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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID LEE MARKLAND,

Defendant and Appellant.

C047136

(Super. Ct. No.  
03F05117)

A jury convicted defendant David Lee Markland of forcible rape and related offenses of A., a 16-year-old girl. The jury deadlocked on charges that, nine months later, defendant sexually molested M., a 14-year-old girl. Defendant argues the court erred by refusing to sever trial of the charges involving each victim, excluding evidence that the 16-year-old victim had a boyfriend who may have been responsible for her pregnancy, and imposing upper term sentences. We affirm the judgment.

## FACTS AND PROCEEDINGS

### *Victim A.*

The offenses involving victim A., who was in foster care, took place at the residence of her aunt, who was defendant's girlfriend. Even though A. was not supposed to visit the aunt because the aunt had a "background," A. managed to arrange several weekend visits to her aunt's crowded, single-story residence. In addition to defendant and A.'s aunt, the residence was home to the aunt's son and daughter, her son's fiancé and the fiancé's sister, as well as defendant's sister and her husband. A. slept on a sofa in a lounge room next to the kitchen.

The offenses occurred during A.'s weekend visit with her aunt in mid-October 2002. On Sunday morning, sometime before 8:00 a.m., A. went to the kitchen because she was unable to sleep. Defendant was fixing a drink for A.'s aunt because she was not feeling well. Defendant gave A. an alcoholic drink, which she sipped until she felt lightheaded and sick. While A. was sitting in a chair between the kitchen and living room, defendant approached her, pulled his penis out, and told her to touch it. A. could not remember whether she touched defendant's penis, but she did recall that defendant thereafter led her to a back room where she had slept on a couch the night before. At defendant's direction, A. laid down on the couch, defendant covered her with a blanket and she fell asleep.

The next thing A. knew, the blanket was gone, her pants were off, and defendant was kissing her neck, breasts and stomach. A. heard defendant say, "she's too tight. I need some Vaseline." She felt defendant's penis inside her vagina, rocking back and forth. She also felt pain in her vaginal area and told defendant to stop, but could not push him away because she was feeling weak. Defendant told her to be quiet because she was "too loud." When A. looked up at his face, defendant jumped back in surprise, and left. She passed out.

A. slept all day, awakening in early evening. Her clothes were disheveled, her panties were bloody, and her vagina hurt and was bleeding. She decided not to tell anyone what happened "because it was all surreal to me," and "I still didn't know if it was true."

A. returned to her aunt's residence the following weekend. Despite misgivings, A. did not object when defendant said he would drive her to her foster home. While en route, defendant stopped at a self-service carwash, parked, and told A. to kiss him. When she refused, defendant replied, "well, that's not what you were saying the other day." Defendant asked A. to suck his penis three times over the course of their half-hour stay, but she refused each time, and successfully resisted his attempt to push her head into his lap each time he asked.

When she returned to her foster home, A. told her foster sister about the two incidents, but the foster sister told her not to report them because A. was not supposed to be at the aunt's house. Six weeks later, A. told her brother's girlfriend

about the incidents, and that she thought she was pregnant. The girlfriend called A.'s cousin, who notified the police.

The parties stipulated that A.'s aunt, if called, would testify that she told a detective that A. told the aunt that defendant "had drugged and raped her." The aunt said she would further testify that she arrived at her residence at 4:00 a.m., the morning of the alleged rape, and found defendant in bed. When she awoke at 9:00 a.m., defendant was still in bed. The aunt admitted she had visited with defendant numerous times in person and by telephone while he was incarcerated for the offenses.

Defendant was convicted of forcible rape (Pen. Code, § 261, subd. (a)(2)--count four), rape by use of an intoxicant (*id.*, § 261, subd. (a)(3)--count five), and statutory rape. (*Id.*, § 261.5, subd. (a)--count six.)

*Victim M.*

On the evening of June 10, 2003, 14-year-old M. was at home with her 13-year-old girlfriend, while her sister was upstairs in a bedroom and her mother was around the corner visiting a friend. Around 11:00 p.m., she heard defendant's car stop in front of the house. She recognized defendant as her mother's friend of many years, and did not object when he went inside to use the restroom.

