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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. EUGENE DAVIS, Defendant and Appellant.	B266256 (Los Angeles County Super. Ct. No. BA423738)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed as modified with directions.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie C. Brenan and Wyatt E. Bloomfield, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Eugene Davis, of: four counts of forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)(A))[1]; two counts of pandering by procuring (§ 266i, subd. (a)(1)); two counts of human trafficking to commit another crime (§ 236.1, subd. (b)); assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)); and two counts of torture (§ 206) and forcible rape (§ 261, subd. (a)(2)). Defendant was sentenced to two life terms plus 62 years, 8 months. We modify the judgment and affirm as modified.

II. THE EVIDENCE

In early April 2014, over the course of several days, defendant sexually and physically assaulted Julie B. Defendant's goal was to persuade Julie to work for him as a prostitute. Initially, Julie's relationship with defendant was consensual. She went with defendant to a house in Compton. After spending some time with defendant, she began to feel nervous and she wanted to leave. Nevertheless, she had sexual intercourse with him. She thought that if he got what he wanted, he would let her leave. But defendant became mean and aggressive when Julie started to leave. He took her phone. He would not allow her to depart. Defendant: twice forced Julie to orally copulate him; choked her; raped her; and ejaculated on her face. Julie told defendant she needed to get some money and she would return. She left and went home. But she returned an hour later. She wanted to retrieve her computer. Defendant made it clear he expected her to work for him as a prostitute. She complied with defendant's demand for oral sex and had intercourse with him.

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[1] Further statutory references are to the Penal Code unless otherwise noted.

She went along with his demands so that he would not force himself on her. She was afraid. When Julie tried to leave again, defendant: choked and slapped her; removed her clothing and burned her on the chest and wrist with a lit cigarette; and burned her buttocks with a heated corkscrew. Later that day, after defendant sent Julie out to prostitute herself, she encountered two police officers. She did not tell them anything about defendant. She was afraid that defendant was watching her. The officers took Julie to a friend's house. Eventually, Julie went to the Compton sheriff's station and made a report. With respect to Julie, the jury found defendant guilty of torture, pandering and human trafficking. The jury was unable to reach a verdict on forcible oral copulation and forcible rape charges.

Shortly after Julie escaped, defendant met Krystal W. Krystal was a prostitute who lived with her boyfriend. She was also a methamphetamine addict. Krystal's boyfriend introduced her to defendant. Defendant wanted to become Krystal's pimp but she refused. Krystal tried to scare defendant off. Krystal told defendant her father was a member of the Hell's Angels. In response, defendant said he belonged to a Compton gang. Defendant imprisoned Krystal and, over the course of several days, raped, assaulted and tortured her. Defendant: slapped Krystal in the face; repeatedly forced her to perform oral sex on him; punched her in the mouth with a closed fist and knocked out a front tooth; punched her in the eye; kicked and spit on her; twice urinated on her; punched her in the face and body; repeatedly burned her buttocks with a hot screw, a hot spoon and a hot fork, causing excruciating pain; put pills in her mouth and forced her to swallow them with tequila; nicked her throat with a chisel; forced her to orally copulate another man; and forced her

to have vaginal sex with him. Ultimately, Krystal escaped. With respect to Krystal, the jury found defendant guilty of four counts of forcible oral copulation, forcible rape, assault with force likely to produce great bodily injury, torture, pandering and human trafficking.

Defendant denied he was a pimp. He denied having forced either woman to engage in sexual acts. In rebuttal, the prosecution presented evidence that while he was in custody, defendant attempted to recruit another prostitute to work for him.

III. DISCUSSION

A. Defendant's Prior Juvenile Adjudication

Over defendant's Evidence Code section 352 objection, the trial court, citing Evidence Code section 1108, subdivision (a), allowed the prosecution to ask defendant about conduct underlying a prior sexual assault juvenile adjudication. The trial court ruled that if defendant admitted the conduct, the evidence would be more probative than prejudicial. (Evid. Code, §§ 352, 1108, subd. (a).) On cross-examination, defendant admitted that in March 2005, when he was 15 years old, he was detained in a juvenile facility. Defendant was housed with a Hispanic boy named Christian. The two boys had an altercation. Defendant denied knocking Christian unconscious. Defendant further denied forcing a toothbrush, a deodorant stick, or an erect penis into Christian's anus. Defendant admitted he was charged with forcible sodomy and forcible foreign object penetration and that he "took a deal." But he denied he ever admitted the underlying conduct. As a result, defendant was sent to the California Youth Authority, which the deputy described as "state prison for juveniles."

