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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM CARL LAWRENCE, Defendant and Appellant.	D047547 (Super. Ct. No. SCD189310)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed in part, reversed in part.

William Carl Lawrence appeals a judgment arising out of his convictions of 11 charges of lewd acts on a child under the age of 14. He contends that (1) his convictions must be reversed because the trial court improperly excluded his proposed expert testimony regarding the frequency with which child reports of sexual abuse are false; (2) the trial court denied his right to a jury trial and violated due process by denying his

request to have the jury determine the issue of whether he was the person who suffered prior convictions in 1961 and 1970 as alleged in the information against him; (3) the trial court erred in admitting evidence outside the record of the 1961 conviction in support of the enhancement allegations regarding that conviction; and (4) the trial court denied his right to a jury trial by deciding to impose consecutive sentences on all counts based on sentencing factors not found by a jury. We agree that the prosecution could not properly rely on extra-record evidence to establish the truth of the 1961 prior conviction allegation and reverse the true finding as to that allegation. Otherwise, we find Lawrence's arguments unavailing and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Lawrence, who owned a tile and swimming pool cleaning business, was a friend and business associate of Jim K. From July to November 2004, Jim's 9-year-old twin sons, K. and Ko., helped Lawrence with his cleaning pool route, usually on alternate Fridays, for which Lawrence paid them $30 to $50 a day. By late November 2004, Jim and his wife, Christine, became concerned that Lawrence was regularly giving the boys extra money and toys, spending quite a bit of time with the boys and often bringing the boys home late; based on these concerns, they did not allow K. and Ko. to see Lawrence any more.

In late January 2005, K. and Ko. told Christine that Lawrence had sexually abused them, prompting Christine to call Child Protective Services and the police. (All further dates are in 2005 except as otherwise noted.) On February 22, a forensic interviewer at the Chadwick Center of Children's Hospital (Armida Valencia) separately interviewed

the boys. San Diego Police Detective Susan Righthouse observed both interviews, which were videotaped, through a one-way mirror. During the interviews, the boys described various incidents of oral copulation and other sexual activities they had had with Lawrence between July and November 2004, including one incident that occurred at a pool house bathroom at the home of one of Lawrence's clients and one that occurred when Lawrence took K. to a nudist camp. K. and Ko. were examined by a sex trauma nurse for signs of physical trauma or sexual related injuries, but were found to have none.

On February 22, Detective Righthouse had K. make a pretext phone call to Lawrence from the police station. K. told Lawrence that his friend Zach was threatening to tell adults about "all that stuff we talked about" and asked what he should do. Lawrence initially responded "let's see, uh, kill him" but then urged Ko. to "settle it" with Zach by giving him money, toys and Pokeman cards. When Ko. inquired how he should respond if his mother asked about "stuff like that," Lawrence told him to deny that anything happened and tell her that Zach was mad at him and lying to get him in trouble. Shortly thereafter, Ko. ended the call.

Police detectives obtained search warrants for Lawrence's apartment, his truck and his storage unit. On February 26, 2005, officers arrested Lawrence and took him to the police station. Other officers conducted the searches, finding a Polaroid camera, an inflatable anatomically-correct female doll and a surround-sound chair, all of which the boys had previously described during their interviews; they also seized a computer, photographs and files.

Detective Righthouse interviewed Lawrence, who admitted that on numerous occasions he had taken the boys to his apartment and taken Polaroid pictures of them in the nude. He admitted that he had orally copulated each of them once and that although the boys had told the officers something happened nearly every time either or both of them were with him, it was "probably . . . not every time." Lawrence also confessed that he had encouraged the boys to simulate sexual intercourse with the inflatable doll, but denied that either of the boys had orally copulated him or engaged in sodomy with him, that he ever encouraged them to orally copulate each other or that he had ever orally copulated them at a client's home.

