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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CLAUDE EDWARD FOULK, Jr. Defendant and Appellant.	B231469 (Los Angeles County Super. Ct. No. NA084803)

APPEAL from a judgment of the Superior Court of Los Angeles County, James Pierce, Judge. Affirmed.

Verna Wefald, 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, Assistant Attorney General, Victoria B. Wilson and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Claude Edward Foulk, Jr., appeals from the judgment entered following his convictions by jury on two counts of forcible lewd act upon a child (Pen. Code, § 288, subd. (b)(1); counts 1 & 2), 13 counts of forcible oral copulation (former Pen. Code, § 288a, subd. (c); counts 3, 4, 6, 7, 9, 10, 12, 13, 15, 16, 18, 19 & 21), seven counts of forcible oral copulation (former Pen. Code, § 288a, subd. (c)(2); counts 22, 24, 25, 27, 28, 30 & 31), seven counts of forcible sodomy (former Pen. Code, § 286, subd. (c); counts 5, 8, 11, 14, 17, 20 & 23), and two counts of forcible sodomy (former Pen. Code, § 286, subd. (c)(2); counts 26 & 29), with, as to each of counts 1 through 26, a true finding as to a Penal Code section 803, subdivision (f)(1) statute of limitations allegation. The court sentenced appellant to prison for 248 years. We affirm the judgment.

FACTUAL SUMMARY

1. *People's Evidence.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established appellant committed the above 31 sexual offenses (counts 1 through 31) against J. F. (J.) from October 18, 1992, through October 17, 2002, inclusive,[1] i.e., when J. was between the ages of 9 years and 21 years. Appellant adopted J. when he was 12 or 13 years old. The evidence of the present offenses (other than the uncharged offense evidence) was the testimony of J., who was about 28 years old at the time of his 2011 trial testimony.

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[1] In particular, during the period from October 18, 1992, through October 17, 1993, appellant committed the offenses at issue in counts 1 through 5. Appellant committed two counts of forcible oral copulation and one count of forcible sodomy during each of the eight subsequent years as follows: (1) October 18, 1993, through October 17, 1994 (counts 6-8); (2) October 18, 1994, through October 17, 1995 (counts 9-11); (3) October 18, 1995, through October 17, 1996 (counts 12-14); (4) October 18, 1996, through October 17, 1997 (counts 15-17); (5) October 18, 1997, through October 17, 1998 (counts 18-20); (6) October 18, 1998, through October 17, 1999 (counts 21-23); (7) October 18, 1999, through October 17, 2000 (counts 24-26); and (8) October 18, 2000, through October 17, 2001 (counts 27-29). During the period from October 18, 2001 through October 17, 2002, appellant committed two counts of forcible oral copulation (counts 30 & 31).

The People also presented evidence of uncharged forcible sexual offenses, i.e., appellant repeatedly committed forcible sexual crimes against four victims. In particular, Steven B. (Steven), who was about 58 years old at time of trial, testified the abuse occurred from about 1966 through 1970, i.e., when he was between the ages of 8 and 12 years. Mark G. (Mark), who was about 58 years old at time of trial, testified the abuse occurred from about 1970 through 1972. Donald M. (Donald), who was about 46 years old at time of trial, testified the abuse occurred from about 1974 through 1986, i.e., when he was between the ages of 9 and 21 years. Donald also testified that, during this time, appellant abused another boy as well as Jeff Foulk (Jeff). Richard W. (Richard), who was about 46 years old at time of trial, testified the abuse occurred from about 1975 through 1976, i.e., when he was between the ages of 10 and 11 years.

In defense, appellant, who had been executive director of Napa State Hospital, denied he committed the offenses. Jeff, a 41-year-old drug addict who had been imprisoned for drug possession and petty theft, testified appellant adopted Jeff when he was eight years old. Appellant never sexually abused Jeff or Donald.

ISSUES

Appellant claims (1) the admission of the evidence of four remote uncharged offenses violated his right to due process, and (2) his sentence constituted cruel and unusual punishment.

DISCUSSION

1. *The Admission of the Uncharged Offense Evidence Was Proper.*

a. *Pertinent Facts.*

On November 3, 2010, the People filed a motion to admit uncharged offense evidence pursuant to Evidence Code sections 1101, subdivision (b) and 1108, and Penal Code section 803, subdivision (f)(1).[2] The written motion indicated police investigation

[2] Penal Code section 803, subdivision (f)(1) provides for a one-year statute of limitations (measured from the date of a report of a sexual assault to law enforcement personnel) for certain sexual offenses committed against a minor, provided, inter alia, there is independent evidence corroborating the victim's allegation. Moreover, section

revealed appellant had sexually molested 11 victims. The People wished to introduce evidence as to six, discussed below.

