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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RUSSELL OTIS, Defendant and Appellant.	B222686 (Los Angeles County Super. Ct. No. TA105481)

APPEAL from a judgment of the Superior Court of Los Angeles County. Pat Connolly, Judge. Affirmed.

Law Office of Leonard B. Levine and Leonard B. Levine; Law Office of Kiana Sloan-Hillier and Kiana Sloan-Hillier, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

Russell Otis appeals from the judgment entered after a jury convicted him of misdemeanor child molestation, contending in part that the trial court erred by allowing evidence of a prior accusation concerning sex with a minor and by not severing the sex offense case from two unrelated counts of forgery and theft. We reject those contentions, and the others he raises on appeal, and therefore affirm the judgment.

PROCEDURAL HISTORY

Russell Otis, coach of the successful basketball program at Dominguez High School in Compton, was charged with a felony count of meeting with a minor for lewd purposes (Pen. Code, § 288.4, subd. (b)) and a misdemeanor count of child molestation/annoyance (Pen. Code, § 647.6, subd. (a)(1)) after one of his players – Kevin S. – accused Otis of offering him cash if Kevin would let Otis touch his penis. Joined with these counts were charges of grand theft and forgery, based on allegations that Otis cashed a $15,000 check that Nike had donated to the school's basketball program.

The jury convicted Otis of the misdemeanor molestation count, deadlocked on the felony sex count, and acquitted him of the theft and forgery charges. The prosecutor then dismissed the felony sex offense count. Otis contends that: (1) there was insufficient evidence to support the molestation conviction; (2) the trial court erred by allowing the prosecution to put on evidence that several years earlier Otis had oral sex with another one of his players, a case that went to trial and ended in Otis's acquittal; (3) the trial court erred by denying his motion to sever the sex counts from the stolen check counts; and (4) the trial court erred by excluding evidence that Otis used the funds from the Nike check for the benefit of the basketball team.

FACTS

1. *The Incident With Kevin S.*

Kevin testified that in the late hours of August 30, 2008, he was playing video games at his house with several friends and family members. During the course of the evening, Otis sent him numerous text messages on various subjects. In one, Otis said he would stop by Kevin's house to give him money for school clothes. In another, he mentioned having Kevin take part in "the experiment," a topic Otis had mentioned several times before, without explaining what it meant. Sometime either right before or after midnight, Kevin received a text message from Otis stating that he was parked outside Kevin's house.

Kevin left the house without telling anyone and, after spotting Otis's Escalade parked nearby, walked over to the passenger side window. They spoke for awhile, mostly about basketball, until Otis asked Kevin if he wanted to do the experiment. When Kevin asked what that meant, Otis pulled a wad of money out of his car ashtray, told Kevin that there was $1,500, and said that he could have it all if he let Otis touch his penis because Otis was sure he could give him an erection in a minute. Kevin refused and Otis gave him a $100 bill and drove off.

Kevin said nothing about the incident until September 3, when the new school year started. He told his grandmother, who then contacted the police. Kevin obtained Otis's signature on a hardship waiver form that allowed Kevin to transfer to another school. According to Kevin, when he told Otis that his grandmother knew about the incident, Otis began to cry, asked Kevin not to tell anyone else about it, and also asked Kevin to tell his grandmother that he had lied about it.

David Bridges was at Kevin's house on the night of "the experiment" and recalled seeing several text messages from Otis on Kevin's mobile phone. According to Bridges, these included messages that Otis would buy clothes for Kevin, that Otis would give Kevin money if Kevin let Otis touch him, and that Kevin would be able to do things to Otis in a matter of minutes.

The only text messages stored in Kevin's phone when sheriff's investigators examined it were from Otis asking whether Kevin had told anyone. Some were deleted because Kevin did not save them. Most were erased, Kevin said, because he dropped his phone, damaging it. However, phone records for both Kevin's and Otis's mobile phones confirmed that they exchanged numerous text messages in the late hours of August 30, 2008, and the early morning hours of August 31.

