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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES DAVID VENZOR, JR.,

Defendant and Appellant.

2d Crim. No. B186141
(Super. Ct. No. 1095298)
(Santa Barbara County)

Charles David Venzor, Jr. appeals his conviction, by jury, of the forcible rape (Pen. Code, § 261, subd. (a)(2))¹, and sodomy by force (§ 286, subd. (c)(2)), of K.M. The jury further found that appellant inflicted great bodily injury on K.M. during both crimes. In the bifurcated portion of the trial, at which appellant waived jury, the trial court found that appellant was eligible for sentencing on the rape count pursuant to section 667.61, subdivision (a) because he had a prior conviction of sexual penetration with a foreign object. (§§ 289, 667.61, subd. (c),(d)(1).) The trial court further found that appellant had three prior serious or violent felony convictions within the meaning of the Three Strikes Law (§§ 667, subs. (b)-(i), 1170.12, subs. (a)-(d)), that he had one five-year prior serious felony conviction (§§ 667, subd. (a), 1192.7, subd. (c)(25)), and that he had served three prior prison terms. (§ 667.5, subd. (b).)

¹ All statutory references are to the Penal Code unless otherwise stated.

As a result, it sentenced appellant to a total term in state prison of 29 years plus 75 years to life.²

Appellant contends evidence of two prior sex offenses should have been excluded pursuant to Evidence Code sections 352 and 1101, subdivision (b), that admission of the evidence pursuant to Evidence Code section 1108 violated his rights to due process, equal protection and a fair trial, that the sodomy conviction should be reversed because the trial court erred in answering questions posed by the jury during its deliberations, and that the trial court failed to make the factual findings required to impose five-year enhancements pursuant to section 667, subdivision (a). In light of *Cunningham v. California* ___ U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856], the trial court's imposition of the upper sentence term on the sodomy count must be reversed and the matter remanded for resentencing. In all other respects, the judgment is affirmed.

Facts

Assault on K.M.

K.M. was assaulted as she walked down Bath Street near Yanonali Street in Santa Barbara during the early morning hours of August 12, 2002. She had finished her shift as a waitress at a Montecito restaurant, spent a few hours visiting with friends and was walking home when she heard someone running toward her from behind. K.M. turned to see who it was and felt a man's hands around her neck. The man placed her in a choke hold and turned her away from him. K.M. never got a good look at his face, although she noticed that he was of medium build, between 5'10" and 6 feet tall, with strong arms. He was wearing a dark cap and a flannel shirt.

² The sentence is calculated as follows: (1) 25 years to life on the rape count, pursuant to section 667.61, subdivision (a), tripled to 75 years pursuant to the Three Strikes Law; (2) a five-year term for the section 667, subdivision (a) prison prior; (3) a five-year term for the infliction of great bodily injury on the rape count (§ 12022.7); (4) a consecutive 8-year term on the sodomy count (§ 667.6, subd. (c)); (5) a five-year term for the section § 667, subdivision (a) prison prior; (6) a five-year for the infliction of great bodily injury on the sodomy count; and (7) a one-year prison prior. (§ 470, subd. (d).)

K.M. lost consciousness as the man choked her. She regained consciousness a couple of times during the assault, but each time her attacker resumed choking her and she faded out again. K.M. knew that someone had removed her pants and was having intercourse with her. She knew she was on her knees at one point and also on her back. Her attacker dragged her further down the alley. At times he was on top of her; at times, he was behind her.

Robert Demetriou lived in a condominium adjacent to the alley where K.M. was being attacked. He heard the sound of a woman in distress in the alley, so he went down to investigate. At first, Demetriou saw nothing, but he felt uneasy. After using his car headlights to illuminate the alley, Demetriou saw a large man wearing a dark knit cap and a flannel shirt on top of a woman whose naked leg was sticking up in the air. Demetriou called 911 because he thought the man was raping the woman. When he looked again, both the man and the woman were gone. Demetriou later identified appellant as the attacker from a photographic line-up.

Erika Conti and Flavio Kubagawa, tenants in another adjacent building, heard similar noises and went to the alley to investigate. They saw a woman lying naked on the ground in the alley and a tall, Caucasian man bending over her. It seemed like the man had been dragging the woman down the alley. Conti thought the man was assaulting the woman; Kubagawa did not. By the time the couple got back to their apartment, the police had already arrived. Conti could not identify appellant from the photographic line up, but testified at trial that he "looked like the person she saw" in the alley that night. Kubagawa was not able to identify appellant.

Medical Examination of K.M.

The police officers who responded to Demetriou's 911 call found K.M. lying naked in the alley, near a concrete picnic table. She appeared to be severely injured and traumatized. She could not communicate; her eyes could not track movement. Officers found puddles of blood, urine and feces in the alleyway and on the ground near K.M.'s body. The contents of a woman's purse were found in a nearby driveway.