According to Stephen, appellant molested him from 1966 through 1971, when Stephen was "between the ages of 7 to approximately 11" years old. Appellant was Stephen's step-uncle. The abuse began when Stephen used to stay at appellant's parents' home. Appellant began touching Stephen's penis over his clothing. This escalated to appellant orally copulating him and Stephen being forced to orally copulate appellant. Appellant soon began sodomizing Stephen and requiring Stephen to sodomize appellant. Appellant told Stephen not to tell anyone because it was their secret and appellant was his lover. Appellant took Stephen on trips and took nude photographs of Stephen.

According to Mark, appellant molested him from 1970 through 1972, when Mark was 11 to 12 years old. Mark was appellant's cousin. The abuse started when appellant fondled him under a table when they went to dinner. Appellant would let Mark and his brother participate in activities like motor biking, shooting guns, and playing in the mountains when appellant would take them to his cabin in Lake Arrowhead. Appellant would tell them scary stories at night, then offer to let them sleep in his bed.

When Mark slept in appellant's bed, appellant would fondle Mark's penis over his clothing, and this progressed to appellant touching Mark's skin. As Mark continued visiting the cabin, appellant began orally copulating him and making Mark orally copulate appellant. Appellant kissed Mark on the mouth. Mark claimed the abuse

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803, subdivision (f)(2)(C), provides "If the victim was 21 years of age or older at the time of the report, the independent evidence shall clearly and convincingly corroborate the victim's allegation." Except to the extent of appellant's admissibility claim, there is no dispute as to the validity of the true findings pertaining to the section 803, subdivision (f)(1) allegations as to counts 1 through 26 in the first amended information. The subdivision (f)(1) allegation as to each of those counts was, inter alia: (1) J., a minor when appellant committed the offense, made the report on January 14, 2010, and a criminal complaint was filed within one year thereafter, and (2) clear and convincing corroboration would include appellant's molestations of Stephen, Mark, Donald, and Richard.

continued at appellant's home in Long Beach and included oral copulation. Appellant threatened to tell Mark's friends what Mark was doing.

According to Donald, he met appellant at the Children's Hospital in Los Angeles, where Donald was being treated for diabetes. Appellant molested him from the time Donald was nine years old until he was 21 years old. Donald came from a troubled home and his mother was having financial problems. She shared this information with appellant and he offered to have Donald live with him and take care of his medical needs.

Donald lived with appellant in North Hollywood and later in Long Beach. When they lived in Long Beach, a boy named Brian lived with them. Brian's family was experiencing financial hardship. Appellant began physically abusing Donald first. Appellant would tell him to remove his clothes and, if Donald resisted, appellant would beat him. Shortly thereafter, appellant began forcing Donald to orally copulate him and, using Vaseline, sodomizing him. Appellant sexually abused Brian.

A neighbor contacted the Department of Children and Family Services (DCFS) to report the noise from the beatings, but appellant lied to the DCFS representatives and told Donald and Brian that appellant would kill them if they ever disclosed the abuse. When Donald was in the fifth grade, he told a school official about the abuse, but appellant came to school and told them Donald had behavioral problems. The abuse continued until Donald was 21 years old. The abuse included appellant taking nude photographs of Donald and Brian and plying them with alcohol. Brian ran away when he was 15 years old.

Shortly thereafter, appellant began looking into adopting a boy and told Donald to pick any boy he wanted. A boy named Jeff, who was about 9 to 10 years old, began living with Donald and appellant. Appellant wanted to have sexual relations with Jeff and Donald. Donald refused, and appellant punched him in the face. Donald tried to go back to his mother's house but appellant came, picked him up, and beat him. Appellant forced Donald to engage in oral copulation at least four times a month and sodomized him at least twice a month. Appellant would buy Donald gifts and take him on trips.

When Donald was 20 years old, he disclosed to a counselor that appellant had abused him, but appellant claimed Donald was lying. Donald ran away when he was 21 years old. When Donald was 23 years old, appellant contacted him and told him that appellant had adopted a boy named John.

According to Richard, appellant molested him from 1975 through 1976, when Richard was 10 years old. Richard and Donald were friends, and Donald lived with appellant. Appellant would have Richard sleep in appellant's bed. On one such occasion, appellant turned Richard on his back, pulled down Richard's underwear, and put Richard's penis in his mouth. Appellant later orally copulated Richard in appellant's Lake Arrowhead cabin, to which appellant frequently took children. During a later incident at the cabin, appellant orally copulated Richard and tried to sodomize him. Appellant masturbated in front of all the boys. Richard continued going to appellant's home because there were fun things to do there that his parents could not afford, and Richard did not want anyone to know what had happened to him. Andrew B., Brian B., and Brock D. were additional victims.