Detectives Righthouse and Thomas Kinney interviewed Lawrence a second time on February 22. During this interview, Lawrence admitted that he had taken the boys to his apartment, engaged in sexual acts with them and photographed them with his Polaroid camera while they were engaged in sexual activities. Initially, Lawrence said that he had given the boys "an occasional oral copulation blow job," "at least once," although he later admitted that he had done so about five times each. He maintained, however, that he had not allowed the boys to touch him and that he had turned down their offers to orally copulate him.

Later in the interview, Lawrence admitted that on one occasion one of the boys laid on top of him while they were both nude, with the boy's penis touching his buttocks. When asked whether he ever used his hands to arouse the boys sexually, Lawrence responded "[o]h, yeah, definitely," indicating that he had "masturbated" them and rubbed his hands over their buttocks and the rest of their bodies. He also admitted that he had

orally copulated both boys in his client's pool house bathroom in late September 2004 and again in the horse shed of their parents' house when he was invited over for dinner later in the year.

The district attorney filed an information charging Lawrence with 13 counts of lewd acts with a child under the age of 14 and alleging that Lawrence had previously been convicted of child molestation, two serious felonies and three prior "strikes." At trial, the prosecutor introduced evidence of the foregoing and called the boys, who testified regarding instances in which Lawrence had touched their penises, orally copulated them and had them orally copulate each other or him. They also testified that every time Lawrence orally copulated them, he gave them extra money, which he called "bonus bucks." They further testified that Lawrence told them not to tell anyone about their activities because, if they did, they might get in trouble and he would go to jail.

Lawrence called witnesses who testified that they had seen the boys with him on various occasions and not seen anything strange. He also introduced expert medical testimony that he suffered from numerous health problems, including chronic pancreatitis, an enlarged prostate and Peyronies disease, which causes scarring in the spongy bodies that form the erectile part of the penis and would have made it "extremely unlikely" that he would have been able to achieve and maintain an erection similar to what the boys described. The defense expert admitted, however, that he had not tested Lawrence to determine whether Lawrence could achieve an erection and that the location of the plaque that Lawrence had from the Peyronies disease could cause his penis to "bend straight up."

A jury convicted Lawrence of 11 of the charges, acquitted him of two of the charges and found that 10 of the 11 guilty counts involved substantial sexual conduct between him and the victims. In a bifurcated proceeding, the court found that Lawrence was the person who suffered the prior convictions and the jury found that all the prior conviction allegations were true and that Lawrence qualified as a habitual sex offender. The court sentenced Lawrence to 75 years to life for each conviction, consecutive, for a total of 825 years to life, stayed imposition of sentence on certain enhancements and ordered Lawrence to pay certain fines and victim restitution. Lawrence appeals.

DISCUSSION

1. *Exclusion of the Proposed Defense Expert*

During trial, Lawrence brought a motion to admit expert testimony regarding the veracity of the children's reports of sexual abuse. Specifically, Lawrence proposed to call Dr. William Dess, a child and family psychologist in private practice who regularly conducted child custody evaluations for the family law courts in San Diego. At a hearing under Evidence Code section 402, Dr. Dess testified that he had received training on suggestibility in children and how they process and articulate information and conducted "hundreds" of forensic psychiatric evaluations of children, 15 to 20 percent of which involved allegations of sexual abuse. He testified in part that, in his experience, approximately 60 to 70 percent of children's reports of such abuse were false or exaggerated, but that parents nonetheless tended to believe their children's allegations in this regard and could influence the child through verbal and nonverbal cues.

Defense counsel argued that Dr. Dess's proposed testimony was a proper subject for expert testimony because it related to matters beyond the ordinary experience of jurors and that his client was entitled to present a defense that the boys might have been mistaken or not telling the truth in accusing Lawrence of sexual abuse, particularly in light of the fact that what they originally told their parents changed over time. The prosecutor argued that Dr. Dess did not qualify as an expert on the subject because his experience was primarily in family law cases where custody was contested (such that the parents might be prone to manipulating their children into making false accusations against the other parent), and because the proposed testimony was not a proper subject for expert testimony.

