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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

THE PEOPLE, Plaintiff and Respondent, v. DONALD RAY BREDFIELD, Defendant and Appellant.	C050407 (Sup. Ct. No. 992126)

A jury convicted defendant of eight counts of forcible lewd acts on a child (Pen. Code, § 288, subd. (b)), and found true the enhancement that he tied or bound the victim (Pen. Code, § 667.61, subd. (e)(6)). Sentenced to two consecutive terms of 15 years to life plus a determinate term of 18 years, he appeals. Defendant contends (1) allowing the victim to testify with his back to defendant violated the confrontation clause; (2) it was prejudicial error to admit defendant's Oregon conviction to prove predisposition; (3) the victim was improperly permitted to express a lay opinion as to defendant's guilt; (4) denial of a

jury trial on aggravating factors violated his right to a jury trial; and (5) there is an error in the abstract of judgment. We find merit only in the last contention and order the abstract corrected.

FACTS

Defendant was originally convicted in 2002 after a jury trial. That conviction was reversed due to irregularities in the certification of competency. The second jury trial occurred in June 2005.

The primary prosecution witness in the second trial was the victim, J.S. J.S. did not want to have to make eye contact with defendant. The prosecutor requested that J.S. be allowed to take the stand outside the presence of defendant and face away from him. The prosecutor reported J.S. expressed a profound fear of testifying; J.S. basically said he was profoundly afraid of defendant. The trial court declined to make any special accommodation, but had no problem with counsel standing at an angle so the witness did not face defendant.

J.S. was 14 years old; he was born in 1990. He had lived in Goshen, Oregon in a trailer with his mother and defendant. The trailer did not have a shower; they went to the truck stop to shower. When asked what happened in the shower, J.S. declared he would not answer that question. Defendant went with him to the shower.

J.S. testified defendant did something to him in the shower that made him feel bad. Defendant did it three or four times. He did the same thing when they lived in Weed; defendant did

these things more than once. J.S. would scream, but he was not always able to scream because defendant taped his mouth with duct tape. Defendant also taped his hands and wrists. Defendant told J.S. not to tell anyone and J.S. felt scared.

J.S. did not want to answer questions about exactly what defendant did to him. J.S. testified defendant touched him below his waist and above his knees in front and in back. Defendant touched him in front with his mouth. Defendant also had J.S. touch him. When J.S. would not answer whether defendant touched him with his penis, the testimony concluded for the day.

The next morning the prosecutor reported that he was with J.S. at the hospital the night before until almost 10 o'clock. J.S. apparently attempted to kill himself by slashing his wrists with a razor and may have tried to jump out a window. He was not physically injured. J.S. was upset that he had to see defendant while testifying; he claimed defendant made faces at him, mocking him. No one else observed this; the defense investigator saw defendant shake his head. The prosecutor had seen the superficial cuts on J.S.'s wrists and damage to a window screen.

Defense counsel was concerned that the jury not see any injuries to J.S.'s wrists. He wanted J.S. to wear a long-sleeved shirt. Counsel opposed closing the courtroom to the public.

The court agreed to have J.S. enter the courtroom before defendant. The prosecutor could position himself so J.S. was at

a 90 degree angle from defendant. The court admonished defendant to be passive. The court described the positioning. The courtroom was a rectangle oriented north and south. The counsel table was towards the south; the witness stand towards the north, with the jury box to the west. J.S. was positioned northwest.

J.S. testified he ran away from home in Weed after defendant did things to him. In the shower in Goshen, defendant touched the inside of J.S.'s butt with his penis. Defendant put his hand and his mouth on J.S.'s penis and had J.S. touch his penis with J.S.'s hand and mouth. He also did these things in Weed while J.S. was tied with duct tape.

After they lived in Goshen, they moved to Eugene and then Clear Lake before Weed. J.S. did not allege any molestation in Eugene or Clear Lake. Defense counsel brought out inconsistencies between J.S.'s current testimony and his previous testimony, such as the color of the house in Weed and when his mother worked at McDonald's. At a dependency proceeding, when defendant was absent, J.S. said defendant touched him "quick, like a second." He also said he had his clothes on. J.S. had previously testified defendant taped his legs. J.S. could not recall whether he made other inconsistent statements, such as denying defendant orally copulated him or originally omitting the mention of duct tape. J.S. had lived in numerous foster and group homes, always with other children.

Paul Wilkins testified he owned the Road Runner Tire business in Goshen, Oregon. Defendant worked there beginning in

September 1995. Defendant lived in a trailer behind the shop and he saw defendant and J.S. use the shower in the shop on a regular basis. They left after approximately one year.

