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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH LEE TOWNSEND, Defendant and Appellant.	2d Crim. No. B289889 (Super. Ct. No. MA071039) (Los Angeles County)

Joseph Lee Townsend appeals a judgment following his conviction for possession of child or youth pornography (Pen. Code, § 311.11, subd. (b)[1]) (count 1), and vandalism under $400 involving a GPS ankle monitoring device (§ 594, subd. (a)) (count 2). The jury found true the allegations on count 1 that he was previously convicted of possession of child or youth pornography (§ 311.11, subd. (a)) in 2011, and of a lewd or lascivious act by force on a child under the age of 14 (§ 288, subd. (b)(1)) in 2003, a serious felony (§§ 667.5, subd. (c), 1170, subd. (h)(3), 1192.7).

[1] All statutory references are to the Penal Code unless otherwise stated.

Townsend fell within the purview of the three strikes law and the trial court sentenced him to an aggregate prison term of 13 years, with a consecutive term of 364 days to be served in county jail on count 2. We conclude, among other things, that the trial court did not abuse its discretion by admitting evidence of two prior sexual offenses, including Townsend's 2003 prior conviction for committing a lewd act on a child by force. (§ 288, subd. (b).) We affirm.

FACTS

Craig Ridgway and his wife Cherlyn Brader lived in a trailer park. Townsend, his girlfriend Melia, and a man named Bill lived in another trailer in that park. On a few occasions Townsend allowed Ridgway to use his cell phone.

On February 4, 2016, Ridgway went to the trailer where Bill resided to drink beer. Townsend and Melia were not home. Ridgway was listening to music on Townsend's white Samsung cell phone. A "YouTube Kik app popped up." When he clicked on that app, a pornographic video appeared. In the Kik app "under the video" was a text message which stated, "I got more in your Dropbox, bro." He "exited" the Kik app and "clicked on the first thing that said Dropbox."

In Dropbox, there was "selection of files" and one was labelled "Young." Ridgway clicked on the Young file. It contained images of three-year-old children. He saw a "three or four-year old little boy or girl getting forced to give oral sex." Ridgway told Brader, his wife. He also contacted Townsend's parole agent.

The next day Thomas Foster, Townsend's parole agent, arrived at the trailer where Townsend resided. Brader approached Foster and said, "[I]f you see a white Samsung cell phone in there, it has child porn on it. I want [Townsend] and

that cell phone out of this park." Foster knocked on the door. Townsend answered. Foster entered the trailer, saw the white Samsung phone, and took possession of it. Melia said that phone belonged to her. Townsend told Foster, "[Y]ou can't take that telephone with you. It belongs to her." Foster relied, "I'm going to check the phone to make sure that you're abiding by your conditions of parole." Townsend had a parole condition that prohibited him from having child pornography.

As Foster tried to leave, Townsend stood in front of Foster's car and said, "[Y]ou're not leaving." He told Foster, "You need to give me the phone back. You're not leaving until you give me the phone back." Foster would not give the phone back to him. Townsend "eventually walked away and went inside his trailer."

Foster opened the cell phone. He went to the "Gmail account" and then went to "Dropbox." The phone contained pictures of "sexual[ly] explicit minors." Foster showed Sheriff's Detective Tim Schank the phone.

Schank testified, "In order to confirm there was indeed child pornography, I went ahead and accessed that app and looked into it and confirmed that there was pornography on the phone." He confirmed that the cell phone belonged to Townsend. It contained "approximately 159 child pornography videos" with "children aged from . . . approximately six years old, 16 years old, with numerous acts, oral sex, anal and vaginal sex. . . . [S]ome of the children were tied up in bondage."

Deputy Sheriff Susan Velazquez testified the phone contained "videos of sexual incidents between adults and minors. Some were infants. Some were toddlers." One video depicts "a three to four-year-old little girl with a female adult that is putting her mouth on the genitalia of the little girl. It also appears that something might be placed into the little girl's

vaginal area where she cries out a little bit." One video shows "an infant" female "under one year[] old" and "an adult . . . putting his penis inside that child."

