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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROBERT LEE ANDERSON, JR., Defendant and Appellant.	B259312 (Los Angeles County Super. Ct. No. KA097332)

APPEAL from judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Robert Lee Anderson, Jr., appeals from a sentence and judgment, following his convictions for committing a lewd act upon his two grandchildren (I. and R.). He contends (1) that the trial court erred in not forcing appellant's daughter N. to take the stand to inform the jury she would not testify or permit her children to do so; (2) that the court erred in giving a consciousness of guilt instruction; and (3) that the court erred in admitting evidence of prior uncharged sex crimes under Evidence Code section 1108. For the reasons set forth below, we find no reversible error. Accordingly, we affirm the judgment.

PROCEDURAL HISTORY

In an amended information, appellant was charged with committing lewd acts upon a child (I.) between January 1, 2010 and July 3, 2011 (Pen. Code, § 288, subd. (a); counts 1 and 2),[1] committing a lewd act upon a child (R.) between January 1, 2010 and July 3, 2011 (§ 288, subd. (a); count 3), and continuous sexual abuse (against N.) between July 16, 1995 and July 15, 1998 (§ 288.5, subd. (a); count 4). As to all counts, the information alleged appellant committed the sexual offenses against more than one victim (§ 667.61, subds. (b) & (c)).

During trial, the court granted the prosecutor's motion to dismiss count 2 (committing a lewd act upon I.). The jury convicted appellant of the remaining counts and found the special allegations true as to each count. After trial, the court granted appellant's motion for a new trial only as to count 4 (continuous abuse

[1] All further statutory citations are to the Penal Code, unless otherwise stated.

against N.). It vacated the conviction for insufficient evidence, and dismissed the count pursuant to section 1385.[2]

The court sentenced appellant to consecutive 15-year terms in state prison on counts 1 and 3. Appellant timely appealed from the judgment.

FACTUAL BACKGROUND

A. *Prosecution Case*

1. *Unavailability of Victims as Trial Witnesses*

Prior to jury selection, the court held an Evidence Code section 402 hearing to determine whether N., I. and R. were unavailable as trial witnesses. N. told the court that she had informed the deputy district attorney several times that she would not testify at trial. In response to the court's questioning, she stated that although she had provided information to the police and had testified at the preliminary hearing, she would not do so again. Teary and emotional, she said: "I'm tired of going through this. I've gone through enough. I don't want to go through no more." When asked if speaking with a counselor might help her to testify, she replied it would not, reiterating that "I don't need this no more." She described herself as "angry that I have to be here again and again and again and again. . . . Me and my kids are the victims and I feel like people treat me like I'm a criminal instead of a victim." When asked whether being held in contempt and confined to the courthouse for the duration of the trial might change her mind about testifying, she said it would not. N. further confirmed that she would not allow her children to testify. "They shouldn't have to keep talking about it," she explained, noting that when the subject was raised, I. became emotional, and that

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[2] The court found that although there was evidence that appellant had sodomized N. on one occasion and had orally copulated her on another, there was insufficient evidence as to a third predicate act of abuse.

after the last court appearance, the children cried. ("They just cry and they don't want to talk about it.")

In making its determination that N., I. and R. were unavailable witnesses, the trial court noted that N. was "very emotional at the beginning, teary-eyed. As the court continued to make the inquiry, her emotions changed to one of anger and resentment, and it was clear that she was strong in her position." It determined that N. "felt that she has done her duty by testifying at the preliminary hearing, allowing the children to testify at the preliminary hearing." The court found that "any avenue the court went with this witness, she immediately put up a road block saying that would not be effective. That would not in any way change her mind or her willingness to testify or having her children testify." Defense counsel argued that in the absence of medical evidence that N. and her children would suffer psychological damage, they "still should be forced to testify." The court, noting its limited ability to coerce N. to testify, determined that N., I. and R. were unavailable and thereafter permitted their preliminary hearing testimony to be read into the record.[3]

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[3] Under Code of Civil Procedure section 1219, subdivision (b), "a court shall not imprison or otherwise confine or place in custody the victim of a sexual assault or domestic violence crime for contempt if the contempt consists of refusing to testify concerning that sexual assault or domestic violence crime." In *People v. Cogswell* (2010) 48 Cal.4th 467, 478, the Supreme Court noted that for many sexual assault victims, to "relive and to recount in a public courtroom the often personally embarrassing intimate details of a sexual assault far overshadows the usual discomforts of giving testimony as a witness." In addition, seeing the attacker again is a "visual reminder of the harrowing experience suffered." The court found that the Legislature was animated by these concerns when it forbade the jailing of sexual assault victims for refusing to testify. (*Ibid*.)