William Lachenmyer, a police lieutenant in Weed, testified he investigated J.S. running away from home April 25, 1997. J.S. told him he ran away because he got spanked with a belt. The officer did not ask about molestation.

The parties stipulated a medical examination of J.S. would not have provided relevant information. The prosecution admitted exhibit No. 1, stipulated facts to support defendant's conviction for second degree sexual abuse in Oregon. The victim, a girl under the age of 18 years, would testify she climbed on defendant's lap at bedtime in July 1990 and he rubbed her vaginal area for 10 seconds through her clothes.

DISCUSSION

I

Defendant contends his rights under the confrontation clause were violated when J.S. was permitted to testify with his back to defendant. He further contends there were insufficient findings that J.S. would be traumatized by defendant's presence to justify the denial of the right of face-to-face confrontation.

The record is conflicting as to the placement of J.S. when testifying. The trial court described the placement of J.S. as facing northwest in a courtroom oriented north-south. Defense counsel described J.S. as having his back to counsel; the prosecutor replied, "[w]ell, almost." In a motion for a new

trial, defendant claimed J.S. was 135 degrees from the prosecutor and 180 degrees from defendant. The prosecutor disagreed; J.S. was 90 degrees from the prosecutor and 130 degrees from defendant. The trial court indicated there was a profile view of J.S. from the counsel table.

It is the appellant's burden to provide an adequate record to show error. (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1385.) In this context, defendant had the burden to provide a clear record showing the actual placement of J.S. as a witness. To the extent that the difference between the placement as articulated by the trial court and by defense counsel is constitutionally significant, defendant has failed to carry his burden to provide a record showing error.

The confrontation clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment (*Pointer v. Texas* (1965) 380 U.S. 400, 403 [13 L.Ed.2d 923, 926], provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.])"

In *Coy v. Iowa* (1988) 487 U.S. 1012, 1016 [101 L.Ed.2d 857, 864], the court, stressing the time-honored view that face-to-face confrontation was essential to fairness, observed "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. [Citation.]" The court held placing a screen between the complaining witnesses and defendant violated defendant's right to a face-to-face encounter. (*Id*. at p. 1020.) The court left

for another day whether there were exceptions to the right of face-to-face confrontation. (*Id*. at p. 1021 [101 L.Ed.2d at p. 867].)

In *Maryland v. Craig* (1990) 497 U.S. 836, 857 [111 L.Ed.2d 666, 686], the court held the confrontation clause did not prohibit a child witness from testifying against a defendant at trial, outside defendant's presence, by a one-way closed circuit television to protect the child from trauma that would impair the child's ability to communicate where the reliability of the evidence is ensured by subjecting it to rigorous adversarial testing. The requisite finding of necessity to depart from face-to-face confrontation must be case specific; the court must hear evidence and determine the procedure is necessary to protect the welfare of the particular child witness. (*Id*. at p. 855.) The court must find the child witness would be traumatized by the presence of defendant and that such emotional distress is more than de minimus. (*Id*. at p. 856.)

In assessing defendant's contention, we must first determine if he was denied his right to face-to-face confrontation and, if so, whether the requisite showing of necessity was made. We find defendant was not denied his right of face-to-face confrontation, so we need not determine if the finding of necessity was sufficient.

Face-to-face confrontation does not require the witness to look at defendant: "The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will

draw its own conclusions." (*Coy v. Iowa, supra,* 487 U.S. at p. 1019 [101 L.Ed.2d at p. 866].) Numerous courts have held that, as long as the defendant and witness are present in the courtroom and their view of each other is not physically obstructed, as by a screen or two-way mirror, the Confrontation Clause is not violated by allowing the witness to testify while facing away from the defendant. (See, e.g., *State v. Miller* (N.D. 2001) 631 N.W.2d 587, 594 [witness not facing defendant]; *Smith v. State* (Ark. 2000) 8 S.W.3d 534, 537-538 [witness outside defendant's line of sight]; *State v. Brockel* (La.Ct.App. 1999) 733 So.2d 640, 644-646 [witness with back to defendant]; *Brandon v. State* (Alaska Ct.App. 1992) 839 P.2d 400, 409-410 [witness seated in small chair perpendicular to defendant]; *State v. Hoyt* (Utah Ct.App. 1991) 806 P.2d 204, 209-210 [witness out of defendant's line of sight]; *Stanger v. State* (Ind.Ct.App. 1989) 545 N.E.2d 1105, 1112-1113 [witness chair angled towards jury, away from defendant], overruled in part on other grounds by *Smith v. State* (Ind. 1997) 689 N.E.2d 1238, 1246-1247, fn. 11; *People v. Tuck* (N.Y.App.Div. 1989) 537 N.Y.S.2d 355, 356 [witness table facing jury]; *Ortiz v. State* (Ga.Ct.App. 1988) 374 S.E.2d 92, 95-96 [witness at 90 degree angle].)

