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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RONNIE MACON, Defendant and Appellant.	B233585 (Los Angeles County Super. Ct. No. BA358969)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed.

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

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Zee Rodriguez and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Ronnie Macon (defendant) was convicted of three counts of committing a forcible lewd act upon a child under 14 years old (Pen. Code, § 288, subd. (b)(1)[1]) and three counts of committing a lewd act upon a child under 14 years old (§ 288, subd. (a)). On appeal, defendant contends that the trial court erred in admitting evidence of defendant's acts of prior sexual abuse, and Evidence Code section 1108 violates the Due Process and Equal Protection clauses of the United States Constitution. We affirm the judgment.

BACKGROUND

A. Factual Background[2]

1. Lewd Acts Committed Upon W.A.

W.A. testified at trial that he was born in 1991. When he was approximately 10 years old he moved from living in his father's home to live with his mother (mother) and defendant, mother's boyfriend.

W.A. testified that "every other week or every other day" defendant punched and head-butted him. Defendant would scream and curse at W.A. and mother. On one occasion, W.A. saw defendant point a knife to mother's stomach and was surprised that defendant did not stab her.

W.A. testified that defendant began to sexually abuse him when W.A. was approximately 10 years old. The first incident occurred when W.A., asleep in his bed, was awakened by defendant grabbing W.A.'s penis. Defendant told W.A. to get off the bed and "suck on [defendant's] dick." W.A. was "really scared"—afraid that defendant would hurt him or mother if he did not do what defendant said. Defendant took off his

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[1] All statutory citations are to the Penal Code unless otherwise noted.

[2] Defendant did not offer any evidence in his defense.

underwear and told W.A. to put defendant's penis in his mouth. Defendant then told W.A. to put W.A.'s finger inside defendant's mouth and "suck on [defendant's] penis, how [defendant] sucked on [W.A.'s] finger." W.A. complied. Defendant then told W.A. to suck on defendant's nipple, and defendant masturbated. After defendant ejaculated, defendant told W.A. to suck on defendant's penis again and "swallow what [was] on it." Defendant told W.A. to continue orally copulating defendant until after defendant ejaculated again. Defendant punched W.A. on the lip because W.A. had bitten defendant. Defendant also orally copulated W.A. W.A. wanted to cry, but he did not because he believed that if he did defendant "was going to hurt me more than I was already feeling." W.A. did not sleep that night.

W.A. testified that the next incident occurred when he was approximately eleven years old. Defendant stopped W.A. after W.A. exited the bathroom, and told W.A. to get on his knees and orally copulate him. W.A. did not want to do it, but he "knew that if I didn't [defendant] would end up hurting me." W.A. did not cry because defendant would usually slap W.A. or tell W.A. to stop crying.

The third incident occurred when W.A. was eleven years old. When W.A. was watching television with his three-year-old sister and defendant, defendant told W.A. to orally copulate him. W.A. was afraid that if he refused to comply with defendant's directive, he was not sure if defendant was going to hit him. When W.A. approached defendant, defendant pulled down his underwear and told W.A. to suck defendant's penis. W.A.'s three-year-old sister was sitting directly across from defendant. As W.A. was orally copulating defendant, defendant put his hands on the back of W.A.'s head and pushed W.A.'s head down to make defendant's penis go deeper into W.A.'s mouth. As defendant had done during the first incident, he told W.A. to suck defendant's nipple until he ejaculated and to "go down and swallow it."

W.A. testified that a fourth incident occurred when W.A. was in his bedroom watching a movie on the television. Defendant entered W.A.'s bedroom and told W.A. to orally copulate him. W.A.'s "heart dropped" because he thought that the sexual abuse was "completely over with." W.A. went over to defendant and dropped to his knees.

Defendant took out his penis, and while W.A. was orally copulating him, defendant put his hands on the side of W.A.'s head, guiding W.A.'s head back and forth.