M. laid down on the couch in the living room, and defendant put a blanket over her and knelt next to her. Defendant was holding a drink and offered her some, but she refused. They

talked for about an hour, mostly about songs on the radio. During their conversation, defendant fondled M.'s left breast over her clothes, and put his hand under her boxer shorts. Defendant sent the 13-year-old on errands during this period, and gave her an alcoholic drink as well. M. eventually gave her friend a "weird" look, and the friend looked to see what was amiss, but she could not see where defendant touched M., other than on her shoulder.

The parties stipulated that M.'s mother would testify that she left her residence around 10:40 p.m. to visit her friend, and that later on, a visibly shaken M. arrived at the friend's house, yelling for her and telling her that defendant had felt her breasts and put his hand on her privates after going to the bathroom and sending her friend out of the room.

The information alleged that defendant committed three lewd and lascivious acts upon M. (Pen. Code, § 288, subd. (c)(1)-- counts one, two & three.) Two were based on defendant touching M.'s breasts at different times, and the third was based on defendant placing his hand down M.'s shorts.

The jury deadlocked on these offenses, which were later dismissed on the People's motion.

## DISCUSSION

### I

#### *The Motion to Sever Was Properly Denied*

On the eve of trial, and relying on evidence substantially similar to that adduced at trial, defendant moved to sever trial

of the charges as to each victim on the grounds that the evidence as to each victim would not be cross-admissible, and the joinder of two weak cases would violate his right to a fair trial. The People's opposition took issue with these assertions, and the trial court resolved the issue against defendant.

Defendant argues the court erred because both cases were weak, the core proof of each incident was not cross-admissible, the charges were inflammatory, and joinder prejudiced him because the proof of the crimes involving A. was "minimal and incredible." The record is otherwise.

"An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts . . . ." (Pen. Code, § 954.) However, "the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." (*Ibid.*)

Where, as here, the charges in the cases all allege offenses of the same class, the statutory requirements for joinder are satisfied, and the defendant can predicate error in denying severance "only on a clear showing of potential prejudice." (*People v. Kraft* (2000) 23 Cal.4th 978, 1030.) We review the trial court's ruling for abuse of discretion, which we will find only if the ruling falls outside the bounds of reason. (*Ibid.*; *People v. Osband* (1996) 13 Cal.4th 622, 666.)

"[I]n assessing whether the trial court abused its discretion in denying severance, we examine the state of the record at the time of the ruling." (*Kraft, supra*, at p. 1032.)

"The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial.' [Citation.] Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case." (*People v. Sandoval* (1992) 4 Cal.4th 155, 172-173.)

None of those concerns warranted a severance of the charges. In both cases, the victims were young teenage girls; defendant was a close friend of the mother of each victim; defendant attempted to build rapport with each victim; the sexual assaults were perpetrated on sofas; each victim was under a blanket during part of the sexual assault; no adults were present during the assaults; and defendant offered both victims alcoholic drinks. This evidence was cross-admissible. (Evid. Code, § 1108, subd. (a); *People v. Britt* (2002) 104 Cal.App.4th 500, 504-506.) Nor were both cases weak, or one strong and the

other weak, or likely to inflame the jury. Viewing the matter from the point where the trial court was called upon to decide the severance motion, neither case was particularly strong or weak. Both depended on the credibility of the children defendant molested, as such cases do. Both reflected some inconsistencies in the children's stories, again a common happening in such cases. Put simply, if the individual victim was believable, the cases were strong, if not, they were weak. We cannot say the court allowed two weak cases to be tried jointly, allowing each to bolster the other.

In any event, even if the trial court's decision to deny the severance motion was error--and we do not find that it was--defendant shows no prejudice. It is apparent the jury was able to distinguish the evidence and separate its consideration of the evidence relating to A. from the evidence relating to M. It did, after all, deadlock in its effort to decide whether defendant committed the offenses alleged against M. and those offenses were dismissed. Defendant's contentions on appeal relating to the question of severance cannot prevail.

## II

### *The Court Properly Excluded Evidence that A. Had a Boyfriend*

Following the rape, A. discovered she was pregnant. She told a detective that defendant was the father because she had not had sexual intercourse in the preceding two or three years. A. underwent a therapeutic abortion, but the aborted fetus was never recovered. At the People's request, the court excluded any evidentiary reference to A.'s pregnancy.



