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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. RONNIE LEE ROMAN, Defendant and Appellant.	B284949 (Los Angeles County Super. Ct. No. BA436498)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, 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 Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

Initially, defendant Ronnie Lee Roman was charged with 11 counts of lewd act with a child. In his first trial, jurors acquitted defendant of three charges and were unable to render a verdict on eight charges. The court declared a mistrial as to the eight unresolved charges, and one later was dismissed. Following a second trial, jurors convicted defendant of the seven remaining charges. In this appeal from defendant's second trial, he challenges the exclusion of evidence of the outcome of the first trial, i.e., that he was acquitted of three charges and that jurors were unable to reach a verdict on the remaining charges.

We conclude that evidence of the acquittals in the first trial was irrelevant and properly excluded because the prosecutor proffered no evidence related to the counts on which defendant had been acquitted. Evidence that the jury in the first trial was unable to reach a verdict also was irrelevant and properly excluded. The jury would have had no basis to "decipher" the meaning of a hung jury, and during a retrial, the inability of a prior jury to reach a verdict does not make the " 'existence of any fact . . . more probable or less probable.' " (*Yeager v. United States* (2009) 557 U.S. 110, 121.) We affirm the judgment.

FACTUAL BACKGROUND

This section summarizes the salient facts from defendant's second trial. Relevant information from defendant's first trial is provided in the procedural background.

Defendant was an employee of the Los Angeles Unified School District and supervised an after-school program at an elementary school. Five of the seven counts of lewd act with a child involved defendant's conduct while playing with female

elementary school students in the after-school program. Specifically, defendant played "four corners" with several girls. To play the game, one girl was blindfolded and stood in the middle of a room. Other girls would stand in one of the room's four corners. Defendant would spin the girl in the middle. The girl in the middle would then choose a corner and the girls in that corner would lose the game. The key disputed issue was whether after spinning the girl in the middle, defendant would pull the girl towards him and press his penis into the student's buttocks.

We summarize the victims' testimony and then defendant's testimony. We begin with the two counts that were unrelated to the four corners game and then turn to the five counts involving evidence of defendant's conduct while playing that game. We also briefly summarize the expert testimony introduced to assist jurors in evaluating the credibility of the victims. Except for K.R. and E.S., at the time of trial, the other victims were in either elementary or middle school.

1. K.R.

At the time of trial, K.R. was 23 years old. In 2002, when she was an elementary school student, defendant took K.R. to the school auditorium after school hours. He closed all the doors and told K.R. to sit in his lap. Defendant pulled up his shorts and rubbed his penis, moving his hand back and forth. K.R. felt defendant's penis between her thighs. K.R. previously lied when she testified that defendant touched her genitals.

2. E.S.

E.S. was 23 years old at the time of trial. When she was in elementary school, sometime between January 1, 2003 and September 15, 2005, defendant was friends with her mother.

One time, defendant read her a book as she fell asleep. E.S. could feel defendant's hand on her thigh, raising her shorts. E.S. moved, and defendant again lifted her shorts.

3. B.M.

In 2013, when B.M. was 10 years old, she participated in an after-school program defendant supervised. B.M. played the four corners game with defendant. When B.M. was in the middle, defendant would sit on a table behind her with his legs open. After defendant spun B.M. around, he grabbed her hips and pulled her into his body. B.M. felt defendant's penis on her buttocks. B.M. mentioned defendant's conduct to her friends and they responded that defendant had also pulled them into him.

4. K.M.

Between January 2012 and September 2014, when K.M. was in fifth grade, she participated in the after-school program supervised by defendant. K.M. played the four corners game with defendant. Once, when she was selected to be the person in the middle, she felt defendant's penis press against her buttocks.

5. A.R.

Sometime between January 2012 and September 2014, when A.R. was in fifth grade, she attended an after-school program supervised by defendant. A.R. also played four corners with defendant. Defendant would pull A.R. into him as he spun her. A.R. could feel his penis pressing against her buttocks. A.R.'s mother told A.R. not to play four corners because defendant "would do the same thing with [her] older sister."

6. D.M. (also known as D.G.)

At the time of trial, D.M. was 12 years old. In 2014, when she was in elementary school, D.M. played four corners with defendant. When D.M. was designated the girl in the middle, defendant would sit behind her on a desk with his legs open. When defendant stopped her from spinning, he would pull D.M. into his body. D.M. felt his penis on her buttocks.

