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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOHN ADAM WHITSELL, Defendant and Appellant.	B279635 (Los Angeles County Super. Ct. No. PA084603)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cynthia L. Ulfig, Judge. Affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant John Adam Whitsell appeals from a judgment of conviction entered after a jury found him guilty of forcible oral copulation on a child under the age of 14 (Pen. Code, § 288a, subd. (c)(2)(B); count 1), four counts of lewd acts on a child (*id.*, § 288, subd. (a); counts 2 to 5), and four counts of oral copulation or sexual penetration with a child 10 years old or younger (*id.*, § 288.7, subd. (b); counts 8 to 11). (All undesignated statutory citations are to the Penal Code unless otherwise noted.) The trial court sentenced Whitsell to 520 years to life.

On appeal, Whitsell's main argument is the trial court erred in permitting the jury to learn he had been convicted of raping three girls in Louisiana in 1971. We affirm.

FACTS

A. *The Charged Counts*

Whitsell is the great uncle of victim Chloe H., who was born in 2005. The relevant events were from January to March 2015, when Chloe was nine. Whitsell then was 71.

Chloe lived with her mother in an apartment. Chloe's mother, a single parent, asked her uncle Whitsell to babysit on weekends while Mother was at work. Whitsell babysat six times and molested Chloe each time. Chloe described the molestation as follows.

The first time, Whitsell followed Chloe into the kitchen where she went to wash dishes. He pinned her arms to the counter and kissed her for about five seconds, sticking his tongue into her mouth. She went into the living room, where Chloe's brother was watching television. She was going to tell her

brother what happened but Whitsell came into the room, so Chloe said nothing.

Another time, Chloe went into her mother's bedroom to get a movie while her brother was in the living room. Whitsell came into the bedroom. While Chloe was sitting on the bed, Whitsell pinned her arms back and kissed her, again sticking his tongue in her mouth. She tried to pull away from him but could not.

Once, Chloe went into the kitchen to make breakfast while everyone else was asleep. Whitsell, who had been sleeping on the living room couch, called her. When she came over to him, he put his hand inside her jeans and stuck fingers in her vagina. She had worn jeans to bed because she was afraid he might get into her bed and molest her while she slept.

There was a time when Whitsell's 14-year-old son was staying at the apartment. Whitsell's son and Chloe's brother were asleep in the bedroom. Whitsell called Chloe over to the living room couch and kissed her.

Another time, Whitsell followed Chloe into the garage. He pinned her arms to her sides and kissed her, sticking his tongue in her mouth, for five to 10 seconds.

While Chloe was in her bedroom folding laundry, Whitsell entered and turned off the lights. He pushed her to the floor, pulled down her pants and underwear, and lay on top of her. He put his fingers in her vagina and moved them around. He took his own pants off, and Chloe felt his penis on top of her vagina. He also licked her vagina. Chloe cried and told him to stop. Whitsell told Chloe that Ben, her mother's ex-boyfriend, wanted to do the same thing to her. Afterwards, Chloe went to the bathroom to wipe her tears off because she was crying a lot. Whitsell followed her into the bathroom and warned her not to

tell anyone what happened or else they would take her mother away.

Another time Whitsell was sleeping in Chloe's brother's bed. Whitsell called Chloe over and promised her $50 if she would lie in bed with him. She got into the bed, and he put his fingers in her vagina. He gave her $15.

Months later, during summer vacation in 2015, Chloe had a nightmare about Whitsell. She told her brother and her stepsister about it, and her stepsister told her to tell her parents, which she did. Chloe spoke to the police when they got home.

B. *Whitsell's Past Sex Offenses*

The People moved to introduce evidence Whitsell had committed four past rapes: three in Louisiana and one in Pomona. The trial court admitted evidence of the three Louisiana rapes and excluded evidence about the Pomona rape. The evidence of the Louisiana rapes varied. The People presented live witness testimony about one rape. For the other two, the People offered documentary evidence alone.

The live testimony was by Mary B., who was 17 when Whitsell raped her in Louisiana. The other two Louisiana rapes were of a 15-year-old and a 14-year-old.