While A. was preparing to testify, the prosecutor asked why she had taken six weeks to report the rape to anyone besides her foster sister. A. responded that she decided to disclose the rape because she thought she was pregnant. The prosecutor requested permission to question A. on this point, in order to explain why she delayed reporting the rape. The court ruled that A. could testify that she believed she was pregnant, and told her cousin. The evidence would be admitted solely to show A.'s state of mind. In response, defendant asserted that A. accused defendant of rape in order to deflect attention from her boyfriend, who was the person actually responsible for her pregnancy. The court refused to permit such inquiry absent a good faith belief that defendant could prove A. was having sex with someone else during the relevant time period.

Following a recess, defendant informed the court that his investigator had just spoken with A., who told him that she never had sex before defendant raped her. Defendant argued that these inconsistencies warranted further inquiry into A.'s relationship with her boyfriend. The court disagreed, and reiterated its earlier ruling.

The court thereafter read the following admonishment to the jury: "The victim's testimony that she believes she was pregnant may be considered by you as it may relate to her state of mind and her subsequent actions. This is the only purpose for which you may consider this evidence, and you are not to speculate any further on this subject. You're specifically not to speculate about whether or not she was actually pregnant."

On appeal, defendant renews his contention that the court should not have admitted any evidence of A.'s pregnancy without permitting defendant to present evidence that A. had a boyfriend, especially in light of the inconsistent statements she made regarding her sexual history. We note, however, defendant was unable to make a good faith offer of proof that someone other than defendant caused A.'s pregnancy.

The trial court has discretion under Evidence Code section 352 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.'" (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 448.) We review rulings pursuant to Evidence Code section 352 under the abuse of discretion standard. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) We reverse only if the trial court's ruling was "arbitrary, capricious or patently absurd" and caused a "manifest miscarriage of justice.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) The court acted well within its discretion in excluding testimony concerning A.'s boyfriend.

Defendant proposes the court's ruling violated his right to due process of law because it allowed the jury to infer he was the father of the aborted fetus, but prevented the jury from drawing any inference that her boyfriend had impregnated her. To the extent defendant contends that due process required the court to allow inquiry regarding A.'s boyfriend, the argument is

not cognizable because defendant did not object on that basis in the trial court. (*People v. Partida* (2005) 37 Cal.4th 428, 438.) To the extent defendant wishes to argue that the court's ruling itself violates due process, he is required to show the ruling made the trial fundamentally unfair. (*Ibid.*) Since defendant has not made such a showing, we reject the argument.

Moreover, the trial judge instructed the jury that it could not consider the evidence for anything other than defendant's state of mind at the time, which state of mind explained why she revealed these incidents when she did. We presume the jury followed the court's instructions as it was required to do. (*People v. Cruz* (2001) 93 Cal.App.4th 69, 73.) There was no error.

### III

#### *The Upper Term Sentences Are Valid*

The court imposed an upper term sentence of eight years for the forcible rape conviction, which was doubled to 16 years pursuant to the three strikes law. (Pen. Code, §§ 667, subds. (b)-(i); 1170.12.) The court imposed concurrent upper term sentences for the other two convictions, but stayed them pursuant to Penal Code section 654.

In its statement of reasons for the imposing upper term sentences, the court cited multiple recidivist aggravating circumstances, including defendant's numerous prior convictions (Cal. Rules of Court, rule 4.421(b)(2)), service of prior prison terms (Cal. Rules of Court, rule 4.421(b)(3)), probationary status when the crime was committed (Cal. Rules of Court, rule

4.421(b)(4)), prior unsatisfactory performance on probation or parole (Cal. Rules of Court, rule 4.421(b)(5)), and two non-recidivist aggravating circumstances: the particular vulnerability of the victims (Cal. Rules of Court, rule 4.421(a)(3)), and taking advantage of a position of trust or confidence to commit the offenses. (Cal. Rules of Court, rule 4.421(a)(11).)

Defendant argues the trial court imposed the upper term sentences in violation of his federal constitutional right to trial by jury, as described in *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*). (See also *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*); *United States v. Booker* (2005) 543 U.S. 220, 232-234 [160 L.Ed.2d 621, 643].)