2. *Evidence at Trial*

a. *N.*

At the preliminary hearing, N. testified that in 2011, her children, I. and R., stayed at her parents' house every other weekend. On July 4, 2011, I. complained to N. that it hurt him to defecate after appellant inserted a finger into his rectum. N. became angry and called the police to report appellant's molestation. The police brought the family to the hospital for medical examinations. After R. was examined by a nurse at the hospital, she told N. that appellant had touched her "privates." N. and her children were interviewed by the police at the hospital.

During her police interview, N. told Police Officer Cardenas that she had been molested numerous times by appellant when she was about eight or nine years old. On one occasion, appellant had placed his mouth on her vagina. On another, he had inserted his penis into her rectum. N. also observed appellant orally copulating her cousins, Jimmy and Giovanni, while they were on a dirt biking trip in Barstow. Her cousins were about nine or 10 years old at the time.

N. stated that in 2006, her parents had custody of I. because she was in a drug rehabilitation program. In 2006, she had I. examined for possible sexual abuse after she noticed what looked like a "hickey" on his scrotum.

b. *I.*

I., who was eight years old at the time of the preliminary hearing, testified he used to go to his grandparents' house. Every other day, appellant would perform masturbation on a clothed I., holding I.'s penis with his thumb and first finger and moving his hand rapidly up and down. On some occasions, appellant would put his hand inside I.'s underwear and touch his penis. I. denied telling his mother that appellant had inserted a finger in his rectum, and stated that appellant never committed that act.

c. *R.*

R., who was six at the time of the preliminary hearing, testified that she used to go to her grandparents' house. On one occasion, when she was going to the bathroom, appellant touched her "where I go pee." On another occasion, appellant took off her pants and underwear and touched her. She asked appellant to stop, but he did not. R. also observed appellant take off I.'s clothes and touch I. "where he goes pee."

d. *G.G.*

G.G. testified she married appellant's stepson, J., in July 2012, but they divorced in December 2013. G.G. met J. at work, and she moved in with him in 2006. The first night they spent in J.'s home, G.G. observed J. crying. J. explained he had been abused by appellant. J. said that when he was eight years old, appellant placed his penis against J.'s butt while J. was sitting in appellant's lap playing video games.

In 2012, G.G. overheard appellant speaking with J. Appellant asked J. to "forgive him" for hurting J. G.G. then confronted appellant, asking him why he had molested J. Appellant stated he did not know, but denied molesting N. or the grandchildren. G.G. told appellant he needed help. Appellant responded, "I will take my help later." Appellant also told G.G. that if she agreed to say nothing about the matter, he would pay her immigration lawyer $5,000. G.G., who was experiencing immigration problems at the time, replied, "I won't say nothing but you don't have to give me money for that."

In 2013, J. called G.G. after seeing her with another man. G.G. recorded the call, and the recording was played for the jury. During the conversation, G.G. told J. he should not use appellant's prior acts as an excuse for his current behavior. J. responded, "I'm not using it as an excuse. . . . An excuse is somebody that says 'It

never happened to me.'" G.G. told J. she would go to court and tell the truth about appellant's molestation of J.

G.G. also testified that in 2006, she observed appellant regularly bring I. and R. into a room that served as an office and lock the door. Appellant and the children would be in the room for about 30 minutes, and G.G. would hear the children crying "really, really bad." In November 2011, I. and R. told G.G. that appellant had molested them.

G.G. also observed appellant having an erection while playing in the swimming pool with his five-year-old grandnieces.

e. *Detective Roger Iwig*

Pomona Police Detective Roger Iwig testified that on October 5, 2011, he spoke with J. about N.'s allegations against appellant. Iwig asked J. if he had been abused. J. answered that his past was his past, and that he was going to leave it behind him and go on with his life.

On November 4, 2011, after appellant was arrested, Iwig spoke with J. at appellant's house. J. was sobbing uncontrollably, saying that the whole investigation made him feel like a "helpless little boy again." J. was also afraid that I. had been molested.