7. M.R.

M.R. was 14 years old at the time of trial. Between January 2012 and September 2014, when M.R. attended elementary school, she sometimes stayed after school and played four corners with defendant. After spinning her around, defendant would pull M.R. towards him. She felt his penis on her buttocks or near her buttocks. His penis felt hard.

8. Defendant

Defendant testified that the girls who testified were not the only girls who played four corners and that boys too played four corners. Defendant testified that he never pulled a girl into his body. He further testified that he was not aroused by spinning the girls. Defendant stated that he never inappropriately touched a student.

Defendant remembered K.R. but denied taking her to an auditorium and denied exposing himself to K.R. Defendant remembered E.S., but denied touching her and believed that her mother was upset with him because of unrequited affection. (E.S.'s mother denied having such motive.)

Defendant testified that he was being sued civilly based on the same allegations involved in this case.

9. Additional Evidence

The victims used the term "private part" to refer to defendant's penis, and several described feeling "weird" or "uncomfortable." Some of the girls spoke to one another about defendant prior to speaking to law enforcement. Pretrial interviews of B.M., A.R., M.R., and K.M. were played for jurors.

10. Expert Witnesses

Two prosecution experts and one defense expert testified regarding the suggestibility of young children. Nicole Farrell testified on behalf of the prosecution. She was the director of a facility that receives referrals involving alleged child sexual abuse and that conducted the pretrial interviews of the victims in this case. She testified that the later facility used proper procedures during the pretrial interviews of the victims in this case. According to Farrell, research on child suggestibility indicated that children rarely fabricate acts of sexual misconduct. Farrell was asked about words children commonly use to describe their feelings during incidents of sexual abuse. She testified children often describe feeling weird or uncomfortable when they are the victims of sexual abuse. They also commonly use the phrase "private part" to refer to male and female genitals.

Developmental psychologist Susan Hardie, another prosecution witness, testified consistently with Farrell. When asked whether children will make up abuse to "be part of the in crowd," she responded that in her experience, children were reluctant to report abuse. Hardie was not aware of any cases in which a child falsely reported abuse. She was aware of one case in which a child exaggerated a report of sexual abuse by claiming that the abuser used a knife when he did not have a weapon.

Like Farrell, Hardie testified that victims of sexual abuse often describe the abuse as weird or uncomfortable.

Professor Bradley McAuliff testified for the defense based on his research into the suggestibility of children. In contrast to Farrell and Hardie, he testified that children may falsely report sexual abuse. According to McAuliff, this case involved repeated interviews, which could influence the accuracy of the victims' accounts. Specifically, the interviewer could suggest details to the victims and could try to elicit information to support the interviewer's "preexisting beliefs." According to McAuliff, police officers often report using open ended questions when they actually failed to do so. McAuliff explained that even if the interviews conducted at the facility run by Farrell followed proper procedures, the victims may have reported false details based on prior interviews in which answers may have been suggested to them.

PROCEDURAL BACKGROUND

A. Information

An amended information charged defendant with 11 counts of lewd act with a child in violation of Penal Code section 288, subdivision (a).[1] The victims in order of the counts were B.M. (count 1), D.R. (count 2), R.R. (count 3), A.R. (count 4), D.J. (count 5), M.R. (count 6), K.M. (count 7), L.O. (count 8), K.R. (count 9), E.S. (count 10), D.M. (count 11). A multiple victim enhancement within the meaning of section 667.61, subdivision (c) was alleged with respect to each count. With respect to count 10, it was further alleged that E.S. was under

[1] Undesignated statutory citations are to the Penal Code.

the age of 18 at the time of the offense and that the prosecution was commenced prior to her 28th birthday.

Prior to the second trial, a second amended information was filed but added nothing new. Prior to the second trial, count 8 (involving L.O.) was dismissed because the prosecution was unable to proceed.

B. Verdict in the First Trial

In defendant's first trial, jurors acquitted him of charges involving D.R., R.R., and D.J. (counts 2, 3, and 5). Jurors were unable to reach a verdict on the remaining charges. Jurors were split 7 to 5 in favor of guilt with respect to count 4 involving A.R. and 10 to 2 in favor of guilt with respect to the remaining charges. The trial court declared a mistrial as to all charges on which jurors were unable to reach a verdict.