Kevin was impeached on cross examination in several ways. First, with evidence that he claimed to have had no contact with Otis after September 3, when phone records showed around 200 text messages between them from September 3rd through the 16th. Second, with evidence that he had a motive to falsely accuse Otis in order to facilitate his transfer to another school, where he could get more playing time. Third, with evidence that he knew about the earlier accusations made against Otis. And fourth, with evidence that the timing of the numerous text messages exchanged between Otis and Kevin did not precisely match the timing of events as described by Kevin.

Bridges was impeached because he did not recall the more damaging text messages from Otis until redirect examination by the prosecution, when his recollection was refreshed with his written statement to sheriff's investigators.

2. *Evidence of a Previous Sexual Assault By Otis*

In 2001, Otis was tried and acquitted of charges that he orally copulated and forcibly sodomized D.C., then a member of the Dominguez High basketball team. The trial court in this case allowed the prosecution to introduce evidence of that incident under Evidence Code section 1108, but only as to the oral copulation incident.[1] The trial court believed that the sodomy, which D.C. contended took place immediately after he was fellated by Otis, was too inflammatory. Otis's lawyer chose to allow in the sodomy

[1] All further section references are to the Evidence Code.

evidence because he believed he could better impeach D.C. in regard to that part of his story.[2]

D.C. testified that Otis used to give him rides, let him borrow a car, bought him basketball shoes, gave him cash, and bought him clothes. He and other team members would sometimes go to Otis's house to play video games. Otis asked if D.C. was a virgin, and several times asked if he had ever had "pompom," a reference to oral sex. While sitting in Otis's car one time, Otis pulled out an envelope with $6,000 in cash and told D.C. it was his if he wanted it. On another occasion, he went to Otis's house and found him watching a pornographic movie. Otis touched D.C.'s thigh near his crotch.

A few weeks later, while Otis and D.C. were watching television at Otis's house, Otis asked D.C. if he was ready for "pompom." Otis reached inside D.C.'s pants and fellated him. D.C. said he complied out of fear. When Otis was done and D.C. began getting dressed, Otis grabbed D.C. from behind, and then sodomized him. At first D.C. did not tell anyone what had happened, but when he asked to transfer to another school, his grandfather questioned him and D.C. told him about the incident.[3] D.C. told the jury that Otis was acquitted of the charges.

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[2] Otis never mentions this until his reply brief, and then only as a factual aside. He has not discussed or cited legal authority in connection with that aspect of the trial court's ruling, or his companion contention that he was forced to raise the issue as a result of the trial court's ruling on the copulation incident. Accordingly, we deem waived any issues with regard to the effect of the sodomy evidence (*People v. Carillo* (2008) 163 Cal.App.4th 1028, 1135 & fn. 5), and will therefore analyze the trial court's ruling only in the context of the oral copulation evidence.

[3] Although it is not relevant to our analysis as to whether this evidence should have been admitted under Evidence Code section 1108, we note that Otis's lawyer conducted a thorough and skillful impeachment of D.C., including exposing certain credibility gaps in his story, along with the results of a medical examination that showed no signs of genital or anal trauma.

3. *The Theft and Forgery Evidence*

Distilled, there was evidence that after several attempts to obtain authorization from school officials, Otis deposited a $15,000 check from Nike into his own account. Otis was acquitted of these charges.

DISCUSSION

1. *Evidence of the Earlier Sex Offense Charges Was Properly Admitted*

Although Evidence Code section 1101 generally prohibits the use of character evidence to prove a defendant's propensity to commit certain conduct, Evidence Code section 1108 provides an exception to this rule in sexual assault cases, so long as the evidence of other sexual offenses is not inadmissible under Evidence Code section 352. Because evidence of other sexual offenses is uniquely probative, section 1108 was enacted in order to ensure that the trier of fact learned of the defendant's other sex offenses in order to evaluate the credibility of both the victim and the defendant. (*People v. Escudero* (2010) 183 Cal.App.4th 302, 309-310.)