On April 2, 2014, Iwig conducted a recorded interview with J. The recording was played for the jury. Initially, J. told the detective that he suffered only mental abuse by appellant. The detective later asked: "Did you think you were the only one growing up? That was being sexually abused by [appellant]?" J. replied, "Yeah." The detective also asked J. if he told appellant's wife about appellant's abuse. J. replied, "I told her I was abused. I didn't tell her sexually or give details. I couldn't do that to her."

f. *J.*

J. asserted that appellant never touched him in an inappropriate or sexual manner when he was a child. He denied ever telling anyone that appellant did so. He admitted being subjected to mental abuse by appellant. On cross-examination, J. stated he had questioned I. and R. about their allegations against appellant. They told him they had lied about being molested because N. told them to do so.

g. *Other Trial Testimony*

Annie Acosta, a substance abuse counselor, testified that in 2006, N. disclosed that she had been molested by appellant. N. also stated she was worried that I. was being abused by appellant.

Dr. Jayme Jones, a clinical psychologist with expertise in child sexual abuse, opined that it was not unusual for a victim of a parent's sexual abuse to allow her children to stay in the parent's home. Jones explained that the victim might be coping with the trauma of past abuse by not recalling the abuse and not considering the possibility that the same abuse would happen to the children.

B. *Defense Case*

Edelmira Anderson, appellant's wife, testified she never saw anything inappropriate between appellant and N. or appellant and the grandchildren. In 2006, after I. was reported as being sexually abused, Edelmira and appellant took I. to a hospital for an examination. The examination did not reveal abuse. N. later told Edelmira that she had lied about appellant abusing I. in order to gain custody of her children. In 2012, after appellant was arrested, N. told Edelmira that she had made up the allegations against appellant. Edelmira testified that when her grandnieces visited, sometimes appellant would swim with them in the pool. However, either she or her niece would be watching the children when they were in the pool.

Doris Ayala managed the apartment complex where N. and her children lived in 2011. Three or four days after the police were summoned to N.'s apartment, Edelmira called Ayala and told her that I. had accused appellant of inserting a finger in his butt. Ayala questioned the children three or four times about the sexual abuse allegations. The first time, I. told her that appellant had touched and kissed his butt. The following day, Ayala told I.: "I want you to tell me the truth. What really happened?" I. replied that he had lied and R., who was present, called I. a liar. In response to Ayala's questioning, I. also said that N. had told him to lie.

Pomona Police Officer Jesus Cardenas testified that on July 3, 2011, he responded to N.'s call about appellant committing a lewd act on her child. Cardenas took statements from N., I. and R. N. said that she had been sodomized in 1997. I. said that appellant had inserted his finger in I.'s rectum, placed his chin on I.'s butt, and performed masturbation on I.'s penis. R. said she had not been victimized in any way. Cardenas took the children to the hospital for an examination.

C. *Prosecution Rebuttal*

On December 1, 2011, Susie Flores of the Child Advocacy Center interviewed I. and R. separately. The interviews were recorded, and the transcript of the interviews read to the jury.

I. told Flores that he was lying in bed when appellant came into the room, undressed him, touched his penis and inserted a finger into his rectum. He also said that appellant used his hand to try to make I.'s penis "big."

R. told Flores that on one occasion, when she was in the bathroom at appellant's house, appellant had touched her in the butt and made her want to pee. R. also said she saw appellant touch I.'s penis.

DISCUSSION

A. *No Reversible Error Resulted from the Court's Questioning N. Outside the Presence of the Jury about Her Refusal to Testify or to Permit her Children to do so.*

As detailed above, the trial court held an Evidence Code section 402 hearing to determine whether N. and her children were unavailable as trial witnesses. After questioning N., the court concluded that she was resolute in her determination not to testify or to permit her children to do so. Noting the emotional toll the protracted proceedings had taken on her family, she expressed her unequivocal unwillingness to endure -- or force her children to endure -- the ordeal of testifying again about their painful past. After noting that N. was deeply emotional during the hearing, the court determined that she would not testify, even if the court held her in contempt. Defense counsel argued that absent medical evidence of emotional or psychological harm, N. and the children "still should be forced to testify," and that N.'s unwillingness was insufficient to demonstrate her (and the children's) unavailability. Counsel never requested that N. be questioned before the jury about her refusal to testify. Nor did he request that the court instruct the jury that it could draw a negative inference from her refusal to testify. Nevertheless, in closing argument defense counsel argued that the entire case rested on N.'s credibility. He reminded the jury, "You didn't hear from [N.]. You didn't get to judge her credibility in the traditional sense of watching her on the stand, evaluating her. . . . body language. That gives you an extra burden to bear."

