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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY TROY FREEMAN, Defendant and Appellant.	2d Crim. No. B237613 (Super. Ct. No. 2008013384) (Ventura County)

Jeffrey Troy Freeman appeals from the judgment entered after his conviction by a jury of lewd act upon a child (count 1 - Pen. Code, § 288, subd. (a)), continuous sexual abuse of a child (count 2 - *Id*., § 288.5, subd. (a)), and oral copulation with a child 10 years of age or younger (count 3 - (*Id*., § 288.7, subd. (b).) He was sentenced to prison for a determinate term of 18 years plus a consecutive indeterminate term of 15 years to life.

Appellant contends that the trial court erroneously admitted evidence of child pornography found on computer hard drives seized by the police during a search of his bedroom. He also contends that his conviction on all three counts violates the proscription against multiple convictions of section 288.5, subdivision (c). Finally, appellant argues that the trial court abused its discretion by ordering him to pay restitution of $100,000 for the victim's noneconomic losses. We affirm.

Facts

M.J., the named victim, was born in September 2001. M.J.'s grandfather was married to appellant's mother. When M.J. was four years old, appellant started sucking M.J.'s penis. M.J. visited appellant every Saturday, and appellant sucked M.J.'s penis during each visit. Sometimes M.J. sucked appellant's penis. M.J. did not tell anyone about these incidents because appellant said "it was a secret."

On February 3, 2008 (Super Bowl Sunday), when M.J. was six years old, he and his father went to appellant's house. While father worked on a project downstairs, M.J. spent most of the time upstairs with appellant in his bedroom. When it was time to leave, father went upstairs to appellant's bedroom to get M.J. The door to the bedroom "was dead bolted, so [father] beat on the door." "It seemed like an eternity" before appellant opened the door. Appellant "was naked from the waist up," and M.J.'s "pants were not fastened." When father and M.J. returned home, M.J. said that appellant had sucked his penis inside the bedroom.

Sheriff's deputies searched appellant's bedroom. They recovered a laptop computer and computer hard drives. The hard drives contained child pornography.

Appellant denied engaging in sexual acts with M.J. He admitted that, in January 2008 when his mother was present, M.J. asked him if he would like to suck M.J.'s penis. Appellant testified that he did not download the child pornography on his hard drives and did not "know how it got there." In his opening brief, appellant states that his "defense was that [M.J.] was making up the allegation against him; coached, perhaps, by his parents and the prosecution team, and motivated by a family dynamic of jealously, greed and retribution."

Admission of Child Pornography Evidence

Trial Court Proceedings

Appellant filed a pretrial motion to exclude the child pornography evidence because the People had failed to establish (1) an adequate "chain of custody" of the computer hard drives from which the evidence had been extracted, and (2) "other preliminary facts showing [appellant] was responsible for the presence of child pornography on his

computer." Appellant did not specify what the "other preliminary facts" were. He argued that "law enforcement had a motive to plant evidence of child pornography on [his] computer."

Appellant also filed a pretrial "in limine" motion requesting that, pursuant to Evidence Code section 352,[1] "the prosecution should only be allowed to present evidence that [appellant] had child pornography sites on his computer without reference to the amount [i.e., number] of sites supposedly recovered [from] the computer and the names of those sites as such evidence is too inflammatory."

The People filed written opposition to the motions. They asserted that child pornography extracted from appellant's computers and hard drives "consisted mostly of images of nude underage boys posing, masturbating or engaging in sexual activity (oral copulation, and sodomy)." The People continued: "There were also many pictures of male infants, with their penises exposed. In addition, [computer technicians] found videos and photographs of male infants being circumcised. The naming tags associated with the images and videos . . . are consistent with child pornography naming conventions. In addition, [computer technicians] found a nude frontal photo of the victim in this case . . . . [M.J.'s] penis is visible [in the photo] . . . ." Computer technicians "also discovered that on February 3, 2008 (the same day [M.J.] disclosed to his father that [appellant] was molesting him), between 4:15 p.m. and 4:31 p.m., at least 1,784 of the images containing child pornography naming conventions were deleted from appellant's computer."

During oral argument on the motions, defense counsel contended that the pornography sites allegedy visited by appellant "have no relevancy" because "[t]here's no assertion that [M.J.] was ever shown any pornography or that any of the purported molestation of him involved pornography." The prosecutor argued that the pornography evidence was relevant to show appellant's sexual intent and that he "had a particular desire for children and specifically the penises of young male children in a sexual fashion." Furthermore, the pornography evidence "bolster[s] the credibility" of M.J. Defense counsel

[1] Unless otherwise stated, all statutory references are to the Evidence Code.

protested that appellant's intent was not an issue because if the alleged acts of oral copulation had occurred, they must have involved a sexual intent.

