Filed 4/19/18 P. v. Gonzalez CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ALFONSO GONZALEZ, Defendant and Appellant.	2d Crim. No. B279207 (Super. Ct. No. 2013020388) (Ventura County)

A jury convicted Alfonso Gonzalez of one count of oral copulation of a child under age 14 (Pen. Code, § 288a, subd. (c)(1)) and three counts of lewd acts on a child (Pen. Code, § 288, subd. (a)). The trial court sentenced him to 55 years to life in prison. It awarded him 1,246 days of actual custody credit and zero days of local conduct credit.

Gonzalez contends the trial court abused its discretion and violated his due process rights when it admitted evidence of his prior sexual offenses. He also asks us to review documents he subpoenaed to determine whether the court properly denied one of his discovery requests, and contends he is

entitled to local conduct credits. We modify the judgment to correct the conduct credit calculation, and affirm.

FACTUAL AND PROCEDURAL HISTORY

Gonzalez lived with his wife, Penny, and their three daughters, C., An., and Ad.[1] He began sexually assaulting C. in 1988 or 1989, when she was 10 years old. At first, he touched her inappropriately. He digitally penetrated her vagina when she grew older, and eventually had vaginal intercourse with her. After each assault, he kissed C. on the cheek and told her he loved her.

In 1995, Gonzalez pled guilty to one count of continuous sexual abuse of a minor (Pen. Code, § 288.5), two counts of lewd acts on a child (then-Pen. Code, § 288, subd. (c)), and one count of unlawful sexual intercourse with a minor (Pen. Code, § 261.5, subd. (c)). He was sentenced to six years in prison. After his release, Gonzalez maintained his sobriety and attended therapy. He reconciled with Penny and made amends with C.

Ad. was living with her parents in 2001 when her friend, Renee, gave birth to a daughter, J.G. Over the years J.G. and Renee grew close with the Gonzalezes. They frequently visited the family, and as J.G. grew older she would spend summers at their home. Gonzalez and Penny gave J.G. her own room in their house, and treated her as if she were their grandchild. They never told Renee or J.G. about Gonzalez's criminal history.

During her visits, J.G. spent a significant amount of time alone with Gonzalez. She often sat next to him or on his lap.

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[1] For ease of identification, we refer to all parties except Gonzalez by first name or initials.

When J.G. got older, Penny told her she was too old to sit on Gonzalez's lap. J.G. continued to do so.

In the summer of 2012, J.G. stayed at the Gonzalezes' home. Several times that summer Gonzalez rubbed J.G.'s thigh "near [her] private area" while she sat on his lap. J.G. felt uncomfortable when Gonzalez did this. But she did not tell anyone about the incidents because she "didn't think it was a big deal."

J.G. began to experience behavioral problems at home after that summer. She grew jealous when Renee became pregnant. She attempted suicide. She told her friends that she hated her life and was sad to spend the summer away from her family. Renee talked to Penny about J.G.'s problems, and said she needed a break.

J.G. spent the summer of 2013 with the Gonzalezes. Gonzalez continued to touch her inner thigh throughout the summer. In June, J.G. went on a camping trip with the Gonzalezes. One night she awoke in the tent to Gonzalez kissing her cheek and rubbing her face. An. was also in the tent, but did not hear any movement. J.G. felt embarrassed and uncomfortable, and did not tell anyone about the incident.

Later that month, J.G. was lying on the couch with Gonzalez. After Penny left for work, Gonzalez kneeled next to the couch, pulled down J.G.'s pants and underwear, and rubbed her vagina with his fingers. She was in pain, and repeatedly told Gonzalez to stop. He said, "I'm doing this because I love you."

Gonzalez then kissed J.G., pulled down her shirt, and licked her nipple. He also kissed her vagina. When he stopped, he told J.G. to get ready to go to the store.

J.G. called the police instead. She told the 911 operator that her grandfather had touched her inappropriately. She then climbed out a window, called Renee, and told her what had happened. Renee called Penny and told her. Penny arrived home a few minutes later, while J.G. was still outside. J.G. told Penny what Gonzalez had done to her. When J.G. went to her bedroom to change clothes, she overheard Penny tell Gonzalez he was going back to jail.