Consistent with these cases is *People v. Sharp* (1994) 29 Cal.App.4th 1772, disapproved of on other grounds by *People v. Martinez* (1995) 11 Cal.4th 434. In *Sharp*, the prosecutor stood or sat next to the witness stand so the child witness did not have to look at defendant. Defendant could see the side and

back of the witness's head while she testified; even if he could not see all her facial expressions, he could see her general demeanor and reactions to questioning. The witness could, but chose not to, see defendant and the jury could see both the witness and defendant. (29 Cal.App.4th at pp. 1781-1782.) The *Sharp* court found the situation "not materially different from one in which a witness might stare at the floor, or turn her head away from the defendant while testifying." (*Id*. at p. 1782.)

The *Sharp* court rejected defendant's contention his confrontation rights were violated. "Surely, appellant cannot be claiming a constitutional right to stare down or otherwise subtly intimidate a young child who would dare to testify against him. Nor can he claim a right to a particular seating arrangement in the courtroom. A witness who avoids the gaze of the defendant may be exhibiting fear, embarrassment, shyness, nervousness, indifference, mendacity, evasiveness, or a variety of other emotional states or character traits, some or all of which might bear on the witness's credibility. It is, however, the function of the jury to assess such demeanor evidence and 'draw its own conclusions' about the credibility of the witness and her testimony. (*Coy v. Iowa, supra*, 487 U.S. at p. 1019 [101 L.Ed.2d at p. 866].) There was no interference with the jury's ability to perform that function in this case." (*People v. Sharp, supra*, 29 Cal.App.4th at p. 1782.)

Defendant relies on an older case from this court, *Herbert v. Superior Court* (1981) 117 Cal.App.3d 661, as did the

defendant in *Sharp.* In *Herbert*, at a preliminary hearing the courtroom was arranged, with the judge in the jury box, so that the defendant and the child witness could not see each other. This court found denial of the right of confrontation. "By allowing the child to testify against defendant without having to look at him or be looked at by him, the trial court not only denied defendant the right of confrontation but also foreclosed an effective method for determining veracity." (*Id*. at p. 668.)

We find *Herbert, supra,* 117 Cal.App.3d 661 distinguishable for the same reasons as the *Sharp* court. First, it is factually distinguishable because here it was not physically impossible for defendant and the witness to see each other. (*People v. Sharp, supra*, 29 Cal.App.4th at p. 1781.) Further, *Herbert's* precedential value was been called into question by subsequent California Supreme Court decisions (*Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1077), statutes enacted to protect child victims of sexual molestation (Pen. Code, § 1346 et seq.), and *Maryland v. Craig, supra*, 497 U.S. 836 [111 L.Ed.2d 666], which permits court to employ procedures allowing less than literal face-to-face confrontation between an adult defendant and his child victims. (*People v. Sharp, supra*, 29 Cal.App.4th at pp. 1782-1783.)

Defendant's confrontation rights were not violated.

II

Defendant contends the trial court erred in admitting, over defense objection, the document entitled "Stipulated Facts," from defendant's 1990 Oregon conviction for second degree sexual

abuse. Defendant contends the trial court abused its discretion in admitting this unduly prejudicial evidence because the facts of the Oregon case were so dissimilar to those of the instant case that evidence of the Oregon case did not logically prove a predisposition to engage in the sexual misconduct charged.

"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." (Evid. Code, § 1108, subd. (a).) Evidence Code section 1108 permits the admission of other crimes evidence to show defendant's propensity or disposition. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911.) It does not require the charged and uncharged crimes be similar. (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41; *People v. Soto* (1998) 64 Cal.App.4th 966, 984.)

Trial courts may admit other sex crimes evidence only after a careful weighing process under Evidence Code section 352. (Evid. Code, § 1108, subd. (a).) Evidence Code section 352 permits a court to 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." Before admitting other sex crimes evidence, "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*, *supra,* 21 Cal.4th at p. 917.)

In arguing the evidence should have been excluded, defendant relies on a single factor, that the evidence was too dissimilar to the charged crimes. All other factors favor its admission. The evidence was short and offered no possibility of confusion; it occurred five years before the charged offenses and thus was not too remote; the stipulation established certainty and it was less inflammatory than the charged offenses.