On appeal, defendant argues the trial court abused its Evidence Code section 352 discretion because: the evidence was inflammatory; the alleged prior conduct was remote, having occurred more than nine years prior to the current offense; it was dissimilar as involving homosexual acts including with foreign objects "precipitated by anger fueled by youthful bravado" as opposed to heterosexual sex with females motivated by a desire for sexual gratification; and the degree of certainty of its commission was low. Defendant asserts the evidence: portrayed him as "an incredibly violent, depraved sex offender" with a "complete lack of empathy," and "a degree of viciousness which would be difficult for the average juror to imagine"; subjected him to probable prejudice against homosexuals; and unnecessarily exposed the jury to "'inflammatory details.'"

Evidence Code section 1108, subdivision (a) authorizes admission of prior sexual offense evidence provided that its probative value is not substantially outweighed by its prejudicial effect. Pursuant to Evidence Code section 1108, subdivision (a), "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Evidence Code section 352 states, "The court in its discretion may 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." Our review is for an abuse of discretion. (*People v. Merriman* (2014) 60 Cal.4th 1, 58; *People v. Falsetta* (1999) 21 Cal.4th 903, 907, 916-919.)

Our Supreme Court has explained: "By reason of [Evidence Code] section 1108, trial courts may no longer deem 'propensity' evidence unduly prejudicial per se, but must engage in a careful weighing process under [Evidence Code] section 352. Rather than admit or exclude every sex offense a defendant commits, 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. [Citations.]" (*People v. Falsetta, supra,* 21 Cal.4th at pp. 916–917; accord, *People v. McCurdy* (2014) 59 Cal.4th 1063, 1098-1099.)

We find no abuse of discretion. The prosecution's questions were not evidence and the jury was so instructed. The jury was instructed: "'Evidence' is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence. [¶] Nothing that the attorneys say is evidence. . . . Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they helped you to understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asked a question that suggested it was true." We presume the jury understood and followed that instruction. (*People v. Charles* (2015) 61 Cal.4th 308, 324, fn. 8; *People v. Hajek* (2014) 58 Cal.4th 1144, 1220, disapproved on another point

in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) Defendant testified only that he "took a deal" and admitted charges of forcible sodomy and forcible foreign object penetration. Defendant was able to defend against this evidence because he testified before the jury. The forcible and sexual nature of the admitted juvenile charges, even though involving a male rather than a female, was similar to the present crimes. The evidence was probative on the question whether, contrary to his own testimony, defendant committed forcible, sexual acts against the victims. The questioning was not extensive. The trial court could reasonably conclude the nine-year gap between the similar juvenile charges and the present crimes was not so great that the evidence lost its probative value. (E.g., *People v. Hernandez* (2011) 200 Cal.App.4th 953, 968 [up to 40 years]; *People v. Pierce* (2002) 104 Cal.App.4th 893, 900 [23 years]; *People v. Branch* (2001) 91 Cal.App.4th 274, 284-285 [30 years].) And, the jury could consider that gap in deciding the weight to give the prior misconduct evidence. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1173; *People v. Hernandez, supra,* 200 Cal.App.4th at p. 968.) The trial court could reasonably conclude the forcible sodomy and forcible foreign object penetration evidence was not more inflammatory than defendant's present acts as described by the victims. Likewise, without abusing its discretion, the trial court could conclude there was little likelihood the jury was confused or distracted. And given the sustained brutality of the present offenses, there is no likelihood the guilty verdicts were premised on a desire to punish defendant for his admissions as a juvenile.

Defendant further argues the prior juvenile adjudication evidence was so highly prejudicial and of such minimal probative value it rendered the trial fundamentally unfair and violated his

constitutional due process rights. Because the trial court acted within its discretion, there was no violation of defendant's constitutional rights. (*People v. Garcia* (2011) 52 Cal.4th 706, 755, fn. 27; *People v. Abilez* (2007) 41 Cal.4th 472, 503; *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)

B. Gang Evidence

Defendant testified that during the time he was with Julie, he was involved in a video shoot of a rap song titled "On Bompton." On cross-examination, Mr. Santiso asked defendant about the meaning of "Bompton": "Q. What's Bompton, Mr. Davis? [¶] A. Well, it's like slang for Compton. [¶] Q. It's more than slang, isn't it Mr. Davis? [¶] A. Slang. [¶] Q. Doesn't a specific group refer to Compton as Bompton? [Objection, followed by a sidebar discussion.] Q. Now, you said that Bompton is used – you use it as slang; right? [¶] A. Yes. [¶] Is there a reason why you can't call it Compton? [¶] A. I can call it Compton. [¶] . . . [¶] Q. My question, Mr. Davis, is are you a member of a gang? [¶] A. Growing up, I was gang-affiliated. But once released from [the California Youth Authority,] no. I'm not part of it. I still have associates, friends that were still part of that gang, that I still chose to hang around with. [¶] A. This affiliation that you're talking about, was that a Blood gang? [¶] A. Yes. [¶] . . . [¶] Q. So you do not have any affiliation at this point in time correct? [¶] A. Do I have any affiliation at this point in time? [¶] Q. Yes, Sir. [¶] [Relevance objection sustained.] [¶] Q. How about at the point in time that you were with Julie? [¶] A. I mean I have friends that are still from that neighborhood. [¶] Q. Do you ever use the term Blood when you're speaking in a conversation? [¶] A. I have – from growing up, using a lot of gang-related terminology when I was young. It

still affects my vocabulary today. If I get upset right now, something might slip. You know [what] I'm saying? Just like on a regular day, just wake up in the mornings, you won't hear me saying Blood."

