

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH DRAKE MOHR,

Defendant and Appellant.

2d Crim. No.B270384
(Super. Ct. No. F494226001)
(San Luis Obispo County)

Kenneth Drake Mohr contends the trial court abused its discretion in consolidating two cases.

In the case of Martha Doe, the jury found Mohr guilty of sexual penetration of a child under 18 and over 14 years of age by a foreign object (Pen. Code, § 289, subd. (a)(1)(C)¹) and forcible rape (§ 261, subd. (a)(2)).

In the case of Elsa Doe, the jury found Mohr not guilty of forcible rape and guilty of the lesser included offense of

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

battery. (§ 242.) The jury also found the special allegation of multiple victims of rape (§ 667.61, subds. (b) & (e)) to be not true.

The trial court sentenced Mohr to the low term of seven years on the count of sexual penetration of a child over 14 years old with a foreign object, a concurrent two years on the count of rape, and a stayed term of 180 days on the count of battery. We affirm.

FACTS

Elsa Doe

(Battery)

In September 2012, Elsa and Mohr had been dating for more than a year. Elsa was 20 years old and Mohr was 17. They had sex approximately 20 times. Mohr would beg for sex and if Elsa would not relent, Mohr would get depressed and anxious.

A few weeks before Elsa left for army basic training, they decided to break off their relationship. In late September they met for one last time to say goodbye.

When Elsa and Mohr met, she made him promise that they would not have sex that night. They spoke briefly and started kissing. Elsa let Mohr touch her breasts and insert his finger into her vagina. She orally copulated him. He asked for sexual intercourse, but she reminded him of his promise.

They went to the floor. Mohr began to remove her clothes. She told him no and to stop. She tried to push his hands away. He removed her pants and underwear. His penis entered her vagina. It was not consensual.

Elsa went into the bathroom. Her vagina was sore, swollen and bleeding. She began to cry and called her mother to

pick her up. On the way home, Elsa's mother noticed Elsa was crying, holding her stomach and was uncharacteristically quiet.

When they got home, Elsa's mother asked her what was wrong. Elsa told her mother that Mohr forced her to have sex. They decided not to call the police. Elsa's mother feared that because of Elsa's prior dating relationship with Mohr, Elsa would not be believed. Elsa did not want to describe the incident to the police. She wanted to forget it.

In October, Elsa left for army basic training. Elsa and Mohr kept in contact by writing letters. They also corresponded through text message. Mohr said, "I do have a problem. I am sorry you had to go through that pain. I am a pathological liar."

Elsa also sent texts to Mohr in October and November 2012. The texts included: "I thought you liked me biting and eating you"; "I guess I kind of miss you"; "Whip out your dick and send me a pic"; "Well, I could at least send you half of my body like you did"; and "I can't stop thinking about sex with you, so it is going to be hard."

After Elsa completed basic training, she came home for a week. She had lunch with Mohr and a group of friends. They spent time alone at the farmers' market. They talked about the incident and kissed briefly on the lips. They agreed they were no longer dating.

After Elsa's brief leave at home, the army sent her for advanced training. She took a course in sexual harassment and assault prevention. She reported the incident with Mohr to the army's criminal investigation division (CID). Agent Thomas Smith of the CID had Elsa text Mohr about the incident.

Elsa sent the text: “You promised me that you wouldn’t have sex with me, then you broke that promise.”

Mohr replied: “I know what I did and I have felt guilty and sorry for what I did every day since then. I have already agreed not to try to contact you any more.”

Because Mohr was not in the military, the CID referred the matter to the civilian authorities.

Martha Doe

(Forcible Rape and Sexual Penetration of a Minor)

On April 12, 2013, Martha Doe was 16 years old. Martha, Mohr, AT and ED decided to go camping. Martha knew Mohr, but they were not close friends. The group set up camp at a remote site near the beach. They sat around the campfire and ate, drank and talked. Martha testified she only had a small glass of wine and was not intoxicated. But Mohr, AT and ED were intoxicated. Mohr flirted with Martha, but she did not respond.

At some point, Martha went into the tent to check her cell phone and listen to music. After a few minutes, Mohr came into the tent.

Martha and Mohr talked for about five minutes before Mohr started kissing her. He removed her leggings and got on top of her. He inserted his penis into her vagina. Martha felt pain and tried to push him off of her. He held her hands above her head and did not stop.