The trial court found that the pornography evidence was relevant on the intent element because "it is the People's responsibility to prove beyond a reasonable doubt that the intent element exists" and the evidence goes "a long way in proving what [appellant's] intent was should the jurors find that he actually touched [M.J.] in the way that [M.J.] has alleged." Moreover, the evidence was relevant to support M.J.'s credibility and to attack the credibility of appellant's character witnesses "should they be allowed to testify that [he] has a character for no sexual interest in children." The court said that, on each sexual image, it would "rule individually" whether the probative value was substantially outweighed by the danger of creating undue prejudice, "but it appears . . . that they are images of activities that are certainly no worse than what are alleged to have occurred here."

After a recess, the court asked defense counsel if he wanted to comment on the People's argument that the child pornography was admissible pursuant to section 1108, subdivision (a), which provides: "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." Defense counsel responded, "I would have the same objections that we've previously made, your Honor." The court ruled that the child pornography evidence was admissible to show intent under section 1101 and to show propensity under section 1108. The court briefly reviewed the allegedly pornographic images and found that "many of them fall under [section] 311.11 of the Penal Code" [knowing possession of child pornography]. The court "considered the [section] 352 analysis that is required, and [found] that the images . . . are more probative than prejudicial." The court noted that the images "are very similar to the charged offense in that they appear to be all young boys and all naked and some engaged in sex acts." The court was "fairly certain that the People will be able to prove that [appellant] . . . knowingly possessed these items."

The Child Pornography Evidence Was

Admissible Pursuant to Section 1101

Appellant contends that the trial court erroneously admitted the child pornography evidence pursuant to sections 1101 and 1108. We need not consider section 1108 because the evidence was admissible pursuant to section 1101.

"Evidence Code section 1101, subdivision (a), . . . generally forbids introducing character evidence to 'prove . . . conduct on a specified occasion.' Subdivision (b) of Evidence Code section 1101 in turn creates an exception to subdivision (a): evidence of conduct may be admitted to prove motive or intent, although it may not be admitted to show a disposition to do the type of conduct shown by the evidence." (*People v. Memro* (1995) 11 Cal.4th 786, 864.) "We review the admission of evidence under Evidence Code section 1101 for an abuse of discretion. [Citation.]" (*Ibid*.)

The admissibility of the child pornography evidence is supported by *People v. Memro, supra*, 11 Cal.4th 786. There, the defendant was convicted of the first degree murder of a male child pursuant to a felony-murder theory. The underlying felony was the commission or attempted commission of a lewd act upon a child in violation of Penal Code section 288. "[A] violation of section 288 occurs whenever, to gratify the child's or the actor's sexual desires, an actor touches a child under 14. [Citations.]" (*Id*., at p. 861.) "In his confession, defendant said he lured [the child] to his apartment to photograph him in the nude. Once there he . . . choked [the child] and tried to have sex with his body." (*Ibid*.)

Over defendant's objection, "[t]he jury . . . received evidence of defendant's sexual interest in youths. These included pornographic magazines and photographs featuring young boys in the nude." (*People v. Memro, supra*, 11 Cal.4th at p. 861.) They were "admitted under Evidence Code section 1101, subdivision (b), as evidence of motive and intent to perform a lewd or lascivious act on [the child] in violation of [Penal Code] section 288." (*Id*., at p. 864.) The magazines "contain[ed] sexually explicit stories, photographs and drawings of males ranging in age from prepubescent to young adult. Some of the photographs [were] of similar character. Others depict[ed] youths in a manner that is not sexually suggestive." (*Id*., at p. 864.)

Our Supreme Court concluded that the trial court had not abused its discretion in admitting the evidence under section 1101, subdivision (b): "We believe the photographs were admissible to show defendant's intent to molest a young boy in violation of [Penal Code] section 288. [¶] Defendant's intent to violate section 288 was put at issue when he pleaded not guilty to the crimes charged. [Citations.] Although not all [of the photographs] were sexually explicit in the abstract, the photographs, presented in the context of defendant's possession of them, yielded evidence from which the jury could infer that he had a sexual attraction to young boys and intended to act on that attraction. (See *People v. Bales* (1961) 189 Cal.App.2d 694, 701 . . . [photograph of molestation victim in the nude admissible to show 'lewd intent.'].) The photographs of young boys were admissible as probative of defendant's intent to do a lewd or lascivious act with [the child victim]." (*People v. Memro, supra*, 11 Cal.4th at pp. 864-865.)