The court denied Lawrence's request. It concluded that insofar as Lawrence proposed to call Dr. Dess to testify that children tell lies, the subject matter was not beyond the ordinary experience of jurors and thus not a proper subject matter for expert testimony. (See Evid. Code, § 801, subd. (a).) Insofar as the proposed testimony related to children's tendency to lie about sexual abuse specifically, Dr. Dess did not qualify as an expert based on the fact that his work with children's allegations of sexual abuse was limited to 25 to 30 instances and arose entirely in the context of divorce proceedings, which present very different dynamics than those involved in this case.

On appeal, Lawrence contends that the trial court erred in excluding his proffered evidence and, in doing so, deprived him of his constitutional right to present a defense. The United States Constitution guarantees a criminal defendant "a meaningful opportunity to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683,

690.) (State statute provides for a similar right. See Pen. Code, § 1093, subds. (c) & (d); *In re Martin* (1987) 44 Cal.3d 1, 29-39.) Although the right to present a defense generally requires that an accused have the opportunity "to present all relevant evidence of *significant* probative value to his defense" (*People v. Babbitt* (1988) 45 Cal.3d 660, 684, original italics, quoting *People v. Reeder* (1978) 82 Cal.App.3d 543, 553), "[a] defendant's right to present relevant evidence is not unlimited" and may be restricted in circumstances where necessary "to accommodate other legitimate interests in the criminal trial process," such as adherence to standard rules of evidence. (*United States v. Scheffer* (1998) 523 U.S. 303, 308; *Taylor v. Illinois* (1988) 484 U.S. 400, 410.)

We need not decide whether the trial court erred in excluding Dr. Dess's testimony in this case because we determine that, in any event, any such assumed error was not prejudicial. Lawrence contends that the prejudice from the exclusion of Dr. Dess's proposed testimony must be assessed under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, pursuant to which prejudice exists unless the error was harmless beyond a reasonable doubt. However, the California Supreme Court has made clear that where a trial court's evidentiary ruling excludes certain evidence concerning a particular defense, but does not preclude the defense in its entirety, the determination of whether the error was prejudicial is made in accordance with the more relaxed standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.)

Here, Lawrence's attorney cross-examined the boys' witnesses extensively regarding the accuracy and reliability of their testimony, emphasized that the boys had

numerous conversations with their parents before the family reported their allegations to the police and that there was a delay in that reporting. Defense counsel also pointed out discrepancies in the boys' accounts of what happened, as well as discrepancies between those accounts and the parents' testimony, and suggested that the boys had various reasons why they might falsely accuse Lawrence of molestation. In addition, the trial court instructed the jury on the many important factors bearing on the reliability of eyewitness identifications. (CALJIC No. 2.92.)

As shown by the foregoing, the court's exclusion of Dr. Dess's proposed testimony did not preclude Lawrence from presenting witness fabrication as his theory of defense. Accordingly, the *Watson* standard applies and Lawrence is entitled to a reversal of his convictions only if there is a reasonable probability the verdict would have been more favorable to him if the court had admitted the proposed testimony. (See *People v. Bradford*, *supra*, 15 Cal.4th at p. 1325.) Based on the fact that during his police interviews, Lawrence confessed that he had committed most of the acts about which the boys testified and for which he was convicted, and on the fact that Dr. Dess's testimony did not purport to address circumstances where child abuse victims inaccurately report some, but not all, incidents of abuse, we conclude there is no reasonable probability that the admission if Dr. Dess's proposed testimony would have convinced the jury to reach conclusions more favorable to Lawrence than they did.

