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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

PETE MARTINEZ,

Defendant and Appellant.

F048870

(Super. Ct. No. F03905803-3)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Lawrence Jones, Judge.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, John G. McLean and Melissa Lipon, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Pete Martinez appeals his convictions for sexual abuse of and for committing lewd acts against a child under the age of 14. He contends that the trial court erred in admitting evidence of prior sex offenses and in instructing the jury pursuant to CALJIC

No. 2.50.01. He also contends that his trial counsel provided ineffective assistance by failing to raise a challenge to his sentence under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). We affirm his convictions, and remand for resentencing.

STATEMENT OF THE CASE

In an information filed June 3, 2005, the Fresno County District Attorney charged Martinez with one count of continuous sexual abuse against Stephanie V., a child under the age of 14, with a special allegation that he engaged in three or more acts of substantial sexual contact within the meaning of Penal Code section 1203.066, subdivision (b), while residing with the victim (Pen. Code, § 288.5, count one),[1] two counts of committing a lewd act upon Stephanie (§ 288, subd. (a), counts two & three), and two counts of committing a forcible lewd act upon Stephanie (§ 288, subd. (b)(1), counts four and five). On June 15, 2005, Martinez pled not guilty to all the charges.

On August 10, 2005, the court impaneled a jury. On August 17, 2005, the jury found Martinez guilty of counts one through four and not guilty on count five.

On September 14, 2005, the court denied Martinez's application for probation and sentenced him to state prison for 24 years calculated as follows: upper term of 16 years for count one with a consecutive full upper term of eight years, pursuant to section 667.6, subdivision (b), for count four. The court struck counts two and three pursuant to section 288.5. Martinez received 800 days for time served and statutory credit. He also was ordered to pay a restitution fine of $800. A second $800 restitution fine was imposed but suspended pending successful completion of parole.

The trial court sentenced Martinez to the aggravated term based upon three aggravating factors: (1) the vulnerability of the victim; (2) the abuse of a position of trust or confidence; and (3) the engagement in violent conduct indicating a serious danger to

[1] All sections cited are to the Penal Code, unless otherwise stated.

society. Although Martinez's counsel argued that there were no aggravating circumstances that would justify the aggravated sentences, he did not challenge the sentencing on the ground that it violated *Blakely*.

On September 14, 2005, Martinez filed a timely notice of appeal.

FACTS

In 1995, when the victim, Stephanie, was five years old, Martinez and her mother, Vera, started dating. Shortly thereafter Martinez moved into the residence with Stephanie, Vera and Stephanie's older sister, Lena. In 1996, Vera gave birth to Martinez's child, Pamela. Although Vera and Martinez did not marry, Stephanie considered Martinez her stepfather.

Martinez started molesting Stephanie when she was 10 years old. The molestation occurred about once a week when Stephanie was 10 years old, and somewhat less frequently when she was 11 years old. Stephanie did not tell anyone because she feared Martinez.

After Martinez and Vera ended their relationship, Martinez and Pamela moved into an apartment with Martinez's mother, Andrea. Stephanie would occasionally go to Andrea's apartment to visit Pamela. During these visits, Martinez continued to molest Stephanie.

On July 4, 2003, Stephanie went to Martinez's home to attend a fireworks display with his family. Stephanie and Pamela started out sleeping on the floor, but Martinez told them to get into bed with him. Martinez started to unbutton Stephanie's pants, but she tried to stop him, pointing out that Pamela was laying next to her. Martinez said Pamela was sleeping and continued to try to touch Stephanie and persuade her to cooperate. Stephanie continued to push his hands away and protest. Martinez then woke Pamela and told her to move to the floor. Stephanie continued to protest, but eventually Martinez was able to reach inside Stephanie's pants and digitally penetrate her vagina. He tried to pull her pants off her body, but Stephanie would not let him. Martinez placed

himself on top of Stephanie and tried to penetrate her vagina with his penis, but was not able to fully penetrate her. Stephanie told Martinez to stop because he was hurting her. Martinez would stop for a moment, but then resumed trying to penetrate Stephanie's vagina. Martinez did not stop trying to molest Stephanie until she threatened to scream and wake his mother sleeping in the next bedroom.

In June of 2003, Stephanie told a friend about the molestation. The friend urged her to report it. In early August of 2003, Stephanie told her sister Lena about the molestation. That night Lena drove Stephanie to the police station to make a report. Martinez was arrested and subsequently charged as previously set forth.

DISCUSSION

I.

Evidence of Prior Sex Offenses

Martinez's first claim of error is that the trial court erred in admitting evidence of prior sex offenses pursuant to Evidence Code section 1108. The prosecution introduced evidence that Martinez had prior consensual sexual relationships with two victims, Bernice H. and Sheena C.