As part of his parole conditions, Townsend had a GPS monitoring device on his ankle. Foster received a message after taking possession of the phone that Townsend had cut that device off his ankle. The device was found in a trash can in a laundry room near the trailer park. Parole agents were unable to locate Townsend because he had left the trailer park.

The People introduced evidence showing Townsend had pled no contest in 2003 to violating section 288, subdivision (b)(1) for "lewd and lascivious conduct with a minor under the age of 14 with force." Townsend also had a prior 2011 conviction for possession of child pornography. (§ 311.11, subd. (a).)

In the defense case, Townsend testified that he was paroled in 2015. He told Ridgway he was a registered sex offender shortly after he moved into the park. Ridgway "didn't really care." Townsend had poor eye sight. He needed a "dioptic lens" to magnify things 20 times. Other people had to read his e-mails for him. He was asked, "Did you have the white Samsung?" He replied, "No. That was . . . still in Bill's possession." He said he did not create "the Dropbox icon" on the phone. Townsend testified he did not download "any child pornography onto the white Samsung phone." He "could not even view it" if it was on that phone.

On cross-examination, Townsend testified he told Bill and Ridgway that he was "specifically convicted of the forcible rape of a minor under the age of 14." In answer to another question, he said, "I didn't say it was rape because the case was never a rape case. I never raped the girl. . . . But I did let him know that I was in a relationship with a girl who was 14. Well, at least she

told me before that she was older than that. It turned out she wasn't."

The prosecutor began questioning Townsend about the facts of that prior crime. Townsend's counsel objected. The trial court overruled the objection. The court ruled Townsend's testimony "opened the door to that line of cross-examination . . . . It goes to his credibility."

The Pre-Trial Motion

The People moved "to introduce evidence of [Townsend's] prior acts, specifically his convictions for forcible rape of a minor under the age of fourteen, and possessing child pornography." Townsend's counsel objected. She said these prior crimes are "highly prejudicial." The court ruled this evidence was admissible. It said, among other things, that it was "highly probative" and showed "the defendant's propensity to engage in and derive pleasure from sexual acts with minors."

DISCUSSION[2]

Admission of Evidence Regarding Townsend's Prior Convictions

Townsend contends the trial court erred in admitting "prejudicial other offense evidence," including his 2003 conviction for "forcible child sexual abuse." We disagree.

Section 1101 generally precludes the admission of evidence about a defendant's character to prove "his or her conduct . . . on a specified occasion." (§ 1101, subd. (a).)

But there is an exception. Section 1108 provides, in relevant part, "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

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[2] All further statutory references are to the Evidence Code.

pursuant to Section 352." (§ 1108, subd. (a).) 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."

In *People v. Falsetta* (1999) 21 Cal.4th 903, 911, our Supreme Court said, "[S]ection 1108 implicitly abrogates prior decisions of this court that 'propensity' evidence is per se unduly prejudicial to the defense." But trial courts must weigh the potential prejudice of this evidence with its probative value. They must consider the uncharged offenses' "similarity to the charged offense." (*Id.* at p. 917.) The greater similarity the greater the probative value. The court also noted that "the prejudicial impact of the evidence is reduced if the uncharged offenses resulted in actual *convictions*." (*Ibid.*) That would reduce the potential temptation of jurors "to convict the defendant simply to punish him for the [uncharged] offenses" that did not result in criminal prosecutions. (*Ibid.*)

Other factors trial courts must consider include: 1) the remoteness of the prior sexual offenses, 2) whether they are more inflammatory than the charged offense, 3) whether admission of this evidence will involve an undue consumption of time, and 4) whether it could confuse the jury. (*People v. Hernandez* (2011) 200 Cal.App.4th 953, 965-966.) "The factors to be considered in conducting the analysis depend on the unique facts and issues of each case." (*Id.* at p. 965.)