2. *Court's Determination of Identity Relating to the Prior Conviction Allegations*

A criminal defendant does not have a state or a federal constitutional right to a jury trial regarding the truth of prior conviction allegations against him. (*People v. Wiley*

(1995) 9 Cal.4th 580, 589; *People v. Vera* (1997) 15 Cal.4th 269, 277.) Penal Code section 1025, however, provides generally for such a right (see also Pen. Code, § 1158), although it requires that the trial court, rather than the jury, make the determination of whether the defendant is the person who suffered the prior conviction. (*People v. Kelii* (1999) 21 Cal.4th 452, 458.) Although Lawrence contends that the statute violates his federal constitutional rights to a jury trial in this regard, he concedes that we are bound by California Supreme Court precedents concluding to the contrary. (*Ibid.*; *People v. Epps* (2001) 25 Cal.4th 19, 29.) For this reason, we reject Lawrence's appellate contention.

3. *Admission of Extra-Record Evidence Regarding the 1961 Conviction*

The prosecution has the burden of proving each element of a prior conviction that is used to enhance a defendant's sentence, beyond a reasonable doubt. (*People v. Rodriguez* (2004) 122 Cal.App.4th 121, 128.) In determining whether the prosecution has met this burden, the trier of fact may "look to the entire record of conviction[,] '*but no further*[.]'" (*People v. Reed* (1996) 13 Cal.4th 217, 226 (*Reed*), italics in original, quoting *People v. Guerrero* (1988) 44 Cal.3d 343, 355; see also Evid. Code, § 452.5, subd. (b).)

Here, each of the charges against Lawrence included three prior strike enhancement allegations, one of which was based on Lawrence's 1961 conviction for committing lewd and lascivious acts in violation of Penal Code section 288. In support of these allegations, the prosecution introduced, over defense objection, certified records from the 1970 convictions; those records included an amended information alleging that Lawrence suffered the 1961 conviction, minute orders reflecting the trial court's true finding in 1970 that Lawrence suffered the 1961 conviction and the unpublished opinion

from Lawrence's appeal of the 1970 judgment, which referenced the trial court's true finding regarding the earlier conviction. Lawrence contends that these documents were outside the record of his 1961 conviction and thus could not properly be considered in determining whether that conviction was a strike. We agree.

Although a prosecutor will often prove a prior conviction by introducing certified copies of the abstract of judgment of conviction and Department of Corrections records showing the defendant's imprisonment, there is no question that he or she may also use other materials, so long as they constitute part of the "entire record" of the prior conviction. (*People v. Myers* (1993) 5 Cal.4th 1193, 1195 [holding that the trier of fact may consider the "entire record of the proceedings leading to imposition of judgment on the prior conviction" in determining whether a prior conviction qualifies as a strike]; also *People v. Woodell* (1998) 17 Cal.4th 448, 456-457 [record of conviction includes not only the trial court record, but also the appellate record and the appellate court opinion].) However, the exact parameters of "record of conviction" have not been completely defined. (See *People v. Houck* (1998) 66 Cal.App.4th 350, 355-357 (*Houck*), & cases cited therein.) Various documents that are deemed to constitute part of a "record of conviction" for the purposes of identifying a strike, at least where the underlying conviction resulted from a guilty plea, include: a preliminary hearing transcript (*Reed, supra*, 13 Cal.4th at p. 223; compare *Houck, supra*, 66 Cal.App.4th 350 [where the underlying conviction resulted from a trial rather than a guilty plea, the preliminary hearing transcript is not part of the record of conviction]); a reporter's transcript of the defendant's plea (*People v. Abarca* (1991) 233 Cal.App.3d 1347, 1350); and charging

documents and a minute order (*People v. Harrell* (1989) 207 Cal.App.3d 1439, 1443-1444).

Here, there is no question that the documents from the 1970 proceedings were not part of the "record of conviction" from the 1961 criminal case. The Attorney General nonetheless contends that because the 1961 record of conviction could properly be "augmented" with the 1970 materials, those materials should be considered as part of the record of the 1961 conviction. Assuming, without deciding, that such augmentation would be proper under the applicable Rules of Court, we conclude that this argument is otherwise unavailing. There would be no legitimate reason to augment the 1961 record with the 1970 materials except in furtherance of the prosecutor's purpose here, which was to obtain a true finding on the 1961 conviction to enhance Lawrence's sentence without first complying with prosecutorial obligations under state law to plead and prove that conviction. (Pen. Code, § 667, subd. (f)(1); *People v. Rodriguez* (2004) 122 Cal.App.4th 121, 128.) In accordance with the authorities discussed above, the law does not allow such a maneuver.