At the preliminary hearing, W.A. testified that he thought it was two weeks from the time of the first incident to the fourth and last incident. At trial, W.A. testified that he believed the incidents occurred over the course of more than two weeks, but less than a month.

W.A. testified that he never told mother about the sexual abuse because defendant had threatened W.A. and told him not to tell anyone about it. W.A. did not tell his father because W.A. was afraid of defendant. When W.A. was approximately seventeen years old, he finally told someone about the abuse. W.A. told his mentor, Colleen, whom he found on a website where people offer advice on personal questions. Colleen assisted W.A. in telling mother about the sexual abuse, and approximately one week later W.A. told the police.

2. Prior Convictions for Committing Lewd Acts Upon A.M. and K.F.

i. A.M.'s testimony

A.M. testified that defendant was her uncle. In approximately 1986, when A.M was two to four years old, defendant sexually abused her while defendant lived with A.M's family. "On a regular basis," defendant touched A.M.'s vagina with his finger and penis both over and under A.M.'s clothing. A.M. did not specifically recall at the time of trial whether defendant penetrated her with his penis, but she told the police shortly after the abuse occurred that defendant did. Defendant also made A.M. orally copulate him, and put A.M. on top of him and "rub[bed]" her against him. Defendant ejaculated during his sexual abuse of A.M. Defendant also performed oral sex on A.M. A.M. further testified that her cousin, K.F., who is about five years older than she, was staying in A.M.'s house for "a couple of weeks" and present during some of the incidents of

defendant's sexual abuse of A.M. A.M. also saw defendant force K.F. to engage in similar sexual conduct with defendant.

A.M. testified also that she would cry and tell defendant that she did not want do those things, and defendant responded by telling A.M. that if she did not do them he would hurt her or her family. A.M. did not tell anyone of defendant's abuse of her while defendant was living with A.M. because she was scared. A.M. told her mother of the incidents of abuse after defendant moved out of A.M.'s home, and A.M. reported the abuse to the police. Defendant was later convicted for sexually abusing A.M. and K.F. and sentenced to prison.

ii. K.F.'s testimony

K.F. testified that she is A.M.'s cousin. In 1987, when K.F. was eight years old, defendant sexually molested K.F. multiple times while she was staying in A.M.'s house for two weeks. Defendant "grind[ed]" his penis on K.F. as she lay on top of defendant while on a couch. Defendant forced both A.M. and K.F. to orally copulate him and lick his buttock. Defendant made K.F. orally copulate him and he ejaculated into her mouth, penetrated K.F.'s anus with his penis, and made K.F. perform oral sex on A.M. K.F. was "terrified" and "scared out of [her] mind." Over the two week period defendant sexually molested K.F., K.F. did not tell anyone what defendant was doing because defendant threatened to kill her relatives. K.F. eventually told the police.

B. Procedural Background

The District Attorney of Los Angeles County filed an information charging defendant with three counts of committing a forcible lewd act upon a child under 14 years old in violation of section 288, subdivision (b)(1) (counts 1, 4, 5) and three counts of committing a lewd act upon a child under 14 years old in violation of section 288, subdivision (a) (counts 2, 3, 6). The District Attorney alleged as to all counts that defendant suffered four prior convictions specified in section 667.61, subdivisions (a) and (d), four prior convictions for committing a lewd act upon a child (§ 667.71), and four

serious or violent felony convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The trial court amended the information changing the charged crime in count 4 to committing a lewd act upon a child (§ 288, subd. (a)) and the charged crime in count 6 to committing a forcible lewd act upon a child (§ 288, subd. (b)(1)).