Sergeant Jeremy Watson arrived a short time later. He spoke with Penny about Gonzalez's criminal history and his status as a registered sex offender. When Sergeant Watson asked J.G. questions, Penny "hovered" over her and answered for her. Penny refused to allow the sergeant to speak privately with J.G.

When Sergeant Watson went to his car, Penny instructed J.G. to tell him that Gonzalez only tried to kiss her. J.G. did so, and denied that any other touching occurred. Penny texted Renee and suggested that J.G. made up the allegations about Gonzalez.

Detective John Coffelt interviewed J.G. the next day. J.G. told him that Gonzalez touched her vagina and placed his mouth on her vagina and breast. She said she lied to Sergeant Watson because Penny instructed her to do so.

J.G. also told Detective Coffelt that she spoke Spanish, played tennis, had multiple pets, and wanted to be a police officer. Penny said none of that was true. J.G. later clarified she knew a few Spanish words, occasionally played tennis, counted the Gonzalezes' pets as her own, and wanted to be a police officer because she liked to watch *Law and Order: SVU*.

A medical exam revealed no male DNA on J.G.'s body. But J.G. did have small abrasions and lacerations on one area of her vagina. J.G. told a nurse that Gonzalez had touched her vagina, and that it had been painful.

Prior to trial, Gonzalez requested that the trial court order J.G.'s school to produce her disciplinary, counseling, psychological, and mental health records. The prosecution opposed Gonzalez's request. In July 2016, the court ordered the school to submit the records for an in camera review so it could determine whether any of them should be disclosed. The court reviewed the records in camera in August. It found that the school complied with the subpoena by sending "various school and health records." The court concluded "there's not anything . . . remotely discoverable here." It ordered the records sealed.

C. was the prosecution's first trial witness. She no longer remembered the details of Gonzalez's abuse. She also did not remember speaking with an investigator from the district attorney's office. But she did remember that most of the abuse happened at night, and that Gonzalez had sex with her when she was under 16 years old. She also remembered talking to the police, that her father went to prison, and that she had a lot of anger toward him.

C. avoided Gonzalez after his release from prison. She went to therapy, and Gonzalez eventually joined her. His personality changed and he no longer made C. uncomfortable. She forgave him for what he did to her, he apologized, and the two started to spend more time together. She considered him a good father.

The prosecution's next witness was the investigator who interviewed C. in 1995. He testified that C. told him that

Gonzalez started touching her when she was around 10 years old. He digitally penetrated her vagina when she grew older, and eventually began to have vaginal intercourse with her. Most of the incidents occurred at night, after others in the house had gone to sleep. After each incident, Gonzalez would kiss C. on the cheek and tell her he loved her. The abuse lasted for about five years, from when C. was 10 to 14 years old. Gonzalez admitted to the abuse, and pled guilty to the charges against him.

Later during trial, the nurse who examined J.G. opined that her injuries occurred recently relative to her examination, were consistent with someone rubbing her vagina with fingers, and were inconsistent with masturbation or an infection. A doctor disagreed. The doctor reviewed photographs of J.G.'s vagina taken during the nurse's examination of J.G. Based on her review, she opined that J.G.'s injuries were consistent with an infection or irritation, and could have been caused by scratching or rubbing. She also stated that J.G.'s injuries would be more widespread had Gonzalez rubbed her vagina as alleged.

DISCUSSION

Evidence of prior sexual offenses

Gonzalez first contends the trial court abused its discretion when it allowed the prosecution to present evidence of his prior sexual offenses against C. because: (1) the offenses were unlike those he committed against J.G., (2) the evidence was inflammatory, (3) the offenses were remote in time, (4) the evidence in the prior case was much stronger than that in the current case, and (5) the evidence was likely to distract and confuse the jury. He also contends admission of the evidence

violated his due process rights. We disagree with these contentions.