A sexual assault examination performed on K.M. revealed blood, bruising, lacerations and other severe traumatic injuries to her vaginal and anal areas. Her face, eyes and neck showed lesions, abrasions and other injuries consistent with strangulation. A vaginal swab contained fecal matter but no semen. Saliva collected from K.M.'s breast contained DNA that was consistent with K.M. and with appellant. A swab of K.M.'s bra contained DNA consistent with K.M., appellant and a third source. Samples taken from her socks contained a small amount of DNA consistent with appellant, but the sample was too small to yield a match. The socks also contained a small amount of sperm that did not match any known donor.

Other Witnesses.

On the same night K.M. was brutalized, a nearby nightclub was hosting a fund raiser for the UCSB Queer Student Union. Appellant tried to enter the bar, but couldn't pay the cover charge. The bar's owner, Klarke Garl, had a long, friendly talk with appellant during which appellant told Garl his name and said that he worked as a security guard at Von's. Later that night, two women who had been at the fundraiser, Allegra Heidelinde and Julie Russo, were assaulted outside the nightclub. They were sitting in the back seat of Heidelinde's car when a man started tapping on the car windows and trying to open the car doors. He became increasingly agitated and violent when he realized the car doors were locked. Heidelinde climbed into the front seat, started the car and drove away. Russo called friends who were still in the bar, to tell them about what had happened. She told Garl that he should walk women to their cars because of the incident. Garl walked about five women to their cars after the call.

Russo and Garl both identified appellant from photographic line ups they saw shortly after the incident. They identified him at trial as well. Heidelinde was initially unable to identify appellant's photograph, but she identified him from a photographic line up that she viewed shortly before trial, and she also identified him in the court room.

Appellant's Prior Sex Offenses.

On an afternoon in December 1981, appellant sexually assaulted M.R. as she was walking down a Santa Barbara street carrying home bags of groceries. Appellant put his hand over M.R.'s mouth, grabbed her crotch and dragged her down an embankment behind an apartment building. Appellant pushed M.R. to the ground, got on top of her and told her, "This won't hurt." At some point, he ripped her dress. M.R. begged appellant to let her collect her groceries which had fallen to the sidewalk during the scuffle. She told him he could do what he wanted if he let her gather her food. Appellant let M.R. get up. She called for help and some children called 911 for her. Appellant took a bottle of vitamins from M.R.'s purse and ran away. He was convicted of assault with intent to commit rape (§ 220) in 1982.

In June 1985, appellant assaulted a woman who had fallen asleep while sunbathing on a Santa Barbara beach. Appellant forced her legs apart, pulled her bathing suit bottom down and shoved his hand inside her vagina. The woman fought appellant off. A bystander called police who found appellant running on the beach. In 1985, he was convicted of penetration with a foreign object by means of force in violation of section 289.

Contentions

Appellant contends his prior sex offenses were not sufficiently similar to the charged offenses to be admissible as evidence of identity or plan under Evidence Code sections 352 and 1101, subdivision (b). He contends the evidence was not admissible under Evidence Code section 1108 because that statute violates his rights to due process, equal protection and a fair trial. Appellant contends his conviction of sodomy should be reversed because the trial court responded inappropriately to questions posed by the jury during deliberations. Finally, he contends the two five-year prior prison term enhancements imposed pursuant to section 667, subdivision (a) must be stricken because the trial court failed to make the findings required for their imposition.

Discussion

Evidence of Prior Sex Offenses

Appellant contends the trial court erred in admitting evidence of his prior sex offenses under Evidence Code section 1101, subdivision (b) because those crimes are not sufficiently similar to the charged offenses to be relevant to prove identity or plan. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403; *People v. Balcom* (1994) 7 Cal.4th 414, 425.) As the Attorney General correctly notes, however, the evidence was admitted under Evidence Code section 1108 rather than section 1101. Accordingly, we will affirm if the evidence was admissible under section 1108. (*People v. Branch* (2001) 91 Cal.App.4th 274, 280-281.)

Evidence Code section 1108 provides: "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 [Evidence Code] Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352." (Evid. Code, b1108, subd. (a).) Generally, evidence of a defendant's past misconduct is excluded by Evidence Code section 1101, unless it is "relevant to prove some fact . . . other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).) In cases involving qualifying past and present sexual offenses, however, Evidence Code section 1108 supersedes the requirement that propensity evidence be excluded without "a 'non-character' purpose for which it is relevant" (*People v. Soto* (1998) 64 Cal.App.4th 966, 984.) Here, the offenses at issue qualify as "sexual offenses" within the meaning of Evidence Code section 1108 and were therefore properly admitted, unless doing so violated Evidence Code section 352. (*People v. Branch, supra*, 91 Cal.App.4th at p. 281.)