The prosecutor moved to admit evidence that defendant had sexually abused A.M. and K.F. to show defendant's propensity to commit sexual offenses. Defendant opposed the motion, arguing the incidents were remote in time, the prior incidents were not similar to the current offense, and the evidence of the prior abuse was extremely inflammatory. Following the arguments by the prosecutor and defense counsel, the trial court granted the prosecutor's motion and admitted the evidence, over defendant's Evidence Code sections 352 and 1108 objections, stating, "So in terms of my evaluation, it appears to me that it is not an undue consumption of time, and it is not undu[ly] prejudic[ial] in terms of the amount of time that this would take or potential for prejudice in this matter." In March 2011, after the introduction of evidence at trial, the jury was instructed with Judicial Council of California Criminal Jury Instructions (2011) CALCRIM No. 1191, the pattern instruction for considering evidence of a prior sexual offense.[3]

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[3] The jury was instructed, "The People presented evidence that the defendant committed the crime of lewd or lascivious act on a child under fourteen years that was not charged in this case. This crime is defined for you in the instructions. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offense, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses and based on that decision, also conclude that the defendant was likely to not [*sic*] commit and did commit a lewd or lascivious act on a child under fourteen years, and a lewd or lascivious act by force or fear as charged here. If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of lewd or lascivious act on a child under fourteen years, and a lewd and lascivious act by force or fear. The

Following a trial, the jury found defendant guilty of the charged offenses. Defendant waived his right to a jury trial on the prior conviction allegations, and the trial court found the prior conviction allegations to be true. The trial court denied probation and sentenced defendant to a total state prison term of 300 years to life.

DISCUSSION

A. The Trial Court Did Not Err in Admitting Evidence of the Prior Sexual Offenses under Evidence Code Sections 352

Defendant contends that trial court abused its discretion under Evidence Code sections 352 in admitting evidence of defendant's prior sexual abuse of A.M. and K.F. We disagree.

1. Standard of Review

Defendant's challenge to the admissibility of evidence of his prior sexual abuse as a violation of Evidence Code section 352 is analyzed under an abuse of discretion standard. (*People v. Griffin* (2004) 33 Cal.4th 536, 577; *People v. Yovanov* (1999) 69 Cal.App.4th 392, 406.) "A trial court abuses its discretion when its ruling 'fall[s] "outside the bounds of reason."' [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 714.) "We will not overturn or disturb a trial court's exercise of its discretion under section 352 in the absence of manifest abuse, upon a finding that its decision was palpably arbitrary, capricious and patently absurd. [Citations.] 'The [trial] court's exercise of discretion under Evidence Code section 352 will not be disturbed on appeal unless the court clearly abused its discretion, e.g., when the prejudicial effect of the evidence clearly outweighed its probative value.' [Citation.]" (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

People must still prove each charge beyond a reasonable doubt. [¶] Do not consider this evidence for any other purpose."

2. Analysis

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 . . . is not made inadmissible by [Evidence Code s]ection 1101,[4] if the evidence is not inadmissible pursuant to [Evidence Code s]ection 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."

"[E]vidence of a 'prior sexual offense is indisputably relevant in a prosecution for another sexual offense.' [Citation.]" (*People v. Branch* (2001) 91 Cal.App.4th 274, 282-283.) The prior sexual abuse of A.M. and K.F. and the abuse of W.A. were similar. "Under Evidence Code section 1108, subdivision (d)(1)(A) through (F), the prior and charged offenses are considered sufficiently similar, for admissibility in this manner, if they are both the type of sexual offenses enumerated there. [Citation.]" (*People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1099.) At a minimum, Evidence Code section 1108, subdivision (d)(1)(C) ["Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person" and subdivision (d)(1)(D) ["Contact, without consent, between the genitals or anus of the defendant and any part of another person's body"] are applicable here.

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[4] Evidence Code section 1101 provides in part, "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, 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. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

In each case defendant took advantage of a child that was staying where he lived. Defendant molested and forced each victim to give him oral sex. And defendant threatened each child with physical violence. There are pertinent similarities between the crimes. (See *People v. Cromp* (2007) 153 Cal.App.4th 476, 480 ["The fact that defendant committed a sexual offense on a particularly vulnerable victim in the past logically tends to prove he did so again with respect to the current offenses"].) Any dissimilarity between the earlier sexual assaults and the charged acts on W.A. went to the weight, not the admissibility, of the testimony of A.M. and K.F. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 660.)