C. D.R., R.R., and D.J. First Trial Testimony

The three charges upon which defendant was acquitted involved the four corners game. In defendant's first trial, R.R. testified that, when she was in third grade, she played four corners with defendant. After defendant spun her, he pulled her closer and she felt his penis on her buttocks. R.R. tried to move forward, but defendant would pull her back.

During the first trial, D.R. testified that she played four corners with defendant. When she was the girl in the middle, she felt defendant's penis on her lower back. She tried to move forward, but defendant pulled her back. D.R. told her sister R.R.

Also during the first trial, D.J. testified that when she played four corners with defendant, he would spin her by her waist. She felt his penis on her buttocks. When D.J. tried to move forward, defendant pulled her back.

D. During Defendant's Second Trial, Defense Counsel Requested Jurors Learn of the Outcome of the First Trial

During the second trial, defense counsel requested that defendant be permitted to introduce evidence in the second trial of the outcome of the first trial. According to defendant's counsel: "[T]o prohibit Mr. Roman from being able to mention the hung jury is . . . prejudicial from Mr. Roman's standpoint. The jurors have already heard that there is another proceeding that there was a hung jury.[2] It's very prejudicial against Mr. Roman because he is going to testify—[the prosecutor] was able to elicit how the girls felt coming back to court to testify again. I think there may have been some testimony how they felt at other proceedings and testify before folks." Defense counsel indicated that there were acquittals on three counts "so those have been removed from the cause of action. [¶] Of the five remaining, and we have them before the court, there was an unequal split as to . . . the guilt and innocence portion of that split." Counsel indicated that defendant believed the girls were lying.

The court initially suggested that counsel should stipulate to what occurred in the prior trial. Ultimately, the court excluded the evidence and prohibited defense counsel from referring to the outcome of the prior trial.

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[2] During cross-examination, without objection, E.S. testified that her aunt told her there had been a "hung jury" and a "mistrial" requiring her to testify again.

E. Second Trial Verdict and Sentence

Jurors convicted defendant of seven counts of a lewd act with a child and found the multiple victim enhancement true as to each count.

The court sentenced defendant to prison for 105 years to life (consisting of a 15 year-to-life indeterminate term for each victim). This appeal followed.

DISCUSSION

The sole issue on appeal is whether the court erred in excluding evidence that the first-trial jury acquitted defendant of three charges and was unable to reach a verdict on the remaining eight charges (one of which was later dismissed). As we explain below, the evidence was irrelevant, and a trial court lacks discretion to admit irrelevant evidence. (*People v. Thornton* (2007) 41 Cal.4th 391, 444.) Additionally, a defendant's right to present a defense does not encompass the right to present irrelevant evidence. (*Id.* at p. 445.)

I. The Evidence of the Prior Acquittal Was Irrelevant

In the second trial, the prosecution could have proffered evidence of defendant's conduct with R.R., D.R., and D.J. even though the second-trial jurors were not asked if defendant was guilty of those charges. Evidence of prior criminal conduct may be admitted even when a defendant is acquitted of the criminal charges based on the prior conduct. (*People v. Beamon* (1973) 8 Cal.3d 625, 633.) Pursuant to Evidence Code section 1108, "[i]n 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 [Evidence Code]

Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352." (Evid. Code, § 1108, subd. (a).) Section 1108 creates a narrow exception to the rule that propensity evidence generally is inadmissible. (*People v. Cottone* (2013) 57 Cal.4th 269, 285.)

When evidence of an *uncharged* sexual offense is admitted, "it is error to exclude admission of evidence that the defendant has been acquitted of that offense, and such error is reversible if it is prejudicial under the *Watson* harmless error test." (*People v. Mullens* (2004) 119 Cal.App.4th 648, 652.) Our high court explained that: "Although there is authority to the contrary [citation], the better rule allows proof of an acquittal to weaken and rebut the prosecution's evidence of the other crime." (*People v. Griffin* (1967) 66 Cal.2d 459, 465 (*Griffin*).) "[A] properly authenticated acquittal is admissible to rebut prosecution evidence of guilt of another crime."[3] (*Id.* at p. 466.)

