284; *People v. Wilson, supra,* 44 Cal.4th at p. 797; *People v. Falsetta, supra,* 21 Cal.4th at pp. 910-922; see *U.S. v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1024-1027 [upholding a similar federal rule].) Second, defendant asserts instruction with CALCRIM No. 1191 violated his due process rights under the federal and state Constitutions. Defendant raised no objection to the instruction in the trial court. In any event, in *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016, our Supreme Court upheld the constitutionality of a substantially identical instruction, the 1999 version of CALJIC No. 2.50.01.[3] (Accord, *People v. Lewis, supra,* 46 Cal.4th at pp. 1297-1298;

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[3] The 1999 version of CALJIC No. 2.50.01 as modified in *Reliford* stated: "'Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense other than that charged in the case. [¶] '"Sexual offense" means a crime under the laws of a state or of the United States that involves any of the following: [¶] 'Contact, without consent, between the genitals or anus of the defendant and any part of another person's body. [¶] 'If you find that the defendant committed a prior sexual

see also *People v. Loy, supra,* 52 Cal.4th at pp. 71-77.) In *People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1103-1104, *People v. Johnson* (2008) 164 Cal.App.4th 731, 739-740, and *People v. Cromp* (2007) 153 Cal.App.4th 476, 479-480, the Courts of Appeal rejected the very argument raised here, based on CALCRIM No. 1191, under compulsion of *Reliford.* We are bound by the foregoing Supreme Court authority. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 197-198; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

B. Unanimity Instruction

Defendant contends the trial court committed reversible error and violated his rights under the state and federal Constitutions when it failed to give a unanimity instruction for the continuous sexual abuse offense. Defendant never requested a unanimity instruction in the trial court. Moreover, our Courts of Appeal have repeatedly held no unanimity instruction is required nor does the failure to so instruct violate the state or federal Constitution. (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1123-1126; *People v. Adames* (1997) 54 Cal.App.4th 198, 206-209; *People v. Whitham* (1995) 38 Cal.App.4th 1282, 1294-1297; *People v. Gear* (1993) 19 Cal.App.4th 86, 91-92; *People v. Avina* (1993) 14 Cal.App.4th 1303, 1313.) Nothing in *Richardson v. United States* (1999) 526 U.S. 813, 815-824, compels a different conclusion.

C. Lesser Included Offense

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offense in 1991 involving [the victim], you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused. [¶] 'However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense in 1991 involving [the victim], that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime. The weight and significance of the evidence, if any, are for you to decide. [¶] 'You must not consider this evidence for any other purpose.'''''''" (*People v. Reliford, supra*, 29 Cal.4th at pp. 1011 -1012.)

Defendant argues it was error not to instruct the jury on battery as a lesser included offense of lewd acts upon a child as charged in count 4. There is a split of authority in the Courts of Appeal as to whether battery is a lesser included offense of lewd acts upon a child. In *People v. Santos* (1990) 222 Cal.App.3d 723, 739, the Court of Appeal for the Sixth Appellate District held without analysis that battery is not a lesser included offense of lewd acts. In *People v. Thomas* (2007) 146 Cal.App.4th 1278, 1291-1293, the Court of Appeal for the First Appellate District disagreed. The issue is currently before our Supreme Court in *People v. Gray* (2011) 199 Cal.App.4th 167 (review granted December 14, 2011, S197749) and *People v. Shockley* (2010) 190 Cal.App.4th 896 (review granted March 16, 2011, S189462). We need not address the merits of defendant's included offense contention. There is no reasonable probability the jury would have convicted defendant of battery had included offense instructions been given. (*People v. Breverman* (1998) 19 Cal.4th 142, 165; *People v. Nakai* (2010) 183 Cal.App.4th 499, 511-512.) Any purported error was harmless.

D. Sentence Enhancements

Three prior conviction five-year enhancement allegations premised on defendant's prior 1996 continuous sexual abuse conviction were found to be true after a court trial. First, defendant was found to have been previously convicted of a serious felony pursuant to section 667, subdivision (a)(1).[4] Second, defendant was found to have previously been convicted of a specified sex offense within the meaning of section 667.51, subdivisions

[4] Section 667, subdivision (a) (1) states in part, "[A]ny person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately."