Bernice testified that she met Martinez on a telephone chat line when she was 16 years old. Martinez told Bernice that he was 26 years old when he was actually 34 years old at the time. Bernice told Martinez that she was 16 years old. Martinez and Bernice had a consensual sexual relationship. They dated for approximately 11 months.

Sheena testified that she met Martinez on a chat line for teenagers when she was 17 years old. Sheena told Martinez that she was 17; he told her that he was 26 years old even though he was actually 35 years old at the time. Martinez and Sheena had a consensual sexual relationship. They dated for approximately a year and a half.

Before trial, Martinez had pled guilty to two counts of statutory rape pursuant to section 261.5, subdivision (c), relating to these two relationships.

On August 9, 2005, the trial court heard the prosecutor's motion in limine to allow evidence of Martinez's convictions for statutory rape of Bernice and Sheena, pursuant to Evidence Code section 1108.[2] Defense counsel objected to the introduction of evidence relating to the section 261.5 offenses on the ground that it should be excluded under Evidence Code section 352 because the prior offenses involved a consensual relationship with a 16 or 17 year old, whereas the instant case involved sexual conduct with a child between ages 10 and 12. On appeal, Martinez repeats the same objection.

In a prosecution for a sexual offense, Evidence Code section 1108 permits evidence of the commission of another sexual offense provided that it is not inadmissible under Evidence Code section 352 (prejudicial effect of the evidence outweighs its probative value). "By reason of section 1108, trial courts may no longer deem 'propensity' evidence unduly prejudicial per se, but must engage in a careful weighing process under section 352. 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." (*People v. Falsetta* (1999) 21 Cal.4th 903, 916-917.) We will not disturb a trial court's exercise of discretion under 352 unless it is shown that the trial

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[2] Section 1108 provides in part: "(a) 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."

court exercised it "'in an arbitrary, capricious or patently absurd manner.'" (*People v. Frye* (1998) 18 Cal.4th 894, 948; accord, *People v. Sanders* (1995) 11 Cal.4th 475, 512.)

The court's ruling admitting the prior sex offenses was not an abuse of discretion. Martinez contends that evidence of his prior consensual sex acts with teenaged girls was not probative of Martinez's propensity to sexually abuse 10 to 12 year old girls. While we agree that there are obvious differences between the prior sex offenses and the charged offenses, Evidence Code section 1108 contains no predicate requirement that there be an unusually high degree of similarity. As this court noted in *People v. Soto* (1998) 64 Cal.App.4th 966, the Legislature deliberately chose not to add a similarity requirement to Evidence Code section 1108 because doing so could reintroduce the strictures of prior law which the statute was designed to overcome "'and could often prevent the admission and consideration of evidence of other sexual offenses in circumstances where it is rationally probative. Many sex offenders are not "specialist", and commit a variety of offenses which differ in specific character.'" (*People v. Soto, supra,* 64 Cal.App.4th at p. 984, quoting Historical Note, 29B pt. 3, West's Ann. Evid. Code (1998 pocket supp.) foll. § 1108, pp. 31-32.) Thus, evidence can be presented to permit a "reasonable inference" that "the defendant has a disposition to commit sex crimes from evidence the defendant has committed other sex offenses." (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012 (*Reliford*).)[3]

Martinez nevertheless contends that the ruling was an abuse of discretion because he maintains the prior sex offenses had no probative value to the charged offenses, and thus there was nothing to balance the prejudice in allowing the jury to consider the evidence. We disagree. Evidence that Martinez had engaged in sex acts with under-aged

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3 The Supreme Court specifically left open the issue of "whether the uncharged sex acts must be similar to the charged offenses in order to support the inference." (*Reliford, supra,* 29 Cal.4th at p. 1012, fn. 1.)

girls is probative of the current charges that he sexually abused and engaged in sex acts with his under-aged stepdaughter. This evidence tended to support the victim's claim that Martinez sexually abused her. (See *People v. Fitch* (1997) 55 Cal.App.4th 172, 182 ["The Legislature has determined the need for this evidence is 'critical' given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial."].) The trial court did not abuse its discretion in allowing the jury to consider the prior sex offenses.

II.

CALJIC No. 2.50.01

Martinez next complains that he was prejudiced by the court instructing the jury that it could consider the evidence of Martinez's prior sex offenses to show propensity to commit sexual offenses, pursuant to CALJIC No. 2.50.01 (2002 rev.).[4] He contends that this instruction improperly allowed the jury to convict him on evidence of prior crimes that were proven by a preponderance of the evidence, and thus violated the due process clause of the California and United States Constitutions.

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[4] The trial court instructed the jury pursuant to CALJIC No. 2.50.01 (2002 rev.) as follows: "Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in the case. [¶ … ¶] If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crimes of which he is accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offenses. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime. [¶] Unless you are otherwise instructed, you must not consider this evidence for any other purpose."