Among the factors to be considered under section 1108 are the "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 . . . offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

The only limitation on admitting evidence of other sex offenses is section 352, which gives the trial court discretion to exclude evidence whose probative value is substantially outweighed by the probability that its admission will take up too much time, or will create a substantial danger of undue prejudice, confusing the issues, or misleading the jury. "Undue prejudice" does not refer to evidence that shows guilt. Instead, it refers

to evidence that prompts an emotional reaction against the defendant and tends to cause the trier of fact to decide the case on an improper basis. (*People v. Walker* (2006) 139 Cal.App.4th 782, 806.) We review the trial court's rulings under sections 1108 and 352 under the abuse of discretion standard. (*People v. Loy* (2011) 52 Cal.4th 46, 61.)

In his opening appellate brief, Otis contends that the trial court did not properly consider these factors, but never specifies how. Without analysis supported by citation to the record and supporting authority, we deem the issue waived.[4]

In his appellate reply brief, Otis contends the trial court erred in admitting the D.C. evidence because the accusations were several years old, undue time was used litigating the facts of that case, and the offenses against D.C. were dissimilar and far more damaging. We alternatively reach these issues on the merits, and conclude that Otis is incorrect.

The delay of several years between the two incidents is not persuasive, especially given how probative the previous case was due to its many similarities with the crimes charged in this case. (*People v. Walker*, *supra*, 139 Cal.App.4th at p. 807.) In both cases it was alleged that Otis engaged in protracted grooming conduct before attempting any sexual conduct: gifts of cash and clothes, time spent together playing video games or watching television, and an offer to give large amounts of cash as an inducement to sexual contact. Just because the incident with D.C. culminated in an actual sexual act while Kevin walked away instead does not make the two incidents dissimilar.[5]

Furthermore, any potential prejudice from admitting evidence of the D.C. incident was well-ameliorated by both the substantial impeachment of D.C. and by the fact that

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4 Otis also contends that section 1108 violates his due process rights under the United States Constitution. However, he also correctly recognizes that our Supreme Court's holding to the contrary in *People v. Falsetta*, *supra*, 21 Cal.4th 903, precludes us from finding a due process violation.

5 Our conclusion regarding the similarity of the two incidents would not change even if we were to consider the sodomy portion of the D.C. incident. (See fn. 2, *ante*.)

the jury learned Otis had been acquitted of those charges.[6] (*People v. Mullens* (2004) 119 Cal.App.4th 648, 665 [evidence that defendant was acquitted of previous sex assault charges should be admitted because it weakens and rebuts the prosecution's evidence of the other crime and is fair to both the prosecution and the defense because it helps the jury assess the significance of the other crimes evidence].)

Any prejudice from admitting the D.C. evidence was of the permissible kind because those facts were so similar to Kevin's testimony. Based on this, we hold that the trial court did not abuse its discretion by admitting evidence of the earlier sex offense.

2. *There Was Sufficient Evidence of Child Molestation/Annoyance*

Otis was convicted of violating Penal Code section 647.6, subdivision (a)(1), which makes it a misdemeanor to annoy or molest someone under the age of 18. No physical contact is required to violate this statute. Instead, there must be conduct that would unhesitatingly irritate a normal person, and that conduct must be motivated by an unnatural or abnormal sexual interest in the victim. (*In re R.C.* (2011) 196 Cal.App.4th 741, 750.) Otis contends, without discussion of these elements, that there was insufficient evidence that he violated this statute. We disagree.

Words alone are enough to violate Penal Code section 647.6. (*People v. La Fontaine* (1978) 79 Cal.App.3d 176, 185 (*La Fontaine*), overruled on another ground in *People v Lopez* (1998) 19 Cal.4th 282, 292.) In that case, the defendant gave a ride to a 13-year-old hitchhiker and told the boy that he could earn five or ten dollars if he let the defendant fellate him. That conduct violated Penal Code section 647.6, the appellate court held. (*Ibid.*) Otis's statement that he would give Kevin $1,500 if Kevin let Otis touch his penis is substantially the same.