AT decided to go to bed. She walked into the tent and saw Mohr on top of Martha. He was holding her hands above her head. Martha’s face was turned away from Mohr. Martha looked uncomfortable and not engaged or enjoying herself. AT said, “Oh, sorry, guys” and left the tent.

Martha put her clothes on and walked about a mile away from the camp. She sat in silence for a few minutes until someone called her name. She returned to camp and found AT and ED sleeping in the tent.

Martha wrapped herself in a sleeping bag and lay on the ground. Mohr moved beside her and tried to cuddle. Martha pushed him away. Mohr persisted, put his hand down her pants and penetrated her vagina with his fingers. Martha told him to stop and pushed him away. Martha got up and walked away from the camp. She returned about 15 minutes later to find Mohr asleep. Martha went to sleep on the ground on the opposite side of the fire from Mohr.

During the night, AT got up to use the bathroom. She found Martha standing away from the campsite. She asked Martha how she was feeling. Martha said she was feeling better now that she had sobered up.

When AT woke up the next morning, she could hear Mohr and Martha talking outside the tent. Martha told Mohr she thought he had been “a little bit forceful.” She asked whether he remembered she said “no” and “stop” and tried to push him away. Mohr asked Martha if she felt like she was raped. Martha replied “yes.” AT testified Martha and Mohr “laughed it off.”

When AT left the tent, she noticed Martha was “closed off,” “sulky” and seemed “down.” Martha said she did not feel good.

The group broke camp. They dropped Martha off at a junior high school where she lay in the grass for a while before she walked home.

The next day Martha told a school guidance counselor what happened. The counselor called Martha's mother. The following day, Martha had a physical examination by a nurse, Elizabeth Ramirez. Martha had two bruises on her left leg, one on her shin and another on her inner thigh. Martha told Ramirez that Mohr forced himself on top of her, inserted his penis into her vagina, inserted his fingers into her vagina and sucked on both of her nipples. She told Mohr to stop.

Martha told Deputy Sheriff Douglas Scotto that Mohr used his hands to separate her thighs and held her down while he penetrated her vagina with his penis. She told Mohr "no" or "stop" 6 to 10 times. She said she was in shock and tried unsuccessfully to push Mohr off.

Defense

Mohr elected to stand on the state of the People's evidence. He did not present evidence in his defense.

DISCUSSION

Mohr contends the trial court abused its discretion and denied him due process by consolidating the cases of Elsa Doe and Martha Doe.

The cases were filed separately. But the People moved to consolidate them. Mohr opposed the motion on the grounds that the cases involved separate victims, the facts were not similar, and both cases were weak.

The trial court granted the People's motion on the grounds that the offenses alleged are similar; they occurred within a relatively short period of time, seven months; and the People have at least an arguable case for cross-admissibility of the evidence pursuant to Evidence Code section 1108.

Section 954 provides in part: “An accusatory pleading may charge two or more different offenses connected together in their commission, . . . or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated.”

Section 954.1 provides in part: “[W]here two or more accusatory pleadings charging offenses of the same class of crimes or offenses have been consolidated, evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact.”

The accusatory pleadings charged Mohr with forcible rape of Elsa Doe and forcible rape and sexual penetration by a foreign object of Martha Doe. Thus, the pleadings charged the same class of crimes, and the trial court had the discretion to consolidate the cases under section 954.

The pertinent factors for determining whether the trial court abused its discretion are these: “(1) would the evidence of the crimes be cross-admissible in separate trials; (2) are some of the charges unusually likely to inflame the jury against the defendant; (3) has a weak case been joined with a strong case or another weak case so that the total evidence on the joined charges may alter the outcome of some or all of the charged offenses; and (4) is any one of the charges a death penalty offense, or does joinder of the charges convert the matter into a capital case.” (*People v. Marshall* (1997) 15 Cal.4th 1, 27-28.)

Where the statutory requirements for joinder have been met, joinder is the preferred course of action. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.) The defendant must make a clear showing of prejudice to establish that the trial court abused its discretion. (*Ibid.*) In assessing whether the trial court abused its discretion, we review the record before the trial court when it made its ruling. (*Ibid.*)

(a) *Cross-Admissibility*

Evidence Code section 1101 prohibits the admission of evidence of a person's character or trait except to prove some fact such as motive, intent, or "whether a defendant in a prosecution for an unlawful sexual act . . . did not reasonably and in good faith believe that the victim consented." (*Id.*, subd. (a).)