The California Supreme Court has rejected this contention. In *Reliford*, *supra*, the Court proclaimed that "the 1999 version of CALJIC No. 2.50.01 correctly states the law." (*Reliford*, *supra*, 29 Cal.4th at p. 1009.) The Court rejected any suggestion the instruction was likely to mislead the jury regarding the prosecution's burden of proof. (*Id.* at p. 1015.) The Court also rejected an argument that the instruction was too complicated for jurors to apply. (*Id.* at p. 1016.)

The *Reliford* court noted that the 2002 revised version of the instruction instructs the jury "that the inference they may draw from prior sexual offenses is simply one item to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime." (*Reliford*, *supra*, 29 Cal.4th at p. 1015.) The court referred to this sentence as "an improvement," explaining that it "provides additional guidance on the permissible use of the other-acts evidence and reminds the jury of the standard of proof for a conviction of the charged offenses." (*Id.* at p. 1016.) However, the court concluded that "the constitutionality of the instruction does not depend on this sentence." (*Id*. at p. 1015, fn. omitted.)

Here, the trial court used the 2002 revised version of CALJIC No. 2.50.01 which was approved by the Supreme Court in *Reliford*. We are compelled to follow *Reliford* and reject Martinez's claim that CALJIC NO. 2.50.01 violates due process. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

III.

Ineffective Assistance of Counsel

Finally, Martinez complains that his trial counsel provided ineffective assistance because trial counsel did not challenge his sentence as unconstitutionally excessive in light of *Blakely*. We initially rejected this claim concluding that Martinez could not show prejudice because, under *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), the term was not unconstitutionally excessive.

Almost three weeks after we filed an opinion in this case, the United States Supreme Court overruled *Black* and held that California's Determinate Sentencing Law "violates *Apprendi*'s bright line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' [Citation.]" (*Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856; 2007 WL 135687 at p. *11] (*Cunningham*).) Thus, the middle term prescribed under California law, not the upper term, is the relevant statutory maximum. (*Ibid*.)

Based upon *Cunningham*, Martinez filed a motion for relief from default and a petition for rehearing. We granted the motion of relief from default, and modified the sentence, and denied the petition for rehearing. Our decision to modify the sentence was based upon well-established law that "'[a]n appellate court is not restricted to the remedies of affirming or reversing a judgment. Where the prejudicial error goes only to the degree of the offense for which the defendant was convicted, the appellate court may reduce the conviction to a lesser degree and affirm the judgment as modified, thereby obviating the necessity for a retrial. (*See* Penal Code, § 1260; *People v. Harris* (1968) 266 Cal.App.2d 426, 434-435.)' (*People v. Alexander* (1983) 140 Cal.App.3d 647, 666.)" (*People v. Edwards* (1985) 39 Cal.3d 107, 118.)

Like *Cunningham*, Martinez was convicted of violations of section 288.5, subdivision (a) (count one) and section 288, subdivision (b)(1) (counts two, three, and four). The court imposed an upper term of 16 years for count one, a consecutive upper term of 8 years for count four and stayed imposition of sentence for counts two and three pursuant to section 654. The upper terms were based on three aggravating factors: the vulnerability of the victim, the crime involved an abuse of a position of trust or confidence, and Martinez's violent conduct, which indicated a serious danger to society. None of these factors were found by a jury based on proof beyond a reasonable doubt. Thus, we concluded that the aggravated sentence could not be supported by these factors.

The People subsequently filed a petition for rehearing. The People argued that we should affirm the sentence because the trial court could have relied upon Martinez's prior convictions. We asked Martinez to file a response brief. In the response brief, Martinez contended that our decision to modify the judgment was correct under *Cunningham* given that the trial court did not rely upon the prior convictions as a basis for the aggravated sentence even though the People specifically asked the trial court to rely upon the prior convictions. After reviewing the petition and the response, we granted the People's petition for rehearing. We granted the petition because, while the United States Supreme Court in *Cunningham* invalidated the process by which the trial court here imposed the upper term, we cannot say for certain on this record that the same term may not be imposed anew, consistent with *Cunningham*.

DISPOSITION

The convictions are affirmed. Accordingly, the judgment of sentence is vacated with directions as follows: If the People do not bring the matter before the trial court for a contested resentencing hearing within 60 days after the filing of the remittitur in the trial court, the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a sentence of the middle term of 12 years for count one and imposition of a consecutive middle term of 6 years on count four. The People shall in writing notify the trial court and defendant's trial counsel of their intentions in this regard within 30 day after the filing of the remittitur; should the People state an intention to not contest the modification to the middle term or fail to timely notify the trial court and

unless the trial court on its own decides to set a resentencing hearing, the trial court shall promptly modify the abstract of judgment as provided herein.

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Ardaiz, P.J.

WE CONCUR:

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Vartabedian, J.

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Wiseman, J.