Fundamentally, Otis contends that Kevin's testimony was insufficient to support the verdict because it was weak and uncorroborated. He is wrong on both counts. First, there is no requirement that Kevin's testimony have been corroborated. (*La Fontaine,*

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6 It appears from the record that most of the time spent litigating the D.C. incident was consumed by impeachment evidence.

supra, 79 Cal.App.3d at p. 187.) Second, Kevin's testimony was corroborated by Bridge's testimony about the sexually-themed text messages from Otis he saw on Kevin's phone, by the text messages on Kevin's phone where Otis asked if Kevin had told anyone, and by the sheer volume of text messages between the two around the time of the incident. Finally, any inconsistencies or weaknesses in Kevin's testimony were for the jury to resolve and, under the substantial evidence standard of review, we cannot reweigh the evidence. (*Id.* at p. 186.) Because Kevin's testimony, if believed by the jury, showed that Otis violated Penal Code section 647.6, we affirm the judgment.

3. *Issues Related to the Theft and Forgery Counts*

Although the jury acquitted Otis of the theft and forgery counts related to the $15,000 check from Nike, he contends we should reverse his molestation conviction because the trial court denied his motion to sever and try separately the sex offense and theft charges, and because the trial court erred by excluding evidence that he in fact spent the supposedly stolen funds on the basketball team.

As for the severance issue, Penal Code section 954 permits the joinder at trial of different offenses that are connected together in their commission or are of the same class. The trial court denied Otis's severance motion because it believed there was a factual link between the sex offense and check theft charges: that both involved an abuse of Otis's position as coach of the basketball team, and that some of the stolen funds might have been used when Otis propositioned Kevin.

We need not address whether the trial court was correct because even if it erred, Otis must still show he was prejudiced by the supposedly improper joinder. (*People v. Miranda* (1987) 44 Cal.3d 57, 78, overruled on another ground in *People v. Marshall* (1990) 50 Cal.3d 907, 933.) Because Otis was acquitted of the check-theft counts, he cannot show prejudice. (*Ibid; People v. Saldana* (1965) 233 Cal.App.2d 24, 30-31 [although marijuana possession count was improperly joined with rape count, defendant's acquittal of the drug charge, combined with overwhelming evidence of the rape, rendered the error harmless].)

Otis contends that the evidence against him was very much in conflict and not overwhelming. As a result, he argues that the check-theft evidence prejudiced the jury by showing he was a bad person, thereby leading the jury to a compromise verdict where it made sure to convict him of at least one count. We reject this contention. Even if the evidence against Otis was not overwhelming, because the jury found that the theft-related offenses did not occur, it is unlikely that the jury factored that evidence into its evaluation of Otis's guilt or innocence on the sex offense charges. Instead, the jury deadlocked on the felony count and found Otis guilty of only the lesser offense. At oral argument, Otis contended that the primary prejudice from the theft evidence came from the theory enunciated by the trial court when it denied the severance motion – that the large sums of cash Otis displayed to Kevin might have come from the allegedly stolen funds. However, the prosecution did not argue that theory to the jury. On this record, we hold that even if the counts were improperly joined, the error was harmless.

As for excluding evidence that Otis might have used the supposedly stolen funds for their intended purpose, even if error occurred, we will affirm if a different result was not reasonably probable absent the error. (*People v. Corella* (2004) 122 Cal.App.4th 461, 472.) Otis contends that evidence of his proper use of the check funds would have served as character evidence that the jury could have used when evaluating the sex offense charges. Although we agree that the trial court likely erred by excluding that evidence, we do not think it reasonably probable that such evidence would have swayed the jury to acquit Otis of the misdemeanor sex count. First, the jury did not believe that Otis had diverted those funds. Second, the jury's resolution of the sex offense charges hinged on the credibility of Kevin, and the evidence that corroborated his testimony. Third, the prosecution did not argue to the jury that Otis used any of the supposedly stolen funds when he tried to convince Kevin to take part in a sex act with him. Finally, Otis introduced evidence of his good character that was directly relevant to the sex offense charges, in the form of testimony from other former players about how helpful a mentor he was, and how he never acted improperly toward them.

Otis also contends that exclusion of the evidence violated his due process rights. That rule only comes into play when a trial court's evidentiary ruling has the effect of depriving a defendant of the right to present a meaningful defense. (*People v. Corella, supra,* 122 Cal.App.4th at p. 472.) That is not what happened here. For the reasons just discussed, the excluded evidence was tangential at best to Otis's defense of the sex offense charges, and Otis was allowed to conduct a thorough impeachment of the witnesses who testified against him.

DISPOSITION

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.