Whitsell admitted the truth of all three 1971 Louisiana convictions.

At trial in Los Angeles, Mary B. testified she was walking home in Kenner, Louisiana, when Whitsell approached and began talking to her. She could not understand what he was saying. Suddenly he put his arm around her neck. A car drove up and Whitsell pushed her into the back seat. The driver drove the car to a dark area off the main road to park. The two men

ordered Mary to take off her clothes. When she refused, they slapped her. Whitsell had a revolver. He forced Mary to copulate him orally. Then he raped her. The driver also raped her. Mary testified against Whitsell at the trial in Louisiana.

The evidence about the other two Louisiana rapes was that, on November 8, 1971, Whitsell was convicted of aggravated rape at gunpoint of two girls, aged 14 and 15. Their names were Kelly L. and Mara E. The Louisiana court sentenced Whitsell to imprisonment in the state penitentiary, at hard labor, for the balance of his natural life.

Whitsell was released in 1977. He moved from Louisiana to Long Beach.

DISCUSSION

A. *The Evidence Code Section 1108 Evidence*

Whitsell's first claim of error is about the "1108 evidence": evidence showing Whitsell was convicted of three rapes in Louisiana. Whitsell contends that, under Evidence Code section 1108 (section 1108), it was error for the trial court to allow the jury to learn about his three Louisiana rape convictions.

Whitsell objected this evidence was inadmissible and, under Evidence Code section 352, should have been excluded as more prejudicial than probative.

Section 1108, subdivision (a), provides that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code s]ection 1101, if the evidence is not inadmissible pursuant to [Evidence Code s]ection 352." Evidence Code section 352 gives the trial

court discretion to exclude evidence if the probative value of the evidence is substantially outweighed by the probability its admission will create a substantial danger of undue prejudice, confusing the issues or misleading the jury.

The purpose of section 1108 is to facilitate the adjudication of sex crimes, which typically occur outside the presence of potential witnesses and often leave no corroborating evidence. (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 824.) By enacting this provision, the Legislature decided admission of evidence of other sexual offenses to show character or disposition is no longer treated as intrinsically prejudicial or impermissible. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1164.) Rather, evidence of other sexual offenses is so uniquely probative in sex crimes prosecutions that the evidence is presumed admissible without regard to the limitations of Evidence Code section 1101. The charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under Evidence Code section 1101, for otherwise section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in section 1108. (*People v. Loy* (2011) 52 Cal.4th 46, 63.)

Trial courts have broad discretion in determining whether to admit evidence under section 1108. (*People v. Loy*, *supra*, 52 Cal.4th at p. 64.)

If the charged and uncharged crimes bear no similarities at all, this fact is relevant but not dispositive. The evidence may be admissible nonetheless. (*People v. Loy*, *supra*, 52 Cal.4th at p. 63.)

The trial court did not abuse its discretion by admitting the section 1108 evidence in this case.

Four factors support the trial court's exercise of its discretion in this case.

First, the rape convictions were *convictions*, not mere allegations. Louisiana juries already established Whitsell had committed these rapes. The convictions were a certainty. Whitsell admitted to them. Whitsell thus bore no new burden of defending against these charges. Moreover, the jury would not be tempted to convict him of the charged crimes to punish him for the earlier crimes. The convictions lessened any danger of confusing the issues or requiring trials within a trial to determine Whitsell's guilt. And the presentation of the section 1108 evidence was swift. Victim Mary B.'s testimony took only an hour or so. The other two convictions required no witness testimony at all.

These points strongly support admission of the section 1108 evidence. (*People v. Loy*, *supra*, 52 Cal.4th at p. 61.)

Second, Whitsell's attacks were sex offenses against children. In Louisiana, Whitsell raped children aged 17, 15, and 14. Chloe was nine. All Whitsell's victims were minors. There is a span of eight years in age, but nothing in the record suggests an age span of this magnitude is unusual among child predators. (Cf. *People v. Daveggio and Michaud*, *supra*, 4 Cal.5th at pp. 825-826 [a 13-year-old and a 22-year-old]; *People v. Williams* (2016) 1 Cal.5th 1166, 1197 [a six-year-old and a 14-year-old].) The age span here includes prepubescent and postpubescent girls. The jury was able to evaluate the extent to which this distinction bore on Whitsell's potential predilection to assault the victim in this case.