Evidence Code section 352 allows the trial 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." (Evid. Code, § 352.) In exercising this discretion, the trial court should balance the probative value

of evidence against "(1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses." (*People v. Branch, supra*, 91 Cal.App.4th at p. 282, quoting *People v. Harris* (1998) 60 Cal.App.4th 727, 737-741.) We review the trial court's decision under the deferential abuse of discretion standard and will reverse only if its ruling was "arbitrary, whimsical, or capricious as a matter of law. [Citation.]" (*People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1614.)

Appellant concedes the conduct involved in his prior offenses is actually less inflammatory than that involved in the charged crimes. He was convicted in connection with both incidents and in neither case did he engage in the brutal rape, sodomy, choking or beating that marked the present offenses. Evidence of the prior offenses was not time consuming. It required three witnesses, presented at the end of the prosecution's case and lasted less than one hour. This brevity also diminished the risk of juror confusion.

Appellant nevertheless contends evidence of the prior offenses should have been excluded because they were remote in time from the present crimes, having occurred in 1981 and 1985 respectively. Appellant was, however, incarcerated between 1985 and 1990, and then returned to custody for violations of his parole on several occasions between 1993 and 1999. Thus, the gap between his prior incarcerations and the present offenses was 13 years at the most. This is not so remote that the evidence was unfairly prejudicial; gaps of longer periods have been permitted. (*People v. Pierce* (2002) 104 Cal.App.4th 893, 900-901 [23 years]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1396 [20 years]; *People v. Soto, supra*, 64 Cal.App.4th 966, 991 [30 years]; *People v. Branch, supra*, 91 Cal.App.4th at p. 284 [30 years].)

Appellant also contends the prior offenses were not sufficiently similar to the current crimes to be probative of his propensity or disposition to commit rape or sodomy. We disagree. While the present and past offenses are not identical, they are

similar enough to be probative of appellant's propensity to commit sex offenses. The crimes occurred at different times of day, but each involved a woman in her 20's, who was a stranger to appellant and who was in a public area when appellant first attacked her. Each offense involved the forceful removal or ripping of clothing and touching the victim's crotch or vagina. In the 1981 offense, appellant grabbed the woman from behind as she walked down a public street. He used his arms and hands to subdue her, restrict her breathing, and prevent her from calling for help as he dragged her away from the public street and down an embankment to a more secluded area. K.M. suffered a similar fate, as appellant dragged her from a public street into a more secluded alleyway before brutalizing her. These similarities are substantial enough to outweigh the potential for undue prejudice. The trial court did not abuse its discretion in admitting evidence of the prior offenses.

Due Process, Equal Protection and Fair Trial

Appellant contends the trial court should not have relied on Evidence Code section 1108 to admit evidence of his prior offenses because that statute violates his rights to due process, equal protection and a fair trial under both the United States and California Constitutions. These contentions have been waived because appellant did not raise them in the trial court. (*People v. Monterroso* (2004) 34 Cal.4th 743, 759 [failure to object waived due process, fair trial and unbiased jury claims]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1077 [failure to object waived due process, equal protection, and fair trial claims].)

Even if not waived we would reject them. Our Supreme Court settled the due process contention in *People v. Falsetta* (1999) 21 Cal.4th 903. The equal protection claim is also without merit. "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' " (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1198, quoting *In re Eric J.* (1979) 25 Cal.3d 522, 530.) Appellant cannot meet this prerequisite because sex offenders are not similarly situated to other types of felons. (*People v. Hofsheier, supra*, 37 Cal.4th

at p. 1198; *People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1330; *People v. Mitchell* (1994) 30 Cal.App.4th 783, 795.) "By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations." (*People v. Falsetta, supra*, (1999) 21 Cal.4th at p. 915; see also *People v. Fitch* (1997) 55 Cal.App.4th 172, 184.) Because there is a rational basis for the distinction created by Evidence Code section 1108, the statute does not violate the equal protection guarantee contained in either the United States or the California constitutions.³ (*People v. Hofsheier, supra*, 37 Cal.4th at pp. 1200-1201.)

Response to Jury Questions

During its deliberations, the jury sent four written questions to the trial court: "Must sodomy be performed only by a penis as a matter of law?" "Can reasonable doubt be based in part on a theory of the crime not presented by either attorney but consistent with the evidence?" "Are we allowed to debate the merit of our own theories regarding other possibilities or must we debate only the theories, testimony and evidence submitted to the jury?" "In deciding whether the defendant is guilty or not of sodomy (as defined) are we allowed to consider any other means of violation other than the defendant's penis?" The trial court answered the first two questions, "Yes." It answered the third, "You may debate and discuss your own theories of the case. You must base your decision on the testimony and evidence presented to you. Re-read instruction 1.00 regarding the jury's general duties." It answered the fourth question, "No."