(a) and (b).[5] Third, defendant was found to have previously been convicted of a sex offense within the provisions of section 667.6, subdivisions (a) and (e)(6).[6] The trial court orally imposed all three five-year prior conviction enhancements but ordered the section 667.6. subdivisions (a) and (b) term to run concurrently. The abstract of judgment reflects the oral pronouncement of judgment in this regard.

We conclude only a single five-year prior conviction enhancement may be imposed. Our Supreme Court has held, "[W]hen multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply. (*People v. Jones* (1993) 5 Cal.4th 1142, 1150; *People v. Flournoy* (1994) 26 Cal.App.4th 1695, 1697-1701, cited with approval in *People v. Murphy* (2001) 25 Cal.4th 136, 156.) Further, section 1385, subdivision (b) states, "This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under section 667." Therefore, upon remittitur issuance, the trial court must strike the section 667.51, subdivisions (a) and (b) and 667.6, subdivisions (a) and (e)(6) enhancements. (*People v. Flournoy, supra,* 26 Cal.App.4th at p. 1702; see Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 346, p. 449.)

We recognize that section 1170.1, subdivision (h), as it was in effect when the offenses directed at T. were committed, requires the imposition of all enhancements.[7]

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5 Section 667.51, subdivisions (a) and (b) state in part: "(a) Any person who is convicted of violating Section . . . 288.5 shall receive a five-year enhancement for a prior conviction of an offense specified in subdivision (b). [¶] (b) Section . . . 288.5,. . . ."

6 Section 667.6, subdivisions (a) and (e)(6) state in part: "(a) Any person who is convicted of an offense specified in subdivision (e) and who has been convicted previously of any of those offenses shall receive a five-year enhancement for each of those prior convictions. [¶] (e) This section shall apply to the following offenses: [¶] . . . (6) Continuous sexual abuse of a child, in violation of Section 288.5."

7 As in effect in 2008 and 2009, section 1170.1, subdivision (h) stated: "For any violation of an offense specified in Section 667.6, the number of enhancements that may be imposed shall not be limited, regardless of whether the enhancements are pursuant to

However, *Jones* holds once an accused receives a section 667, subdivision (a)(1) five-year enhancement, no other legislatively promulgated *prior conviction enhancement* may be imposed. *Jones* was premised on our Supreme Court's analysis of the voters' intent in adopting Proposition 8. (*People v. Jones*, *supra*, 5 Cal.4th at p. 1153; see *People v. Murphy*, *supra*, 25 Cal.4th at p. 156.) We are bound by the holding in *Jones*. (*People v. Letner and Tobin*, *supra*, 50 Cal.4th at pp. 197-198; *Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.)

E. Presentence Custody Credit

Defendant received credit for 417 days in presentence custody plus 61 days of conduct credit for a total presentence custody credit of 478 days. However, defendant was arrested on January 15, 2010, and sentenced on March 8, 2011. He was entitled to credit for 418 days in presentence custody (*People v. Smith* (2001) 24 Cal.4th 849, 854) plus 62 days of conduct credit (§§ 2933.1, 667.5, subd. (c)(16)) for a total presentence custody credit of 480 days. The judgment will be modified and, upon remittitur issuance, the abstract of judgment corrected.

IV. DISPOSITION

The judgment is modified to award defendant credit for 418 days in presentence custody plus 62 days of conduct credit for a total presentence custody credit of 480 days. Upon remittitur issuance, the trial court must strike the Penal Code sections 667.51, subdivisions (a) and (b) and 667.6, subdivisions (a) and (e)(6) enhancements. The judgment is affirmed in all other respects. The superior court clerk must prepare an amended abstract of judgment and deliver it to the Department of Corrections and Rehabilitation.

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this section, Section 667.6, or some other provision of law. Each of the enhancements shall be a full and separately served term." (Stats. 2002, ch. 126, § 1.)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

MOSK, J.

KRIEGLER, J.