Here, as in *Memro*, the child pornography evidence was admissible as probative of appellant's intent to do a lewd or lascivious act with M.J. Appellant argues that some of the evidence did not constitute child pornography within the meaning of Penal Code section 311.11. Appellant did not make this argument in the trial court; therefore, it is forfeited. (§ 353, subd. (a).) In any event, for the purpose of admission pursuant to section 1101, subdivision (b), the issue is not whether the evidence constituted child pornography within the meaning of Penal Code section 311.11. The issue is whether the jury could reasonably infer from the evidence that appellant "had a sexual attraction to young boys and intended to act on that attraction." (*People v. Memro, supra*, 11 Cal.4th at p. 865.) The trial court did not abuse its discretion in concluding that the jury could reasonably make such an inference.

Appellant complains: "There was no evidence that appellant showed [M.J.] any pornographic images; appellant was not charged with possession of child pornography; and there was nothing in the images of nude adolescent and older prepubescent males that was more probative of appellant's lewd intent than the allegation of oral copulation before the jury." "[A]ppellant's illicit intent was established by the alleged acts themselves: his conduct in orally copulating [M.J.] could *only* manifest a lewd intent . . . ."

It is of no consequence that appellant did not show the sexual images to M.J. and was not charged with possessing child pornography. His possession of the sexual images had significant probative value as to both his motive and intent concerning the crimes allegedly committed against M.J. Appellant's intent "was put at issue when he pleaded not guilty to the crimes charged." (*People v. Memro*, *supra*, 11 Cal.4th at p. 864.) Furthermore, appellant put his intent at issue when he elicited testimony from five witnesses - Michael Meyer, William Cotts, Nancy Cotts, Janet J., and Joe J. - that he did not have a sexual interest in children. The child pornography evidence was admissible to rebut their testimony.

Appellant argues that "there was a fair amount of evidence admitted in appellant's case, like the circumcision-related evidence and the evidence related to females, or mother/son incest, that simply had nothing to do with, and was not probative on, any aspect of the charged offenses." Appellant has forfeited this argument because he failed to make it in the trial court. (§ 353, subd. (a).)[2] In any event, the circumcision-related evidence was relevant because it showed that appellant focused on the penises of male children. Evidence relating to mother/son incest was relevant because it pertained to sexual abuse of male children.

Appellant asserts that "much of the Internet [pornographic] evidence cannot be shown to have belonged to [him] such that it would be substantially probative of his intent." We disagree. Appellant's possession of the evidence was a preliminary fact within the meaning of section 400, which provides, " '[P]reliminary fact' means a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence." "The appellate courts have recognized that admission of . . . evidence under section 1101, subdivision (b) may entail preliminary fact determinations under section 403, subdivision (a)(1), such as the fact that the conduct occurred and the defendant's connection to it. [Citations.]" (*People v. Cottone* (2013) 57 Cal.4th 269, 286.)

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[2] Appellant contends that "defense counsel argued . . . that photos involving infant circumcision need not be admitted." We reject the contention because it is not supported by citation to the record. (*Sky River LLC v. Kern County* (2013) 214 Cal.App.4th 720, 740-741.)

"When the admissibility of evidence turns on the existence of a preliminary fact . . . , the trial court may, as here, hold a hearing outside the jury's presence to determine whether that preliminary fact exists. 'The court should exclude the proffered evidence only if the "showing of preliminary facts is too weak to support a favorable determination by the jury." [Citations.] The decision whether the foundational evidence is sufficiently substantial is a matter within the court's discretion.' [Citation.]" (*People v. Jones* (2013) 57 Cal.4th 899, 956.)

The trial court did not abuse its discretion in finding that that the showing of the preliminary facts at the hearing on the motions was not too weak to support a determination by the jury that appellant possessed the child pornography. In their written opposition to the motions, the People noted that the pornography had been extracted from computers and hard drives seized from appellant's bedroom. There was no evidence that appellant shared his bedroom with another person. Moreover, at the hearing the prosecutor stated: "[T]he People issued a subpoena duces tecum for [appellant's] email account which links [his] Glow Dark email address with the Glow Dark user account associated with the collection of these child pornography images." Defense counsel did not object to or dispute the prosecutor's statement. Counsel merely remarked: "[M]y client has glow in the dark objects and things that glow in the dark. That's not a reference to something untoward."