"The 'determination as to whether the probative value of such evidence is substantially outweighed by the possibility of . . . unfair prejudice or misleading the jury is "entrusted to the sound discretion of the trial judge who is [in] the best position to

evaluate the evidence." ' " (*People v. Hernandez, supra*, 200 Cal.App.4th at p. 966.) "We review rulings under section 352 for abuse of discretion." (*Ibid*.)

Townsend contends the trial court failed to make a proper assessment of the various factors before deciding to admit the evidence of his prior sexual offenses. We disagree.

The trial court carefully evaluated and weighed the relevant factors. It said the two sexual offenses for his prior convictions of possession of child pornography and "forcible rape of a minor under the age of 14" were "highly probative" and show "the defendant's propensity to engage in and derive pleasure from sexual acts with minors." The prior child pornography conviction "is strikingly similar to the charged offense." The pornography involved young children "performing sexual acts." The court said, "[T]he prior forcible rape of a minor is probative of the defendant's propensity to engage in sexual acts with minors that are consummated through the use of force and violence. The rape of the 13-year-old girl and the use of force by the defendant to overcome her will in the company of another minor is not all that different from the content of the videos he's now accused of having possessed. The pornography at issue involves similar sexual conduct, including highly graphic, violent and degrading sexual abuse of minors."

"[T]here is no requirement that the charged and [prior sexual] offenses be so similar that evidence of the prior acts would be admissible under section 1101. If such strict similarities were required, 'section 1108 would serve no purpose. It is enough the charged and [prior] offense are sex offenses as defined in section 1108.' " (*People v. Hernandez, supra*, 200 Cal.App.4th at p. 966.) "[A]ny dissimilarities in the alleged

incidents relate only to the weight of the evidence, not its admissibility." (*Id.* at p. 967.)

The trial court noted that although the 2003 conviction and the charged child pornography offenses involve different elements, the jury would still be confronted with the same underlying child sex abuse subject matter in each crime. It said, "Given the commonalities here between the charged and [prior sexual] conduct, the propensity evidence is not stronger and more inflammatory than the evidence of the defendant's charged crimes."

The trial court found the prior sexual offenses were not "remote or stale." " 'No specific time limits have been established for determining when [a prior sexual] offense is so remote as to be inadmissible.' " (*People v. Robertson* (2012) 208 Cal.App.4th 965, 992.) Here the trial court said Townsend's prior felony convictions occurred in 2003 and 2011. But "the gap" between them "is the result of two lengthy prison sentences respectively of eight and five years." Townsend "was out of prison less than one year between each of the [prior sexual offenses] and charged crimes."

The trial court considered another relevant factor involving the potential for prejudice. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.) It said, "The uncharged conduct resulted in felony convictions. As a result, the jury will not be tempted to punish the defendant for unpunished conduct given that the defendant was previously punished for both crimes and served significant prison terms." (*Ibid.*)

The trial court also noted that this evidence would "not consume much time" as the People intended to introduce this evidence with one law enforcement witness and certified documents establishing the two prior convictions. It said the

People would introduce the conviction, but not call the child victim to testify; that "will be less inflammatory than the victim's testimony."

Improper Cross-Examination

Townsend contends the trial court departed from its earlier rulings later in trial and improperly allowed the prosecutor to cross-examine him about the details of his 2003 child rape conviction.

The People respond that the trial court properly allowed the prosecutor to question Townsend about the facts of that conviction. They claim Townsend opened the door to this questioning after he provided inconsistent testimony about that offense. They argue they had the right to impeach his credibility for his volunteering false testimony about the facts of that crime. We agree.

It is well established that " '[a] defendant who chooses to take the witness stand in a criminal action thereby subjects himself to impeachment in the same manner as any other witness . . . .' " (*People v. Roberts* (1966) 65 Cal.2d 514, 522; *People v. Pike* (1962) 58 Cal.2d 70, 93.) Where a defendant during cross-examination volunteers information, the prosecutor is "entitled to explore defendant's assertions." (*People v. Dykes* (2009) 46 Cal.4th 731, 766.)