Third, Whitsell's attacks were against females. The children he victimized were always girls.

Fourth, Whitsell was unusually persistent. He kept attacking. His multiple Louisiana rape victims qualified Whitsell as a serial sex offender. When Whitsell got opportunities to assault Chloe repeatedly, he took the opportunities. "'The propensity to commit sexual offenses is not a common attribute among the general public. Therefore, evidence that a particular defendant has such a propensity is especially probative and should be considered by the trier of fact when determining the credibility of a victim's testimony.' [Citations.]" (*People v. Villatoro*, *supra*, 54 Cal.4th at p. 1164.) The repetitive quality of Whitsell's offending suggests his propensity would persist, even into his 70's.

Whitsell correctly argues the passage of time is a pertinent factor. The rape convictions were from 1971, and Chloe said Whitsell assaulted her in 2015. The passage of this substantial time is relevant, but this single factor does not automatically render section 1108 evidence inadmissible. (*People v. Soto* (1998) 64 Cal.App.4th 966, 991.) Whitsell was incarcerated part of the time and had no access to girls. The Louisiana sentence was for life in prison; the record does not explain how Whitsell escaped this fate. The People sought to prove Whitsell committed a Pomona rape in 1983, but the trial court excluded this evidence. The trial court did not abuse its discretion by deciding other factors outweighed the passage of time.

Whitsell argues the trial court should have sanitized the evidence of the Louisiana rape convictions by referring to them only as "prior felony convictions bearing on witness credibility." In support, Whitsell cites two cases decided before the Legislature enacted section 1108 in 1995. Cases decided before a statute was passed generally do not inform issues arising under

the statute. As just discussed, section 1108 made uncharged sexual offenses admissible to prove a propensity to commit sexual offenses. The trial court admitted the Louisiana rape convictions for this purpose, which is a broader ground for admissibility than admission for the limited purpose of impeaching a witness. Whitsell's opening brief cites no case for the notion courts are required to sanitize section 1108 evidence.

In sum, the trial court properly admitted evidence about Whitsell's rape convictions under section 1108. This conclusion defeats any objection the evidence was inadmissible under Evidence Code section 1101. (*People v. Daveggio and Michaud*, *supra*, 4 Cal.5th at p. 827.)

B. *The $150,000 Restitution Order*

Whitsell objects to the trial court's order that he pay $150,000 in restitution for the pain and suffering he caused Chloe. This order, however, was not an abuse of discretion.

The People asked the trial court to impose a $300,000 restitution order for Chloe's noneconomic loss. Section 1202.4, subdivision (f)(3)(F), authorized this request for "[n]oneconomic damages[, which] are 'subjective, nonmonetary losses including . . . pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation." (*People v. Smith* (2011) 198 Cal.App.4th 415, 431, quoting Civ. Code, § 1431.2, subd. (b)(2).)

To support their $300,000 request, the People cited recent news reports of victims winning civil jury verdicts of $8 million and $1.7 million against long-term abusers.

Whitsell, on the other hand, asked the trial court to limit its award to $50,000 only, saying too little time had elapsed since the assaults to assess the future impact on Chloe. Whitsell's counsel hoped Chloe would suffer very few serious consequences or lingering effects.

The People responded that serious consequences were predictable and "[w]e don't need a doctor to validate . . . what's based on common sense."

Faced with the People's request for $300,000 and Whitsell's suggestion of $50,000, the court selected $150,000 as the proper figure.

The standard of review is abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) Appellate courts presume a trial court's restitution order is correct and indulge all intendments and presumptions to support the order on matters as to which the record is silent. (*Id.* at p. 666.)

Whitsell objects to this restitution order for three reasons.