³ Appellant contends the statute violates his right to a fair trial because it deprives him of due process and equal protection. The claim fails because the statute does not violate either right.

Appellant contends the trial court erred in its answer to the final question because the jury could have believed it was not permitted to consider the defense theory that K.M. was penetrated by a foreign object.⁴ We are not persuaded.

The trial court's instructions to the jury, including its responses to the jury's questions, were correct and complete. The jury was instructed that the crime of sodomy requires as a matter of law, "contact between the penis of one person and the anus of another person." In light of this instruction, its answer to the final question can only mean that, if the jury found "any other means of violation," it would be required to acquit appellant of sodomy. We note the trial court also instructed the jury that it could debate alternate theories of the case but was required to base its verdict on the evidence. These instructions, taken together, cannot reasonably be construed to limit the jury's consideration of the defense theory. There is no reasonable likelihood that the jury misconstrued or misapplied the trial court's instructions. (*People v. Welch* (1999) 20 Cal.4th 701, 766; *People v. Samayoa* (1997) 15 Cal.4th 795, 833.)

Sentencing Error

At sentencing, the trial court imposed two five-year enhancements pursuant to section 667, subdivision (a), for appellant's prior serious felony conviction. Appellant contends the enhancements must be stricken because the trial court did not make the findings necessary to support their imposition. The argument is without merit.

At appellant's request, trial on the sentence enhancement and prior conviction allegations was bifurcated and conducted by the trial court sitting without a jury. At the conclusion of that proceeding, the trial court found that appellant had suffered the following prior convictions: a 1985 conviction of sexual penetration with

⁴ The issue arises because K.M. lost consciousness two or three times during her ordeal and did not know whether appellant sodomized her. The medical evidence showed injuries to her anus that were consistent with having been sodomized. Fecal matter was found in and around her vagina. Appellant's counsel argued at trial that these conditions could have been caused by a foreign object.

a foreign object in violation of section 289, subdivision (a)(1); a 1982 conviction of assault with intent to commit rape in violation of section 220; and a 1993 conviction of forgery in violation of section 470. It found that the 1985 conviction qualified appellant for sentencing pursuant to the one-strike law (§ 667.61, subd. (a), (c), (d)), and that the 1985 and 1982 convictions required appellant to be sentenced as a third-strike offender. The trial court further found that appellant was eligible for three one-year prior prison term enhancements. (§ 667.5, subd. (b).) It made no specific finding concerning the section 667 subdivision (a) allegations. At sentencing, however, the trial court imposed two five-year enhancements pursuant to section 667 subdivision (a), one on the rape count and one on the sodomy count. It noted that it had already found that appellant had suffered these convictions.

Appellant contends the section 667, subdivision (a) enhancements should be stricken because, at the conclusion of the court trial, the trial court did not expressly find that the section 667, subdivision (a) allegations were true. Our Supreme Court rejected this precise contention in *People v. Clair* (1992) 2 Cal.4th 629. In *Clair*, the trial court imposed a five-year enhancement for a prior serious felony conviction without first expressly finding the prior conviction allegation to be true. Our Supreme Court declined to strike the enhancement, reasoning "At sentencing, the court impliedly-but-sufficiently-rendered a finding of true as to the allegation when it imposed an enhancement *expressly* for the underlying prior conviction." (*Id.* at p. 691, fn. 17.)

As we noted in *People v. Chambers* (2002) 104 Cal.App.4th 1047, *People v. Clair, supra*, controls the result here. (*Id.* at p. 1050-1051.) Although the trial court did not expressly mention section 667 subdivision (a) in its factual findings, it specifically found true the allegations that appellant had previously been convicted of violating sections 289, 220 and 470. At the subsequent sentencing hearing, it imposed the five-year prior conviction enhancements based on one of the prior convictions it had already found to be true: the 1985 section 289 conviction. Thus, the trial court impliedly-but-sufficiently-rendered a finding of true as to the section

667, subdivision (a) prior serious felony conviction allegation. (*People v. Clair, supra*, 2 Cal.4th at p. 691, fn. 17, *People v. Chambers, supra*, 104 Cal.App.4th at p. 1051.) The enhancements were properly imposed.

The trial court imposed the upper term of eight years for the sodomy conviction. As a result, sentence must be vacated and a new sentence must be imposed that is consistent with *Cunningham v. California, supra*, ___U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856]. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Brian E. Hill, Judge

Superior Court County of Santa Barbara

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