While the other crimes evidence involved a brief touching of a young girl through her clothes, rather than the more extensive sexual contact with an unclothed boy in the charged crimes, it was not so dissimilar that it lacked probative value. In enacting Evidence Code section 1108, "the Legislature 'declared that the willingness to commit a sexual offense is not common to most individuals; thus, evidence of any prior sexual offenses is particularly probative and necessary for determining the credibility of the witness.' [Citation.]" (*People v. Soto, supra*, 64 Cal.App.4th 966, 983.) Further, it was more similar

than just any sexual offense; it showed defendant's willingness to exploit young children for his sexual gratification.

Because the probative value of the other crimes evidence was not substantially outweighed by the potential for prejudice, the trial court did not err in admitting it.

III

Defendant contends the trial court erred in admitted J.S.'s testimony that he believed defendant was at fault for what happened in Goshen. He contends the court erroneously admitted lay opinion as to his guilt.

On the first day of testimony, J.S. was reluctant to testify as to exactly what defendant did to him. The prosecutor continued:

"Q: In the shower in Goshen -- J[.], I'm going to have to ask you the question directly, okay? And I'm going to need you to answer, if you can remember.

"A: Huh-uh.

"Q: Because the jury needs to know what happened, and you know the truth. Okay? So I want to work on this. Do you feel that what happened to you was your fault in Goshen?

"A: No.

"Q: Do you understand that it wasn't?

"A: Yeah.

"Q: Whose fault was it?

"A: Mr. Bredfield."

Defense counsel objected and the objection was overruled. The direct examination continued for a few more questions.

After the prosecutor asked if defendant touched J.S. with his penis and J.S. declined to answer, the testimony ended for the day.

"A witness may not express an opinion on a defendant's guilt. [Citations.] The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] 'Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.' [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77.)

In *Coffman and Marlow*, the prosecutor questioned co-defendant Marlow about the kidnapping and robbery of a victim. Answering a series of questions asking the truth of the allegations of the information, Marlow conceded he and Coffman kidnapped and robbed the victim. On appeal, Coffman contended Marlow gave inadmissible lay opinion as to her guilt. (*Id.* at p. 76.) The California Supreme Court disagreed; in context, the prosecutor simply succeeded in getting Marlow to concede the truth of allegations against him and to describe, as a percipient witness, the degree of Coffman's participation. Marlow did not express an opinion as to Coffman's guilt, her credibility, or her state of mind. (*Id*. at p. 77.)

Here, too, read in context, J.S.'s testimony was not an impermissible opinion as to defendant's guilt. Rather, the

prosecutor was attempting to put J.S. at ease and overcome his reluctance and embarrassment to testify as to what happened to him when he was five and six years old. The prosecutor was not eliciting J.S.'s opinion as to defendant's guilt, but confirming for J.S. that whatever happened in the shower in Goshen, and also in Weed, was not J.S.'s fault. What actually happened and whether defendant was legally responsible remained questions for the jury. There was no impermissible opinion testimony.

IV

In a bifurcated trial, the jury was asked to determine the truth of six aggravating factors. The jury unanimously found true only two: the victim was particularly vulnerable and the defendant engaged in tying and binding the victim.

The trial court sentenced defendant to two consecutive life terms under Penal Code section 667.61 based on its finding that the offenses occurred on two separate weekends in Weed. The court sentenced defendant to the upper term on count three based on his criminal history and imposed consecutive sentences on the remaining counts based on the two aggravating factors found by the jury. Defendant's criminal history, as shown in the probation report, spanned 15 years. In addition to the misdemeanor sexual abuse conviction, defendant had multiple convictions for driving under the influence or with a suspended license, and criminal driving, all misdemeanor offenses except the last criminal driving, which was a felony.

Defendant contends his Sixth Amendment rights to a jury trial were violated when the trial court used aggravating

factors not found true by the jury to impose two life terms and the upper term on count three.

As defendant recognizes, the California Supreme Court rejected his contention in *People v. Black* (2005) 35 Cal.4th 1238. Defendant contends he raises the issue to preserve it for federal review and to seek reconsideration in the California Supreme Court. We are bound by the decision in *Black*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

V

Defendant contends, and the Attorney General concedes, there is an error in the abstract of judgment that must be corrected. Defendant was sentenced to consecutive terms of fifteen years to life on counts one and two. The abstract of judgment, however, shows the sentence on counts one and two as life with the possibility of parole; the box on line 5 rather than the box on line 6.a was checked. We order the abstract corrected.

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment showing the sentence on counts one and two as 15 years to life and to send a certified copy of the corrected abstract to the Department of Corrections and Rehabilitation.

MORRISON, J.

We concur:

BLEASE, Acting P.J.

CANTIL-SAKAUYE, J.