First, Whitsell argues the court's $150,000 sum is unsupported by the record. This is incorrect. The court presided over the trial and was familiar both with Whitsell's offenses against Chloe and with Chloe's condition. The court then held an additional and substantial hearing. The transcript of this hearing is 19 pages long. The court stated a reasoned basis for the size of its award. The court emphasized the extent of the victim's "mental suffering, emotional distress, obviously inconvenience of having to go through therapy and other factors in this particular case based on the acts of the defendant, the things he put into play, cornering her, even when her brother was home, and the ongoing stress of the entire situation . . . ." The hearing covered the repeated and escalating character of the

molestation, Whitsell's abuse of his position of trust, and the effect of Whitsell's threat to a nine-year-old that she would lose her mother if she spoke. The court noted child molestation can have long-term effects the court did not want to underestimate. The court recounted experiences from other trials where prospective jurors during voir dire asked for sidebars and reported their own continuing trauma from childhood abuse from 30 and 40 years ago. It "is very tragic and shows that these issues do not subside but they continue on." To the same effect, the court mentioned the testimony of Mary B., whose account of a devastating lifelong impact from Whitsell's attack tended to rebut Whitsell's skepticism about whether his abuse could have "serious consequences or lingering effects" on Chloe.

The trial court appropriately considered information about the nature and severity of this particular conduct. The court likewise assessed the impact on this victim. The trial court's exercise of its discretion was well within a reasonable range.

Whitsell cites *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1179-1184 (*Valenti*), a decision from Division Three of this district that reversed restitution awards and remanded the matters for new hearings. This case differs from *Valenti* in many respects. First, there were many victims in *Valenti,* and the People conceded some trial court's restitution orders were legally invalid. (*Id.* at p. 1180.) The *Valenti* opinion reversed the entire noneconomic restitution order and remanded with directions to hold a restitution hearing to determine appropriate victim-specific damages. (*Ibid.*) This case has no similar feature. Second, the trial court in *Valenti* did not explain its decisionmaking. (*Ibid.*) This trial court did. Third, the *Valenti* victims had not "'actually'" been abused, and were later described

as "'doing fine'" and "'excellent.'" (*Id.* at pp. 1182-1183.) By contrast, Chloe had been abused, actually. The trial court noted Chloe was not doing fine.

Whitsell's second objection to the $150,000 sum is that the trial court improperly mentioned the testimony of Mary B. This would be a valid objection if the trial court had imposed a restitution sum to punish Whitsell for crimes against Mary B. or other victims besides Chloe. That was not the case here, because context makes clear the trial court used Mary B. as an example to rebut Whitsell's suggestion that children can be expected to outgrow childhood events. To the same end, the trial court also mentioned jurors who at sidebar recounted the continuing trauma of abuse from 30 or 40 years ago. These anecdotes illustrate a simple point: child abuse has serious long term effects. The court's comments were not an abuse of discretion.

Whitsell's third objection to the $150,000 order is insubstantial but intricate. He objects to the restitution order because–at the time–the language of former section 1202.4, subdivision (f)(3)(F), limited noneconomic restitution awards to "felony violations of Section 288." The statute did not expressly include section 288.5. Courts drew conflicting conclusions from this fact. (Compare *Valenti*, *supra*, 243 Cal.App.4th at p. 1181 ["Therefore, contrary to the prosecutor's representations below, the court was *not* 'allowed to award restitution to victims in [§] 288[-]*type* cases'"] with *People v. McCarthy* (2016) 244 Cal.App.4th 1096, 1109 [permitting restitution where *Valenti* would deny it] and *People v. Martinez* (2017) 8 Cal.App.5th 298, 300, 304-306 [noting conflict between *Valenti* and *McCarthy* and following *McCarthy*].)

However one reads the old statute, Whitsell's objection lacks merit. Unlike the situation in the *Valenti* case, Whitsell's jury convicted him of violating section 288 as well as sections 288a and 288.7. (Cf. *Valenti*, *supra*, 243 Cal.App.4th at p. 1181 [Valenti was not charged with or convicted of violating § 288].) In fact, the jury found Whitsell guilty of violating section 288 on *four* counts. When determining restitution, the trial court did not abuse its discretion by weighing the course of conduct that comprised these four offenses. Whitsell does not identify any supposedly improper fact the trial court considered that was not a part of this course of conduct. Whitsell's third objection lacks merit.

DISPOSITION

The judgment is affirmed.

WILEY, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.