At the hearing the prosecutor also stated that, "on the date [M.J.] disclosed that he had been molested by [appellant], shortly after the [disclosure], . . . about 1,700 images containing naming conventions consistent with child pornography were deleted from [appellant's] computer." For example, one of the deleted images was described as "three-year old blows dad. That was the naming convention." The prosecutor said that computer technicians had been unable to recover the deleted images, but had recovered the deleted naming conventions. Defense counsel again did not object to or dispute the prosecutor's statement. It is reasonable to infer that appellant intentionally made the deletions to cover up his sexual interest in young boys. It is also reasonable to infer that he had personally saved the child pornography to his computer prior to the deletions. He certainly knew that child pornography was on his computer; otherwise, he would not have deleted it.

In admitting the child pornography evidence, the trial court did not abuse its discretion under section 352.[3] Appellant's possession of the evidence was highly probative of his motive and intent and "was less inflammatory than the testimony about the charged offenses." (*People v. Quang Minh Tran* (2011) 51 Cal.4th 1040, 1050.) "This circumstance decreased the potential for prejudice, because it was unlikely that the jury disbelieved [M.J.'s] testimony regarding the charged offenses but nevertheless convicted [appellant] on the [basis of the evidence of his possession of child pornography], or that the jury's passions were inflamed by" that evidence. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.)

In his pretrial in limine motion, appellant requested that "the prosecution should only be allowed to present evidence that [he] had child pornography sites on his computer without reference to the amount [i.e., number] of sites supposedly recovered [from] the computer and the names of those sites as such evidence is too inflammatory." The trial court did not abuse its discretion in denying this request. It impliedly and reasonably concluded that the number and names of the sites were highly probative of appellant's strong sexual attraction to children. (See *People v. Memro*, *supra*, 11 Cal.4th at pp. 864-865.) "The prejudice which exclusion of evidence under 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. . . . '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.' " (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

Multiple Convictions

Appellant argues that his conviction on all three counts cannot stand. Count 2 alleged that, in violation of Penal Code section 288.5,[4] appellant had continuously sexually abused M.J. from January 1, 2004, through February 28, 2008. Counts 1 and 3 alleged that

[3] Section 352 provides: "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."

[4] All further statutory references are to the Penal Code.

on February 3, 2008, during the period of continuous sexual abuse, appellant had committed specific sexual acts upon M.J. Pursuant to section 288.5, subdivision (c), "appellant cannot stand convicted of both a violation of section 288.5, and of multiple counts of other specific felony sex offenses committed against the same victim and in the same time period as the section 288.5 count."[5] (*People v. Torres* (2002) 102 Cal.App.4th 1053, 1055.) "[E]ither the continuous abuse conviction or the convictions on the specific offenses must be vacated." (*People v. Johnson* (2002) 28 Cal.4th 240, 245.) In *People v. Torres*, *supra*, 102 Cal.App.4th at pp. 1059-1060, the appellate court concluded that the appropriate remedy was to vacate the continuous sexual abuse conviction because the defendant "faced a greater maximum aggregate penalty with respect to [the specific offenses]," and this greater penalty was "most commensurate with his culpability."

The dates alleged in the information conflict with the prosecutor's opening statement and closing argument. According to the prosecutor, the continuous sexual abuse offense and the specific sexual offenses occurred at different times. The prosecutor told the jury: "Count 1 is the very first incident of oral copulation with [M.J.] when he was four years old. [¶] Count 2 covers everything that happened between the first incident and the last incident [on February 3, 2008, when M.J. was six years old]." "Count 3 addresses the very last incident of child molestation in this case." In closing argument the prosecutor reiterated: "Count 3 deals with Super Bowl Sunday [February 3, 2008, when M.J. was six years old]. Count 1, the very first time when [M.J.] was four years old. Count 2, all the ongoing acts in between."

The trial court accepted the prosecutor's specification of the dates of the offenses. At the time of sentencing, the trial court stated: "I agree with the People that the charges that [appellant] has been convicted of are charges that reflect three very distinct instances of

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[5] Section 288.5, subdivision (c) provides in relevant part: "No other act of substantial sexual conduct, as defined in subdivision (b) of Section 1203.066, with a child under 14 years of age at the time of the commission of the offenses, or lewd and lascivious acts, as defined in Section 288, involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative."

criminal conduct. . . . It was made clear in the presentation of the evidence, and the argument to the jury, and it is clear based on the jury's verdict that count 1 reflects criminal conduct in the first incident that [M.J.] was able to remember and testify about, that Count 3 had to do distinctively with the final incident . . . , and Count 2 represented the intervening times, the times that were too many to count of offenses on [M.J.]." Appellant did not object to the court's statement.