The written motion also indicated as follows. J., had been in and out of foster homes since he was a baby. He was placed with appellant in 1992 when J. was nine years old. Appellant bought him gifts. About a year later, appellant began rubbing him over his clothes, then rapidly progressed to oral copulation and sodomy. Appellant would use Vaseline when sodomizing him. Appellant told J. not to tell anyone or he would return him to his foster home and take back the gifts he had purchased for him. The abuse continued until 2002 when J. was "[22]" years old. Appellant threatened to withhold financial support from J. and told him appellant had connections with law enforcement personnel who would find J. if he tried to leave.

In the written motion, the People argued there were many similarities in the way J. and the previously mentioned victims were targeted and abused, and testimony from six of the seven victims was necessary to corroborate J. The similarities included the targeted age group and appellant's modus operandi. The modus operandi included a

grooming process, telling a victim not to disclose the abuse, giving expensive gifts, taking victims on trips, and taking photographs of the victims.

In the written motion, the People also argued as follows. The uncharged offense evidence was admissible pursuant to Evidence Code section 1108. The People were seeking to prove a timeline of abuse of young boys from 1966 through 2002. There was a break from 1991 to 1992, but, during that period, appellant was in the process of having J. placed with him. Absent evidence of the continuum of abuse, jurors might think there was a time appellant stopped molesting boys and jurors might question the veracity of witnesses.

The uncharged offense evidence was also admissible under Evidence Code section 1101, subdivision (b) on the issues of motive, opportunity, intent, preparation, common scheme or plan, and duress. The charged and uncharged acts were crimes of opportunity, and appellant targeted young boys, luring them with adventure, toys, gifts, trips and alcohol. The victims were family members, boys he received because of their medical needs, or boys befriended by his foster children. Appellant sought J. for placement with him and, ultimately, sought to adopt him. Appellant used gifts and threats to prevent the victims from disclosing the abuse. The only dissimilarity pertained to Andrew, whom appellant did not have sufficient time to groom.

The written motion also argued admission of evidence of the uncharged offenses was not barred by Evidence Code section 352. The victims' evidence was independent because none of them knew, lived with, or were relatives of, J. Most of the victims would testify to brief periods of abuse. The extent of Donald's testimony would essentially be the same as his preliminary hearing testimony. There was no danger of undue prejudice, confusion of issues, or a misled jury, especially since the court could give limiting instructions.

At the November 18, 2010, hearing on the People's motion, the People observed that, as to the above seven victims, i.e., Stephen, Mark, Donald, Richard, Andrew, Brian,

and Brock, the prosecutor was seeking to admit testimony from only six, because the prosecutor was proffering testimony from Andrew or Brock, but not from both.

Appellant argued, in pertinent part, as follows. Donald and Richard testified at the preliminary hearing, and their testimony provided all the corroboration needed at trial. The present case was a credibility contest. The lengthy time frame of the offenses precluded appellant from defending himself other than by a general denial, and each additional witness beyond Donald and Richard was more prejudicial than probative and precluded appellant from receiving a fair trial.

The court ruled as follows. The court excluded, under Evidence Code section 352, testimony from Andrew and Brock on the grounds it would involve undue consumption of time, and the incidents involving those two witnesses did not fit a pattern like the incidents involving the other witnesses. Testimony from the remaining five witnesses was relevant; however, to avoid undue prejudice, the People could present testimony from only four. The court indicated its ruling was the best way to balance the parties' interests.

The record contains an undated written motion by appellant, i.e., a "Motion to exclude prior acts under U.S. Constitution, due process clause." In the written motion, appellant argued the People were proffering testimony from four witnesses. Appellant urged their testimony was inadmissible because, despite California Supreme Court authority to the contrary, propensity evidence violates the federal due process clause, and the incidents to which the four witnesses would testify were remote. On January 24, 2011, the court, after considering the motion, stated its previous ruling would stand.

b. *Analysis.*

Appellant claims the admission of evidence of four allegedly remote uncharged offenses violated his right to due process. Appellant argues Evidence Code section 1108, on its face, violates his right to due process. Appellant asserts the United States Supreme Court has not yet decided that issue, but appellant concedes our Supreme Court, in *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), has rejected his argument. Appellant also concedes we are bound to follow *Falsetta* by *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455. We accept the concession.

Appellant also argues the trial court abused its discretion by admitting testimony of the four witnesses "to prove propensity and to provide the [Penal Code section 803, subdivision (f)] corroboration for the statute of limitations problem." He asserts the minimal probative value of the testimony was outweighed by its undue prejudice; four witnesses were "overkill"; if, as appellant had requested, only Donald and Richard had been permitted to testify at trial, it was reasonably probable appellant would not have been convicted of any charge; and the admission of the testimony of the four witnesses violated appellant's right to due process.