If a defendant is on trial for a sexual offense, evidence of a prior sexual offense is "presumed admissible[,] and is to be excluded only if its prejudicial effect substantially outweighs its probative value in showing the defendant's disposition to commit the charged sex offense or other relevant matters. [Citations.]" (*People v. Cordova* (2015) 62 Cal.4th 104, 132; see Evid. Code, § 1108, subd. (a).) This requires the trial court to "engage in a careful weighing process under [Evidence Code] section 352" before admitting evidence of the prior offense. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917 (*Falsetta*).) The court should "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. [Citations.]" (*Ibid.*)

We review the trial court's admission of evidence under Evidence Code sections 352 and 1108 for abuse of discretion. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1168.) We will not find an abuse of discretion unless the court's decision was "'arbitrary, capricious, or patently absurd'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1009) or "based . . . on impermissible factors [citation]" (*People v. Knoller* (2007) 41 Cal.4th 139, 156).

There was no abuse of discretion. First, the offenses Gonzalez committed against C. were similar to those he committed against J.G., rendering them highly probative. (*People v. Balcom* (1994) 7 Cal.4th 414, 427.) In both cases, Gonzalez abused young girls with whom he had close familial relationships. (*People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1105 (*Dejourney*) [offenses similar where defendant exploited vulnerabilities of victims]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41 (*Frazier*) [offenses similar where defendant exhibited a "pattern of molesting his young female relatives"].) In both cases, Gonzalez began by touching his victims inappropriately and then escalated to rubbing or penetrating their vaginas. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 660 (*Mullens*) [offenses similar where both involved touching of young girls]; *People v. Soto* (1998) 64 Cal.App.4th 966, 991 (*Soto*) [same]; see generally *People v. Wesson* (2006) 138 Cal.App.4th 959, 969-970 [similarities shown where prior crimes are of the "same class and nature as the charged offenses"].) And in both cases, Gonzalez would tell his victims he loved them after he abused them. (*People v. Pierce* (2002) 104 Cal.App.4th 893, 900 (*Pierce*) [similarities shown where defendant had "a similar sexual impulse" while committing offenses].) That Gonzalez never had the opportunity to escalate the abuse of J.G. to the level of digital penetration or rape does not render the prior offenses dissimilar. (*Soto*, at p. 991.)

Second, the evidence of Gonzalez's offenses against C. was not unduly prejudicial. The testimony about the prior offenses was brief and not overly emotional; C. remembered few details of the abuse and had forgiven her father, and the investigator testified only to the facts of the prior case. (*People v.*

Boyette (2002) 29 Cal.4th 381, 425 [brief, factual nature of testimony lessens inflammatory impact].) The similarity of the offenses to those he committed against J.G. also decreased their inflammatory nature. (*Falsetta*, *supra*, 21 Cal.4th at p. 924; *People v. Branch* (2001) 91 Cal.App.4th 274, 283-284 (*Branch*); *People v. Yovanov* (1999) 69 Cal.App.4th 392, 406.) And the trial court instructed the jury "to consider the evidence of the uncharged crimes only for the purpose of showing that appellant 'was disposed or inclined to commit sexual offenses.'" (*People v. Hernandez* (2011) 200 Cal.App.4th 953, 969.) We presume the jury followed this instruction. (*People v. Holt* (1997) 15 Cal.4th 619, 662.)

Third, Gonzalez's prior offenses were not too remote in time to be admissible. Seventeen years elapsed between when Gonzalez pled guilty to the offenses against C. and when he began to commit offenses against J.G. But Gonzalez spent up to six years in prison after his plea. (See, e.g., *People v. Walker* (2006) 139 Cal.App.4th 782, 807 [20-year-old prior offense not too remote where defendant was incarcerated for 11 years]; *Pierce*, *supra*, 104 Cal.App.4th at p. 900 [23-year-old conviction not too remote where defendant spent at least 12 years in prison].) And the similarities between Gonzalez's prior offenses and those against J.G. further balances any remoteness. (*Branch*, *supra*, 91 Cal.App.4th at p. 285 [30-year-old offenses not too remote where there were "substantial similarities between the prior and the charged offenses"]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1393-1395 [offenses occurring between 15 and 22 years before trial were not too remote because of similarities between the prior and current acts].)

Fourth, there was not the disparity in the strength of the evidence in the two cases Gonzalez claims. While he admitted to the offenses against C., physical evidence and expert and lay testimony buttressed J.G.'s account of the offenses Gonzalez committed against her. And the strength of the evidence of the offenses against C. does not render it unduly prejudicial: "'The "prejudice" referred to in Evidence Code section 352 applies to evidence [that] 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. Bolin* (1998) 18 Cal.4th 297, 320.)