The People maintain that, because appellant failed to object to the prosecutor's comments during opening statement and closing argument, he "impliedly consented to the amendment of the charges to incorporate the different offense dates announced by the prosecutor to the jury." We agree. "The informal amendment doctrine makes it clear that California law does not attach any talismanic significance to the existence of a written information. Under this doctrine, a defendant's conduct [e.g., failure to object] may effect an informal amendment of an information without the People having formally filed a written amendment to the information. [Citations.]" (*People v. Sandoval* (2006) 140 Cal.App.4th 111, 133.)

For example, in *People v. Toro* (1989) 47 Cal.3d 966, the jury was instructed on an offense not charged in the information, and the jury was given a verdict form for this offense. The uncharged offense was not a lesser included offense. Our Supreme Court held that, by not objecting to the instructions and verdict form, the defendant impliedly consented to the jury's consideration of the uncharged offense. (*Id*., at pp. 969-970, 977, disapproved on another ground in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.) The Supreme Court quoted with approval the following excerpt from *People v. Francis* (1969) 71 Cal.2d 66, 75: " ' "[D]efendant's failure to object must be regarded as an implied consent to treat the information as having been amended to include the offense on which the sentence was imposed, and thus to be a waiver of the only objection - lack of notice of the offense charged - which was available to defendant." ' [Citation.]" (*People v. Toro, supra*, 47 Cal.3d at pp. 976-977.)

Pursuant to the informal amendment of the information, there is no overlap of the dates of the offenses charged in the three counts. Therefore, the convictions on these counts do not violate the proscription against multiple convictions of section 288.5, subdivision (c).

Restitution

Section 1202.4, subdivision (f)(3)(F), authorizes a sentencing court to order restitution for "[n]oneconomic losses, including, but not limited to, psychological harm, for felony violations of Section 288." Appellant argues that the trial court abused its discretion by ordering him to pay restitution of $100,000 to M.J. for noneconomic losses. "We . . . affirm a restitution order for noneconomic damages that does not, at first blush, shock the conscience or suggest passion, prejudice or corruption on the part of the trial court. [¶] Admittedly, this standard is not as delimited as the review of a restitution order for economic damages. By their nature, economic damages are quantifiable and thus awards of economic damages are readily reviewed for whether they are 'rationally designed to determine the . . . victim's economic loss.' [Citation.] Noneconomic damages, however, require more subjective considerations. Thus, the different standard is justified." (*People v. Smith* (2011) 198 Cal.App.4th 415, 436 (*Smith*).)

Applying this standard, the *Smith* court concluded that the trial court had not abused its discretion by ordering restitution of "$750,000 in noneconomic damages for years of sexual abuse . . . ." (*Smith, supra*, 198 Cal.App.4th at p. 436.) The appellate court reasoned that the award did "not shock the conscience or suggest passion, prejudice or corruption on the part of the trial court. [Citation.]" (*Id*., at pp. 436-437.)

In *Smith* the trial court calculated the award by multiplying 15 years of sexual abuse (from the age of 8 until the age of 23) times $50,000 for each year. The defendant protested that he had been convicted of molesting the victim for only seven years: from the age of 8 until the age of 15. The appellate court responded: "We are not concerned by the [trial] court's statements in making the award. As would a jury, the court was searching for some way to quantify [the victim's] pain and suffering. And there is no credible argument, especially on the facts of this case, that [the victim's] psychological harm ended when she was 15 years old. Accordingly, the court did not abuse its discretion." (*Id*., at p. 437.)

M.J. was convicted of molesting appellant for approximately two years: from the age of four until several months after his sixth birthday. For these two years of molestation, the trial court awarded restitution of $100,000 for noneconomic damages, or $50,000 for each year. As in *Smith*, this award "does not shock the conscience or suggest passion, prejudice or corruption on the part of the trial court." (*Smith, supra,* 198 Cal.App.4th at pp. 436.) Like the victim in *Smith,* M.J.'s psychological harm did not end on Super Bowl Sunday in February 2008 when appellant committed his last sexual offense. According to the probation report, M.J.'s mother stated: "As a result of the offense, [M.J.'s] school performance has been impacted negatively and he appears to be more anxious and nervous than a 'normal' 10-year-old boy should be. He craves attention and cannot seem to make enough friends. . . . While [M.J.] held his composure on the [witness] stand, he broke down immediately afterward and cried himself to sleep. . . . [Appellant's] actions have not only caused [M.J.] to lose his uncle [i.e., appellant], but also his grandparents, who chose to defend [appellant's] conduct . . . . [M.J.] lost several family members whom he loved so much and it was extremely difficult to explain to him why he could no longer see his grandparents and to try to convince him that it is not his fault that [appellant] is in custody."

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Patricia M. Murphy, Judge

Superior Court County of Los Angeles

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Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

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