Applying the Sixth Amendment to the Constitution of the United States, the Supreme Court held in *Apprendi* that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at p. 500 [147 L.Ed.2d at p. 461].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts.

(*Blakely, supra*, 542 U.S. at pp. 302-305 [159 L.Ed.2d at pp. 413-414].)

Relying on these principles, defendant contends the upper term sentence was unauthorized because the trial court relied on facts not submitted to the jury and proved beyond a reasonable doubt, thus depriving him of the constitutional right to a jury trial on facts legally essential to the sentence.

Defendant concedes the Supreme Court of California rejected this argument in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), where it held that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence . . . under California law" (*id.* at p. 1244) does "not violate a defendant's right to a jury trial under the principles set forth in *Apprendi, Blakely, and Booker*" (*Black, supra*, at p. 1254).

We note that a petition for certiorari is pending in *Black, supra*, 35 Cal.4th 1238 (cert. pending *sub nom. Black v. California*, case No. 05-6793) and the United States Supreme Court granted certiorari in *People v. Cunningham* (Apr. 18, 2005, A103501) [nonpub. opn.], cert. granted *sub nom. Cunningham v. California* (2006) 547 U.S. \_\_\_\_ [164 L.Ed.2d 47], which addresses a similar issue. Oral argument in the latter case was held October 11, 2006.

Even if we assume, for the sake of argument, that the federal Supreme Court decides *Blakely, Apprendi* and *Booker* apply to upper term sentences imposed under California's determinate sentencing scheme, defendant's argument still must fail because the "prior conviction" exception of *Apprendi* applies not only to

the fact of a prior conviction, but to "an issue of recidivism which enhances a sentence and is unrelated to an element of a crime." (*People v. Thomas* (2001) 91 Cal.App.4th 212, 223.) A narrow reading of the *Apprendi* language that applies only to the "'fact of a prior conviction'" fails to consider the basis for the exception, and "takes that language out of its context." (*Thomas, supra*, at p. 216.) As *Apprendi* explained, one reason for the exclusion of prior convictions from the jury trial requirement for increased sentences is that the existence of a prior conviction "'does not relate to the commission of the offense.'" (*Apprendi, supra*, 530 U.S. at p. 488 [147 L.Ed.2d at p. 454], quoting *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 244 [140 L.Ed.2d 350, 368].) Another reason may be traced to the "procedural safeguards attached to any 'fact' of [a] prior conviction." (*Apprendi, supra*, at p. 488 [147 L.Ed.2d at p. 454].) Finally, recidivism "is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." (*Almendarez-Torres, supra*, at p. 243 [140 L.Ed.2d at p. 368]; see also *Apprendi, supra*, at p. 488 [147 L.Ed.2d at p. 454].)

Here, four of the six circumstances the court cited in support of upper terms are based on defendant's recidivism and are unrelated to an element of a crime, and thus validly support the upper term sentences. Even if we assume that the remaining two factors are invalid, defendant is not entitled to a reversal. "The mere fact a trial court erroneously relies upon certain factors in imposing an upper term does not per se

require reversal. Reversal is only required where there is a reasonable probability the trial court would sentence the defendant differently absent the erroneous factors. [Citation.] Thus, where the trial court has stated several factors warranting the upper term, and only some of those factors are erroneous, the sentence is generally affirmed. [Citations.] Indeed, even one valid factor is sufficient to justify the upper term. [Citation.]” (*People v. Holguin* (1989) 213 Cal.App.3d 1308, 1319.)

Here, there are four valid factors in aggravation and, to the extent the record suggests the trial court considered factors that it should not have taken into account, it is not reasonably probable that the trial court would have sentenced defendant other than it did had it considered only those factors relating to recidivism. If that was error, defendant did not suffer prejudice thereby.

Therefore, pursuant to the pertinent federal Supreme Court decisions, as well as *Black*, which we are bound to follow (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), we reject defendant’s claim of sentencing error.

DISPOSITION

The judgment is affirmed.

\_\_\_\_\_ HULL \_\_\_\_\_, J.

I concur:

\_\_\_\_\_ SIMS \_\_\_\_\_, Acting P.J.

I concur except that I concur in the result as to part II.

\_\_\_\_\_ ROBIE \_\_\_\_\_, J.