Defendant argues that the trial court erred in admitting the testimony of A.M. and K.F. because they were "far younger" than W.A. when the alleged abuse occurred. A.M and K.F. were two to four and eight years old, respectively, when they were sexually abused by defendant. W.A. was ten and eleven years old when he was sexually abused. Although A.M. and K.F. were younger than W.A. when they were sexually abused, each child was under 14 years of age when defendant sexually abused them. Evidence of defendant's sexual abuse of A.M. and K.F., therefore, was probative of defendant's propensity to commit the charged offense—lewd acts on a child under age fourteen.

Defendant contends that the court erred in admitting evidence of defendant's prior sexual abuse of A.M. and K.F. because the prior abuse was remote in time. A.M and K.F. were sexually abused by defendant approximately 15 years before W.A. was abused. "No specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible. [Citation.]" (*People v. Branch, supra,* 91 Cal.App.4th at p. 284.) Here, during the 15 year gap between the sexual abuse of A.M and K.F., and that of W.A., defendant served time in prison and did not have an opportunity to abuse W.A. during that time. In addition, defendant sexually abused A.M. and K.F. when they were residing with defendant, and the first instance of defendant's sexual abuse of W.A. did not occur until the same year that W.A. moved in to live with defendant and mother.

Furthermore, because the prior sexual abuse and the abuse of W.A. were similar in several aspects, as stated *ante*, the passage of time does not render evidence of the prior sexual abuse inadmissible. (*People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 ["the similarities between the prior and current acts [of sexual abuse] . . . balanced out the remoteness [of a 20 year gap]"]; *People v. Soto* (1998) 64 Cal.App.4th 966, 977-978, 991 [a 20 to 30 year gap "does not automatically render the prior incidents prejudicial" when the prior and charged sexual offenses are similar.] "Remoteness of prior offenses relates to 'the question of predisposition to commit the charged sexual offenses.' [Citation.] In theory, a substantial gap between the prior offenses and the charged offenses means that it is less likely that the defendant had the propensity to commit the charged offenses. . . . [However] if the prior offenses are very similar in nature to the charged offenses, the prior offenses have greater probative value in proving propensity to commit the charged offenses." (*People v. Branch, supra,* 91 Cal.App.4th at p. 285.)

Defendant contends that the court erred in admitting evidence of defendant's prior sexual abuse of A.M. and K.F. because, unlike the charged offenses here, there was overwhelming evidence of defendant's guilt of the abuse of A.M. and K.F., and "[t]he stronger case made the weaker [case]." Defendant argues that A.M. and K.F. reported the abuse soon after it occurred, but W.A. did not report the abuse for approximately seven years. Defendant, however, does not argue that without the evidence of the prior abuse there is not sufficient evidence to support the judgment. In addition, defendant does not cite to the record in support of his conclusion that A.M. and K.F. reported the abuse "soon after it occurred." Our review of the record fails to disclose when the abuse of A.M. and K.F. was reported (i.e., how soon after the abuse occurred). In any event, the time within which the abuse is reported to the police does not alone support defendant's contention that there was a qualitative or quantitative disparity of evidence of defendant's guilt.

Defendant contends that the court erred in admitting the evidence because defendant's conduct regarding the prior abuse was "more egregious" than the alleged conduct against W.A. Defendant does not argue in what regard the prior abuse was more

egregious than the alleged abuse of W.A., nor does he support such a contention with a citation to the record. The prior abuse and the alleged abuse of W.A. involved vulnerable victims—children under 14 years of age, and defendant required the victims to engage in multiple acts of sexual conduct under the threat of physical violence. The sexual abuse of each of the victims was egregious.