Finally, admission of Gonzalez's offenses against C. did not risk distracting jurors from deciding the issues in this case. The risk of distraction was minimized here because the jury knew Gonzalez had already been convicted of his crimes against C. and thus "would not be tempted to . . . punish him for the" prior offenses. (*Falsetta*, *supra*, 21 Cal.4th at p. 917; see also *People v. Ewoldt* (1994) 7 Cal.4th 380, 405.) Additionally, evidence of the offenses against C. and the offenses against J.G. "each came from independent sources," further minimizing any risk of distraction or confusion. (*Dejourney*, *supra*, 192 Cal.App.4th at p. 1106; see also *Ewoldt*, at pp. 404-405 [where evidence of prior and current offenses comes from sources unaware of the other, probative value of evidence enhanced].) So, too, did the jury instructions on reasonable doubt (CALCRIM No. 220), the use of evidence of prior sexual offenses (CALCRIM No. 1191), and the prosecution's burden of proving each element of the charged crimes (CALCRIM Nos. 1080, 1110). (*Mullens*,

supra, 119 Cal.App.4th at p. 661; *Frazier*, *supra*, 89 Cal.App.4th at p. 42.)

This case is unlike *People v. Jandres* (2014) 226 Cal.App.4th 340 (*Jandres*) and *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*), on which Gonzalez relies. The *Jandres* defendant was on trial for the rape of an 18-year-old woman. (*Jandres*, at p. 356.) The trial court accepted into evidence the defendant's prior inappropriate touching of a minor's mouth. (*Ibid.*) The Court of Appeal held this to be an abuse of discretion. (*Id.* at 357.) The two crimes shared few similarities. (*Id.* at p. 356.) The strength of the evidence in the two cases was different: the current case was "a credibility contest" between the victim and the defendant, while the defendant pled guilty in the prior case. (*Ibid.*) And the trial court misinstructed the jury in several ways. (*Id.* at pp. 358-359.)

The *Harris* defendant was on trial for sexual battery, sexual penetration, and oral copulation. (*Harris*, *supra*, 60 Cal.App.4th at pp. 731-732.) The trial court accepted into evidence the defendant's prior violent sexual assault. (*Id.* at pp. 734-735.) The Court of Appeal held this was error. (*Id.* at p. 741.) The prior offense was dissimilar to the defendant's current charges and "inflammatory *in the extreme*." (*Id.* at pp. 738, 740-741, original italics.) The defendant was not convicted of the prior sexual assault charge, but pled guilty to burglary instead, increasing the likelihood of jury would punish him for his past act. (*Id.* at pp. 738-739.) It also occurred 23 years prior to the current charges, and the defendant had a clean record in the interim. (*Id.* at p. 739.) Thus, because the evidence "was remote, inflammatory and nearly irrelevant[,] and likely to confuse the

jury and distract it from the consideration of the charged offenses," it should have been excluded. (*Id*. at p. 741.)

In contrast, here the prior and current crimes were similar. The strength of the evidence in each case was strong. The evidence was not presented in an inflammatory way. The trial court properly found that the prejudicial effect of the evidence of Gonzalez's crimes against C. did not substantially outweigh its probative value in showing his disposition to commit the offenses against J.G. And because the court did not err when it admitted the evidence, Gonzalez's due process claim also fails. (*People v. Jones* (2012) 54 Cal.4th 1, 51, fn. 12.)

Subpoenaed documents

Gonzalez asks this court to review the documents he subpoenaed from J.G.'s school to determine whether the trial court properly denied his discovery request. We have done so, and conclude there was no error.

"'The defendant generally is entitled to discovery of information that will assist in [their] defense or be useful for impeachment or cross-examination of adverse witnesses. [Citation.] A motion for discovery must describe the information sought with some specificity and provide a plausible justification for disclosure. [Citation.] The [trial] court's ruling on a discovery motion is subject to review for abuse of discretion. [Citation.]' [Citation.]" (*People v. Prince* (2007) 40 Cal.4th 1179, 1232 (*Prince*).)