Griffin held "that competent and otherwise admissible evidence of another crime is not made inadmissible by reason of the defendant's acquittal of that crime [citation], but the proof of the acquittal was also admissible to *weaken and rebut the prosecution's evidence of the other crime*." (*People v. Jenkins* (1970) 3 Cal.App.3d 529, 534.) "[T]he gist of the holding in *Griffin* is that since 'evidence of other crimes always involves the

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[3] In contrast to *Griffin, supra*, 66 Cal.2d 459, federal courts generally exclude evidence of a prior acquittal. (*U.S. v. De La Rosa* (1999) 171 F.3d 215; 219-220; *U.S. v. Marrero-Ortiz* (1st Cir. 1998) 160 F.3d 768, 775; *U.S. v. Thomas* (D.C. Cir. 1997) 114 F.3d 228, 249-250; *United States v. Jones* (7th Cir. 1986) 808 F.2d 561, 566-567; *United States v. Irvin* (11th Cir. 1986) 787 F.2d 1506, 1516-1517; *United States v. Kerley* (5th Cir. 1981) 643 F.2d 299, 300-301.)

risk of serious prejudice, and it is therefore always "to be received with 'extreme caution,' " ' [citation] any competent or otherwise admissible evidence tending to weaken and rebut the evidence of the other crime should be admissible." (*Ibid*.)

More recently, our high court reaffirmed that when evidence of prior uncharged sexual misconduct is admitted, the defendant may introduce evidence of a prior acquittal related to the prior misconduct. (*People v. Cottone, supra*, 57 Cal.4th at p. 288.) "To give full meaning to the presumption of innocence in a case in which the prosecution is permitted to present [Evidence Code] section 1108 propensity evidence showing the defendant committed an uncharged sex crime, a trial court must grant the defense an opportunity to present evidence showing the defendant was acquitted of that alleged uncharged sex offense." (*People v. Mullens*, *supra*, 119 Cal.App.4th at p. 666.)

None of these principles applies here because no evidence of defendant's prior conduct involving R.R., D.R., and D.J. was introduced in the second trial. Absent evidence of the conduct underlying the prior acquittal, the prior acquittal was irrelevant. In other words, because the second-trial jurors were not asked to evaluate whether defendant committed the conduct underlying the prior acquittal, evidence of the prior acquittal had no tendency to prove or disprove a disputed fact. (Evid. Code, § 210 [" 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action"].) In contrast to the circumstances in *Griffin* and its progeny, here the evidence of the acquittal was not relevant to rebut any admitted evidence.

Defendant advocates for "reciprocity" in the admission of evidence based on "principles of fairness." Defendant's plea for reciprocity is unavailing because defendant seeks to admit evidence of an acquittal untethered to the admission of evidence of the underlying conduct. Defendant provided no explanation for the relevance of the prior acquittal in light of the absence of evidence of defendant's conduct with R.R., D.R., and D.J. The trial court thus properly excluded the irrelevant evidence.

II. Evidence of a Prior Hung Jury Was Irrelevant

A count on which jurors were unable to reach a verdict is not equivalent to one on which a defendant was acquitted. Evidence of an acquittal supports the inference that the prosecution was unable to prove every element of the crime beyond a reasonable doubt. (See *Dowling v. U.S.* (1990) 493 U.S. 342, 349 [acquittal does not prove innocence but shows only a reasonable doubt as to guilt].) The fact that the prosecution was unable to meet its burden "has at least some tendency to prove that the defendant did not do it." (*Williams v. U.S.* (2013) 77 A.3d 425, 433.)

In contrast, evidence of a deadlocked jury provides no window into the jurors' collective view of the evidence. As the United States Supreme Court explained: "A hung count is not a 'relevant' part of the 'record of [the] prior proceeding.' [Citation.] Because a jury speaks only through its verdict, its failure to reach a verdict cannot—by negative implication—yield a piece of information that helps put together the trial puzzle." (*Yeager v. United States*, *supra*, 557 U.S. at p. 121.) As relevant here, the high court emphasized that "there is no way to decipher what a hung count represents. . . . A host of reasons—sharp disagreement, confusion about the issues, exhaustion after a long

trial, to name but a few—could work alone or in tandem to cause a jury to hang. To ascribe meaning to a hung count would presume an ability to identify which factor was at play in the jury room." (*Ibid.*, fn. omitted.)

Because no meaning can be ascribed to the hung jury, it did not have the tendency to prove or disprove a disputed issue in defendant's trial and was irrelevant. Defendant's argument that it could have supported his credibility and undermined the victims' credibility is unpersuasive because it incorrectly "ascribe[s] meaning" to the jurors' inability to reach a verdict. (*Yeager v. United States*, *supra*, 557 U.S. at p. 121.) In short, the trial court properly excluded evidence that in a prior trial, jurors were unable to reach a verdict on the same charges as in the current case.

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.