During cross-examination, Townsend testified that he told other people that he was "convicted of the *forcible rape of a minor* under the age of 14." (Italics added.) After another question, he then volunteered a different version of facts about that prior offense. He said, "[T]he case was *never a rape case*. I never raped the girl." (Italics added.) He testified he "was in a relationship with a girl who was 14. Well, at least she told me before that she was older than that."

The prosecutor asked, "[A]t that time the named victim in that case had just turned 13?" Townsend: "Which I didn't know that." Prosecutor: "[I]sn't it true that in that case you and [a] co-defendant lured the victim in that case into another trailer at the mobile park that you were living?" Townsend: "No . . . we didn't even live in the trailer park." Prosecutor: "You didn't live in the trailer park?" Townsend: "No." Prosecutor: "What kind of community was it?"

At this point Townsend's counsel objected that there was "improper impeachment." During a sidebar, she said the details of the offense should be presented by the victim, not the defendant. The prosecutor said Townsend was trying to falsely claim the prior crime was a "statutory" rape and the People were entitled to impeach his credibility. The court overruled Townsend's objection. It found Townsend was denying "certain elements of the conviction of the offense of which he was convicted." The court said he "essentially opened the door to that line of cross-examination . . . . It goes to his credibility."

Townsend notes the prosecutor then asked him questions about the facts of that crime. Those 12 questions constitute a tiny portion of this record, less than three pages of the reporter's transcript. The prosecutor tried to impeach Townsend's testimony that the crime involved consensual sex by asking questions about whether he had detained, physically restrained, digitally penetrated, and forcibly raped the child as she resisted. Townsend answered no to all those questions.

Townsend contends by allowing the prosecutor to ask these questions, the trial court gave the People "carte blanche" to commit what amounts to "prosecutorial misconduct."

But Townsend's trial counsel did not object to any of the 12 questions on the ground of prosecutorial misconduct, and she did

not request any admonitions for the jury. Consequently, this claim is forfeited. (*People v. Dykes, supra*, 46 Cal.4th at p. 766.) In addition, she did not object to any of these questions on relevance or other grounds. Townsend therefore did not preserve the claims he now raises on appeal.

But, even on the merits, Townsend's claims fail. "[A] prosecutor should not pursue a line of questioning that is damaging but irrelevant." (*People v. Dykes, supra*, 46 Cal.4th at p. 766.) But where the defendant opens the door by his testimony, the prosecutor is "entitled to explore the credibility of defendant's claim." (*Ibid.*) That is what occurred here.

Townsend has made no showing that the prosecutor had no factual basis to ask these questions or that he either acted in bad faith or initiated a line of questioning unrelated to the facts of the offense. In fact, defense counsel indicated that she understood why the prosecutor wanted to question Townsend about the details of the crime given Townsend's testimony. Her main objection, however, was that the child witness should testify about the details, not the defendant. But the trial court had previously ruled that having her testify would be more prejudicial to the defense.

Townsend claims the questioning was prejudicial. But the trial court noted that the prior sexual offense was not so dissimilar from the child pornography to make it unduly prejudicial. The comparative prejudicial nature of the 2003 offense was largely diminished because it and the charged offense shared the same subject matter – sexual abuse of children. The 2003 crime was for sexual abuse of a 13-year-old girl. The pornographic videos included sexual abuse of a one-year-old girl. Any prejudice was also diminished because Townsend had

initially testified on cross-examination that he told others that the 2003 offense was for "forcible rape."

Moreover, the alternative of not allowing this cross-examination would give Townsend carte blanche to testify without any check on his ability to falsely testify about the details of the crime. Townsend's testimony was self-contradictory, and cross-examination provided the jury the means to determine his credibility.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Fernando L. Aenlle-Rocha, Judge

Superior Court County of Los Angeles

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