In *People v. Abilez* (2007) 41 Cal.4th 472, our Supreme Court made it clear that prior sex offenses were not to be considered inherently prejudicial. "'Rather than admit or exclude every sex offense a defendant commits, trial judges must 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.' [Citation.]" (*Id.* at p. 502, quoting *People v. Falsetta* (1999) 21 Cal.4th 903, 917 (*Falsetta*).) The *Falsetta* decision had explained that in applying Evidence Code section 1108, "courts will retain broad discretion to exclude disposition evidence if its prejudicial effect, including the impact that learning about defendant's other sex offenses makes on the jury, outweighs its probative value. [Citations.]" (*Id.* at p. 919.) "[A]s the Supreme Court has repeatedly and recently reaffirmed, 'when ruling on a section 352 motion, a trial court need not expressly weigh prejudice against probative value, or even expressly state that it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under . . . section 352.' [Citations.]" (*People v. Jennings*, *supra*, 81 Cal.App.4th at p. 1315.)

The admission of the testimony of A.M. and K.F. did not cause defendant to suffer prejudice in the legal sense. "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying

section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638; *People v. Morton* (2008) 159 Cal.App.4th 239, 249.) Further diminishing the potential for undue prejudice, the trial court instructed the jury that the prior act evidence was insufficient by itself to prove his guilt of the charged offense and that the prosecution was still required to prove each element of the charged offense beyond a reasonable doubt, pursuant to pattern instruction CALCRIM No. 1191.

We conclude that the trial court properly admitted the evidence of defendant's prior sexual offenses. The trial court did not err.

B. Defendant's Constitutional Challenges to Evidence Code Section 1108

Defendant also argues that Evidence Code section 1108 violates the Due Process Clause of the United States Constitution by permitting the introduction of propensity evidence, and the Equal Protection clause by doing so only in cases of sexual offenses. Defendant relies upon *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, reversed in part, *sub nom, Woodford v. Garceau* (2003) 538 U.S. 202 (*Garceau).*

The Attorney General correctly argues that defendant's contention that Evidence Code section 1108 violated his constitutional rights was not the basis of an objection in the trial court and thus was forfeited. (*People v. Catlin* (2001) 26 Cal.4th 81, 122-123 ["[The] [d]efendant's contention that the admission of the other-crimes evidence violated his state and federal constitutional right to a fair trial is waived because it was not raised below"]; *People v. Williams* (1997) 16 Cal.4th 153, 250.)

Notwithstanding such a forfeiture, Evidence Code section 1108 does not offend due process. The California Supreme Court, in a decision binding upon this court (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), held that Evidence Code section 1108 does not violate due process. (*Falsetta, supra*, 21 Cal.4th at p. 917.) An earlier decision in *People v. Fitch* (1997) 55 Cal.App.4th 172, 184-185 (*Fitch*), rejecting an equal protection challenge to Evidence Code section 1108, was cited with approval in *Falsetta*, *supra*, 21 Cal.4th at page 918.

In addition, defendant's reliance on *Garceau*, *supra*, 538 U.S. 202, is misplaced. *Garceau* did not involve, and did not discuss, the constitutionality of Evidence Code section 1108. *Garceau* was a murder case, not a child molestation case, and did not address the propriety of a statute allowing for admission of prior sex acts to prove propensity or disposition. Nothing in *Garceau* casts doubt on the Ninth Circuit's earlier decision in *United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018, which held that admission of uncharged sexual offenses pursuant to Federal Rules of Evidence, Rules 413 and 414 did not violate the defendant's rights to "due process, equal protection, or any other constitutional guarantee." (*United States v. LeMay, supra*, 260 F.3d at p. 1031.) Considering the unique nature of child sexual assault cases, the discussion in *Garceau* is inapposite to the issues raised by defendant. In addition, as a decision of an intermediate federal court, *Garceau* is not binding upon the California courts. (*People v. Bradley* (1969) 1 Cal.3d 80, 86.) In view of the holdings in *Falsetta* and *Fitch*, we see no reason to revisit the due process and equal protection issues raised by defendant. (*People v. Hill* (2001) 86 Cal.App.4th 273, 279.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.