When a potential abuse of discretion rests on the trial court's withholding of nondiscoverable information, the appellant "'must do the best they can with the information they have, and the appellate court will fill in the gap by objectively reviewing the whole record.' [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324,

493, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165; see also *People v. Seaton* (2001) 26 Cal.4th 598, 699 ["A defendant in a criminal case is entitled to an appellate record adequate to permit 'meaningful appellate review.' [Citations.]"].) Our Supreme Court has outlined the procedure courts should follow: The custodian of records presents potentially relevant information to the trial court. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229.) The court reviews the information in camera, with a court reporter present, and makes a record of the documents examined. (*Ibid.*) The transcript of the hearing and any copies of documents are then sealed. (*Ibid.*) On appeal, we independently review the sealed records to determine whether error occurred. (*Prince*, *supra*, 40 Cal.4th at p. 1285.)

The *Mooc* procedure was not followed here. Gonzalez moved to augment the record with the documents subpoenaed from J.G.'s school. (Cal. Rules of Court, rules 8.155(a) & 8.340(c).) We granted the motion. (*People v. Galland* (2008) 45 Cal.4th 354, 373 (*Galland*).) The trial court clerk subsequently filed a declaration stating that the subpoenaed documents "are not in the file" and "can not [*sic*] be provided." We then ordered the court to re-obtain J.G.'s school records, review them, certify they are the same documents it reviewed in 2016, and file them under seal with this court. (See *People v. Martinez* (2005) 132 Cal.App.4th 233, 239 (*Martinez*).) We notified the parties of our augmentation order. (*Galland*, at p. 373.)

In February 2018, the trial court informed J.G.'s school that the records it produced in 2016 had been destroyed, and ordered it to produce "the exact same records" it provided in response to its July 2016 order. The school sent the requested

records in March. The trial court reviewed them, but was "unable to confirm or deny that any particular document within the packet was present when it originally reviewed records" in August 2016. It filed the records with this court, and we notified the parties we had received them. (*Galland*, *supra*, 45 Cal.4th at p. 373.)

When the trial court ordered the school to produce "the exact same records" it produced in 2016, the school replied that it did so. Based on that response, "[w]e have no reason to doubt the authenticity of the" documents provided (*Martinez*, *supra*, 132 Cal.App.4th at p. 239), despite the trial court's inability to confirm they are the same as those reviewed in 2016 (cf. *People v. Gzikowski* (1982) 32 Cal.3d 580, 584, fn. 2 [accepting counsel's representations when judge had no independent recollection]). We have reviewed them, and agree with the trial court that they are not discoverable. There was no abuse of discretion.

Presentence conduct credits

Gonzalez contends the trial court erred when it did not award him presentence conduct credits. We agree.

A defendant is generally entitled to conduct credits for presentence custody. (*People v. Whitaker* (2015) 238 Cal.App.4th 1354, 1357-1360; see Pen. Code, § 4019, subd. (a)(1).) If the defendant is convicted of a violent felony, conduct credits are limited to 15 percent of the days spent in custody. (Pen. Code, § 2933.1, subd. (c); see Pen. Code, § 667.5, subd. (c) [defining violent felony].) A trial court's failure to award a defendant presentence conduct credit is a jurisdictional error that may be corrected at any time. (*People v. Karaman* (1992) 4 Cal.4th 335, 345, fn. 11.)

The trial court erred when it did not award Gonzalez presentence conduct credits. Gonzalez spent 1,246 days in presentence custody. The jury convicted him of violent felonies. (See Pen. Code, § 667.5, subd. (c)(5) [oral copulation is a violent felony] & (6) [lewd or lascivious act is a violent felony].) He is therefore entitled to 186 days of local conduct credits, for a total award of 1,432 days. (*People v. Brewer* (2011) 192 Cal.App.4th 457, 464-465.)

DISPOSITION

The trial court is directed to amend the abstract of judgment to reflect that Gonzalez has 1,432 days of presentence custody credit, consisting of 1,246 days in actual custody and 186 days of conduct credit. The clerk of the superior court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Gilbert A. Romero, Judge

Superior Court County of Ventura

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