Following trial, appellant filed a motion for a new trial, arguing that the trial court prejudicially erred in not forcing N. to refuse to testify in front of the jury. The court held that the claim was forfeited. As the court observed: "There was no objection to the procedure followed by the court. There was no alternate procedure

offered . . . . [N]or [was] there an objection as to the procedure exercised by the court."

On appeal, appellant asserts the same claim of error raised for the first time after trial. He contends that by making its determination of N.'s unavailability at an Evidence Code 402 hearing outside the jury's presence, the trial court deprived him of the right to argue -- and the jury to draw -- negative inferences from witnessing N.'s refusal to testify. Before trial, however, appellant asserted only that N. should be compelled to testify, and that her unequivocal refusal was insufficient to demonstrate her (and the children's) unavailability. At no time did he take issue with the court's procedure for determining whether N. and the children were unavailable. Accordingly, like the trial court, we deem this claim forfeited. (See *People v. Saunders* (1993) 5 Cal.4th 580, 590.)

Appellant argues that if the claim was forfeited due to defense counsel's failure to timely object or propose an alternate procedure, he received ineffective assistance of counsel. "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.) "A defendant who raises the issue on appeal must establish deficient performance based upon the four corners of the record. 'If the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one,

or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.'" (*Ibid*., quoting *People v. Kraft* (2000) 23 Cal.4th 978, 1068.)

Here, the record does not demonstrate that defense counsel's failure to object to the trial court's questioning of N. outside the presence of the jury was anything but a sound tactical decision. Counsel could reasonably have determined that subjecting the jury to an emotionally overwrought mother refusing to testify -- or to subject her children to the trauma of testifying -- to past acts of sexual abuse risked creating more hostility than sympathy toward appellant. Notably, defense counsel capitalized on N.'s absence, attacking her credibility and arguing in closing that the jury had an "extra burden" in evaluating her credibility due to her failure to testify. In short, appellant has not demonstrated ineffective assistance of counsel.

B. *The Trial Court did not Err in Instructing the Jury with CALCRIM No. 371 on Consciousness of Guilt.*

G.G. testified she overheard appellant apologizing to J. After G.G. confronted appellant, he admitting abusing J., but denied abusing N. or her children. Appellant then told G.G. he would pay her immigration attorney $5,000, if she kept silent about the matter. Over defense objection, the trial court instructed the jury with CALCRIM No. 371, informing the jury that if appellant tried to discourage someone from testifying against him, that conduct might show a consciousness of guilt.[4] Appellant contends the court erred in giving the instruction, because (1) appellant's abuse of J. was not charged in the instant case,

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[4] The court instructed the jury: "If the defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself."

and (2) no reasonable inference could be drawn from appellant's offer to pay G.G. that he might have felt guilty about abusing N. or molesting his grandchildren. We disagree.

The evidence showed that immediately after denying that he abused N. or molested her children, appellant sought to buy G.G.'s silence. In the context of the conversation, appellant's offer could fairly be construed as showing guilt over his molestation of N. and her children. Moreover, "'consciousness of guilt'" means "'consciousness of some wrongdoing'" rather than "'consciousness of having committed the specific offense charged.'" (*People v. Crandell* (1988) 46 Cal.3d 833, 871, abrogated on another point by *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) Appellant's offer to pay G.G.'s lawyer also suggests appellant felt guilty about abusing J. As his prior abuse of J. was admissible in the instant case under Evidence Code section 1108, see *infra*, substantial evidence supported giving the instruction on consciousness of guilt. Accordingly, the trial court did not err in instructing the jury with CALCRIM No 371.