There is no dispute the testimony of the four witnesses who testified at trial (Stephen, Mark, Donald, and Richard) constituted Evidence Code section 1108 propensity evidence. As for the Penal Code section 803, subdivision (f)(1) statute of limitations allegation pertaining to counts 1 through 26,[3] appellant did not dispute below, and does not dispute here, the testimony of Donald and Richard was admissible as propensity evidence to prove the corroboration requirement. Appellant in essence argues

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[3] There is no dispute Penal Code section 803, subdivision (f)(2) required the People to corroborate J.'s allegation by "clear and convincing evidence" because J. was over 21 years old when he made his report to law enforcement. (Pen. Code, § 803, subd. (f)(2)(C).) Nor is there any dispute current offenses may be corroborated by Evidence Code section 1108 propensity evidence consisting of uncharged offenses committed against another victim(s). (Cf. *People v. Ruiloba* (2005) 131 Cal.App.4th 674, 682; *People v. Mabini* (2001) 92 Cal.App.4th 654, 659.)

the trial court abused its discretion by failing to exclude under Evidence Code section 352 the testimony of Stephen and Mark as propensity evidence to prove the corroboration requirement.

However, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court concerning the application of Evidence Code section 352. (Cf. *People v. Waidla* (2000) 22 Cal.4th 690, 723-724.) Moreover, when ruling on a section 352 motion, a trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under section 352. (*People v. Williams* (1997) 16 Cal.4th 153, 213.)

In the present case, the trial court, which read the People's written motion, heard the argument of the parties, and was mindful of the statute of limitations issue, reduced to four the number of witnesses who would testify concerning uncharged offenses. None of the uncharged offenses were remote; instead, they were evidence of a continuum of sexual abuse by appellant, who denied committing any offense. The record reflects the trial court understood and fulfilled its responsibilities under Evidence Code section 352. Moreover, the application of ordinary rules of evidence, as here, did not impermissibly infringe on appellant's right to due process. (Cf. *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

Further, even if the trial court abused its discretion under Evidence Code section 352 as to counts 1 through 26 by admitting propensity testimony from Stephen and Mark to satisfy the corroboration requirement, the testimony of Donald and Richard provided clear and convincing evidence corroborating J.'s allegations as to those counts. The testimony of Stephen and Mark was propensity evidence admissible, along with the rest of the evidence, to prove beyond a reasonable doubt the substantive offenses. Their testimony was also admissible on the issues of motive, opportunity, intent, preparation, common scheme, and plan under Evidence Code section 1101, subdivision (b), to prove

beyond a reasonable doubt the substantive offenses. No prejudicial error occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

As for counts 27 through 31, they did not contain a Penal Code section 803, subdivision (f)(1) statute of limitations allegation; therefore, they were not subject to the corroboration requirement and no trial court error relating to a statute of limitations occurred. The testimony of Stephen and Mark was admissible as propensity evidence, and as evidence under Evidence Code section 1101, subdivision (b), as previously mentioned, to prove beyond a reasonable doubt the substantive offenses, the trial court fulfilled its responsibilities under Evidence Code section 352, and no violation of appellant's right to due process occurred.

2. *Appellant's Sentence Was Not Cruel or Unusual Punishment.*

During sentencing, the court indicated as follows. Appellant was a monster and a manipulator. He did not have a life without a criminal record, instead, he merely had a life without criminal convictions. Appellant had manipulated the system to obtain a child for sex, it was the worst case the court had seen in 20 years, and the testimony was horrific. The court later stated, ". . . I want the court of appeals . . . to know how aggravated this case is. The People could have charged 100 counts, and you'd be facing 800 years." The court, pursuant to Penal Code section 667.6, subdivision (d), imposed full, consecutive, eight-year upper terms on each of the 31 counts, resulting in a prison sentence of 248 years. Appellant did not object to the sentence on the ground the sentence constituted cruel or unusual punishment.

Appellant claims his sentence was cruel and/or unusual punishment under the federal and state Constitutions. He argues "a sentence of 248 years for someone with no prior record . . . is cruel and unusual punishment." The claim is unavailing. Appellant waived the issues by failing to raise them below. (Cf. *People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

Moreover, we reject appellant's claim on its merits. It is immaterial appellant cannot serve his sentence during his lifetime. In practical effect, he is in no different position than a defendant who has received a sentence of life without the possibility of parole, i.e., he will be in prison for the rest of his life. Imposition of a sentence of life without the possibility of parole in an appropriate case does not constitute cruel or unusual punishment under the state or federal Constitution. Further, a sentence such as the one imposed in this case serves the valid penological purposes of reflecting society's condemnation of appellant's conduct and providing a strong psychological deterrent to those considering engaging in such conduct. (Cf. *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1383.)[4]

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.

[4] In light of the above analysis, appellant's trial counsel did not provide ineffective assistance by failing to object to appellant's sentence on the ground it was cruel and/or unusual punishment.