Because the prosecution did not introduce any evidence from the actual record of Lawrence's 1961 conviction, we must reverse the true findings on the allegations relating to that conviction. This does not, however, require a change in Lawrence's sentence, since the jury also found true the allegations that he suffered two other prior strike convictions in 1970, which are sufficient to trigger the application of the three strikes sentence imposed in this case.

4. *Imposition of Consecutive Sentences*

In *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), the United States Supreme Court held that any fact, other than the fact of a prior conviction, which "increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely, supra*, 542 U.S. at p. 301, quoting *Apprendi v. New Jersey* (2000) 530 U.S 466, 490.) The court defined "statutory maximum" as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely, supra,* 542 U.S. at p. 303, italics omitted.) Here, the court sentenced Lawrence under the three strikes (Pen. Code, § 667) and one strike (Pen. Code, § 667.61) laws, imposing consecutive terms on each of the 11 counts, for an aggregate term of 825 years to life. Citing *Blakely*, Lawrence argues the trial court erred in imposing consecutive sentences because it did so based on sentencing factors not found by a jury, i.e. that the molestation occurred on separate occasions.

Under the three strikes law, consecutive sentencing is mandatory "[i]f there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts . . . ." (Pen. Code, §§ 667, subd. (c)(6) & (c)(7), 667.61, 1170.12, subd. (a)(6) & (a)(7); *People v. Casper* (2004) 33 Cal.4th 38, 42.) Under these statutes, a court only has discretion to impose concurrent terms for the simultaneous convictions if it finds that those convictions were based on crimes committed on the same occasion and arising from the same set of operative facts.

(*People v. Lawrence* (2000) 24 Cal.4th 219, 233; *People v. Deloza* (1998) 18 Cal.4th 585, 599.)

Contrary to Lawrence's contention, this statutory scheme does not violate the mandates of *Blakely*. *Blakely*, which involved only the imposition of sentence as to a single offense, prohibits the imposition of punishment beyond the prescribed statutory maximum, to prevent the state from circumventing the defendant's right to trial by jury by reclassifying elements of an offense as sentencing factors or converting a separate crime into a sentence enhancement. (*Blakely, supra*, 542 U.S. at pp. 306-308 & fn. 11.) Absent a statutory requirement that the trial court impose concurrent sentences unless it makes certain factual findings (a requirement that is missing here), the analysis of *Blakely* is inapplicable. (*Blakely, supra*, 542 U.S. at p. 305; see *Apprendi v. New Jersey, supra*, 530 U.S. at p. 481, & cases cited therein.) This is true for the simple reason that where, as here, the sentencing scheme expressly authorizes the imposition of consecutive sentences for multiple offenses as a matter of the court's discretion, the exercise of that discretion does not violate a defendant's right to a jury trial. (*Blakely, supra*, 542 U.S. at p. 309.) Rather, only where the statutory scheme accords a defendant the legal right to a lesser sentence is *Blakely*'s concern with "judicial impingement upon the traditional role of the jury" implicated. (*Ibid*.) Because the California sentencing scheme does not accord a defendant a right to concurrent rather than consecutive sentences, the court's imposition of consecutive sentences did not violate Lawrence's right to a jury trial.

DISPOSITION

The judgment is reversed as to the true finding on the enhancement allegations relating to the prior 1961 conviction, but is otherwise affirmed. The trial court is directed to prepare an amended abstract of judgment in accordance with this opinion and to forward it to the Department of Corrections and Rehabilitation.

McINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P.J.

AARON, J.