C. *The Trial Court did not Err in Admitting Evidence of Prior Uncharged Sex Crimes under Evidence Code Section 1108.*

The trial court permitted the prosecution to introduce evidence that appellant had sexually abused his stepson J., had molested his nephews Jimmy and Giovanni during a weekend biking trip, and had been aroused while playing in the swimming pool with his young grandnieces. The court determined the evidence was admissible under Evidence Code section 1108. Appellant contends (1) that the court abused its discretion in admitting the evidence relating to appellant's abuse of J., and (2) that Evidence Code section 1108 is unconstitutional.

Evidence Code section 1101, subdivision (a) provides in relevant part: "Except as provided in this section and in Section[] . . . 1108, . . . evidence of a

person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Evidence Code section 1108, subdivision (a) 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." Evidence Code 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." The trial court's rulings under Evidence Code sections 352, 1101 and 1108 are reviewed for an abuse of discretion. (See *People v. Foster* (2010) 50 Cal.4th 1301, 1328; *People v. Kipp* (1998) 18 Cal.4th 349, 369.)

Appellant contends the trial court abused its discretion in admitting evidence relating to his prior abuse of J. As detailed above, the admission of evidence under Evidence Code section 1108 is subject to the constraints of Evidence Code section 352. In determining whether evidence otherwise admissible under Evidence Code section 1108 should be excluded under Evidence Code section 352, courts 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 . . . offenses, or excluding irrelevant though inflammatory details surrounding

the offense. [Citations.]" (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.) In evaluating such evidence, the court must determine "whether '[t]he testimony describing defendant's uncharged acts . . . was no stronger and no more inflammatory than the testimony concerning the charged offenses.'" (*People v. Harri*s (1998) 60 Cal.App.4th 727, 738, quoting *People v. Ewoldt* (1994) 7 Cal.4th 380, 405.)

Here, evidence of appellant's prior abuse of J. was highly probative. The uncharged act was very similar in nature to the charged offenses. The victims were all very young and closely related to the abuser. The molestations occurred in the same location (appellant's home) and involved similar acts. Appellant abused J., who was eight years old at the time, by placing his penis against J.'s butt. N. testified that when she was eight or nine years old, appellant inserted his penis in her rectum. I. and R. were six and five years old, respectively, when they were molested by appellant. (See, e.g., *People v. Hernandez* (2011) 200 Cal.App.4th 953, 966-967 [prior uncharged sex offenses highly probative where appellant abused very young victims; abuse almost always occurred inside appellant's home; physical force or actual or threatened violence was involved; and victims suffered actual or attempted vaginal penetration by appellant's penis].) Although the abuse occurred 15 to 20 years ago, it was no more remote than the charged offense related to N. Moreover, the passage of time is relevant to the weight of the evidence, not its admissibility. (S*ee id*. at p. 968 [40-year gap between first uncharged offense and charged offense not too remote].) Finally, the testimony of G.G. and Detective Iwig confirming the prior abuse also supports admission of the evidence.

In contrast, the evidence of appellant's abuse of J. did not consume an undue amount of time or create a substantial danger of undue prejudice, confusion of

issues, or misleading the jury. The presentation of the evidence was not overly lengthy, and the record shows the trial court curtailed the prosecution's examination of J. Nor was appellant overly burdened in defending against the uncharged offense; indeed, at trial, J. denied being sexually abused. Evidence of prior uncharged abuse of J. was not more inflammatory than that of the charged acts, and the jury was unlikely to have been confused or misled by the admission of the evidence. In short, evidence relating to appellant's prior abuse of J. was more probative than prejudicial within the meaning of Evidence Code section 352. Accordingly, appellant has not shown an abuse of discretion in admitting evidence of prior uncharged offenses.

Finally, appellant contends Evidence Code section 1108 is unconstitutional, as admission of propensity evidence pursuant to that statutory provision violates his due process rights. As appellant acknowledges, the California Supreme Court has rejected an identical claim. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 922 [rejecting claim that Evidence Code section 1108 violates defendant's due process rights]; accord, *People v. Loy* (2011) 52 Cal.4th 46, 60-61.) This court is bound by that ruling. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) As to appellant's argument that Evidence Code section 1108 violates equal protection, it has been rejected by numerous appellate courts. (See, e.g., *People v. Robertson* (2012) 208 Cal.App.4th 965, 994; *People v. Fitch* (1997) 55 Cal.App.4th 172, 184.) We agree with the reasoning in those decisions and likewise reject appellant's claim of constitutional infirmity.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.