Evidence Code section 1108, subdivision (a) 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 Section 1101, if the evidence is not inadmissible pursuant to Section 352."

Mohr claims there are no common factors in the two cases that would allow cross-admissibility of the evidence. But there are substantial common factors. There was evidence in both cases that Mohr was acquainted with his victims prior to the rapes. He began by kissing and touching his victims before forcing himself on them. He did not use threats or a weapon to subdue his victims. Instead, he used his natural strength. Finally, the offenses were committed within a relatively short period of time, seven months.

Mohr relies on the trial court's ruling refusing the People's proposed instruction stating that the jury may consider evidence of other sex crimes to show propensity. (CALCRIM No.

1191B.) The court refused the instruction under Evidence Code section 352, finding that the probative value of the evidence is substantially outweighed by the probability of creating undue prejudice.

But the trial court made its ruling rejecting the proposed instruction after all the evidence was in and the parties had rested. We must view the record as of the time the trial court made its ruling granting the motion to consolidate. (*Alcala v. Superior Court, supra*, 43 Cal.4th at p. 1220.)

At the time the trial court made its ruling granting the motion to consolidate, it found no impediment to the cross-admissibility of the evidence. In fact, the court gave as one of the reasons for granting the motion to consolidate, “Evidence Code section 1108 would give the People the ability to at least argue cross-admissibility” At the time the court granted the People’s motion to consolidate, it appeared the evidence would be cross-admissible.

(b) Likely to Inflame the Jury

The second factor is whether some of the charges are unusually likely to inflame the jury against the defendant.

All of the charges here involve rape and sexual penetration. All such crimes are horrific, but these were not unusually so. The trial court could reasonably conclude that some of the charges were not “unusually likely to inflame the jury.” If anything, that the jury found Mohr guilty only of simple battery in the Elsa Doe case instead of rape, shows the jury was not inflamed against Mohr.

(c) Joinder of Weak Case

The third factor is whether a weak case has been joined with a strong case or another weak case.

In the Elsa Doe case, the jury found Mohr guilty only of simple battery. But we do not look at the facts as they appeared to the jury. Instead, we look to the record as it appeared to the trial court at the time it granted the motion to consolidate. (*Alcala v. Superior Court, supra*, 43 Cal.4th at p. 1220.)

Here, each victim was willing to testify as to the essential elements of rape and sexual penetration. Neither victim had recanted her accusation.

Elsa's continued contact with Mohr, and particularly her texts, weakened her case. But when Elsa texted Mohr accusing him of breaking his promise not to have sex with her, Mohr's reply was highly incriminating. He said, "I know what I did and I have felt guilty and sorry for what I did every day since then."

It is true, Martha could not remember some of the details of the rape. In spite of her denial, it was obvious she had been drinking on the night of the rape. But AT corroborated Martha's story. AT saw Mohr on top of Martha. He had Martha's hands pinned above her head. Martha's face was turned away from Mohr; she looked uncomfortable and not engaged or enjoying herself.

That Martha was heard laughing about the incident the next day did not significantly diminish the strength of her case. She was only 16 years old. Although Martha may have been laughing, Mohr acknowledged she was accusing him of raping her. Moreover, AT testified that the next day Martha seemed "closed off," "sulky" and "down." Martha told AT she did not feel good.

We view the cases at the time of the motion to consolidate. Neither case seemed particularly weak. If there were a “spill-over” effect, one would expect the jury to have found Mohr guilty of rape in Elsa’s case with a multiple victim enhancement. Instead, the jury found Mohr guilty only of misdemeanor simple battery in Elsa’s case.

DISPOSITION

Mohr has failed to show the trial court abused its discretion in consolidating the cases. The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Jacquelyn H. Duffy, Judge

Superior Court County of San Luis Obispo

Mark S. Givens, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler,
Chief Assistant Attorney General, Lance E. Winters, Senior
Assistant Attorney General, Yun K. Lee, Tasha G. Timbadia,
Deputy Attorneys General, for Plaintiff and Respondent.