Defendant argues the highly prejudicial gang evidence was irrelevant and should have been excluded under Evidence Code section 352. Our review is for an abuse of discretion. (*People v. Montes* (2014) 58 Cal.4th 809, 859-860; *People v. Valdez* (2012) 55 Cal.4th 82, 133.) Our Supreme Court has held: "We . . . will reverse a trial court's exercise of discretion to admit [gang] evidence 'only if "the probative value of the [evidence] clearly is outweighed by [its] prejudicial effect." [Citation.]' (*People v. Carey* (2007) 41 Cal.4th 109, 128.) 'Prejudice for purposes of Evidence Code section 352 means evidence that tends to evoke an emotional bias against the defendant with very little effect on issues, not evidence that is probative of a defendant's guilt.' (*People v. Crew* (2003) 31 Cal.4th 822, 842.)" (*People v. Valdez, supra,* 55 Cal.4th at p. 133.)

There was no abuse of discretion. The evidence was relevant. Defendant told Krystal he was a gang member. The jury could reasonably consider whether defendant's statement contributed to Krystal's fear of him. Moreover, in light of the charged conduct the limited gang evidence was not highly prejudicial. The testimony was brief. Defendant denied current gang membership. He admitted only prior gang affiliation and continuing friendships with gang members. There was no evidence defendant was an active gang member who was involved in gang-related criminal conduct. There was no evidence the charged crimes were gang-related.

C. Presentence Custody and Conduct Credit

The trial court gave defendant credit for 479 days in presentence custody plus 71 days for good conduct. However, defendant was arrested on April 15, 2014, and sentenced 477 days later on August 4, 2015. Therefore, he was entitled to credit for only 477 days in presentence custody. (*People v. Cardenas* (2015) 239 Cal.App.4th 220, 235-236; *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48.) The judgment must be modified and the abstract of judgment amended to so provide. Defendant's conduct credit award was correct. (§ 2933.1, subd. (c); *People v. Valenti* (2016) 243 Cal.App. 4th 1140, 1184.)

D. Sentencing Issues

1. Parole revocation restitution fine

The trial court imposed a $300 restitution fine (§ 1202.4, subd. (b).) However, the trial court failed to orally impose a parole revocation restitution fine in the same amount. (§ 1202.45, subd. (a); *People v. Smith* (2001) 24 Cal.4th 849, 853; *People v. Tillman* (2000) 22 Cal.4th 300, 301-302.) The judgment must be modified to include a $300 parole revocation restitution fine.

2. The court facilities assessment

The trial court orally imposed a $30 court facilities assessment. (Gov. Code, § 70373, subd. (a)(1).) The assessment should have been imposed as to each of the 12 counts of which defendant was convicted. (*People v. Sencion* (2011) 211 Cal.App.4th 480, 483-485; *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415, fn. 3.) The oral pronouncement of judgment must be modified to impose a $360 court facilities assessment.

3. The abstract of judgment

The abstract of judgment is incomplete. It does not include the indeterminate life terms, form CR-292, which it references. It also does not reflect any of defendant's financial obligations. Appointed appellate counsel sought unsuccessfully to augment the record to include the missing document. A superior court clerk certified that following a search of the court file, the courtroom and the clerk's office, "The only felony abstract of judgment is the one previously supplied in the clerk[']s transcript at page 273." Upon remittitur issuance, the clerk of the superior court is to prepare an amended abstract of judgment and insure that it reflects: defendant's two life sentences for torture, counts 7 and 18; the $300 restitution fine (§ 1202.4, subd.); the $300 parole revocation restitution fine (§ 1202.45); a $360 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)); a $480 court operations assessment (§ 1465.8, subd. (a)(1); the $500 sex offenses fine (§ 290.3); the $2,000 restitution (§ 1202.4, subd. (f)(2)); and 477 days of presentence custody credit plus 71 days of conduct credit. Because of the superior court clerk's inability to prepare a proper abstract of judgment, the trial court is to personally supervise the preparation of the corrected abstract of judgment. (*People v. Acosta* (2002) 29 Cal. 4th 105, 109, fn. 2; *People v. Chan* (2005) 128 Cal.App. 4th 405, 425-426.)

IV. DISPOSITION

The judgment is modified to include a $300 parole revocation restitution fine (Pen. Code, § 1202.45) and a $360 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)), and to reflect 477 days of presentence custody credit plus 71 days of conduct credit for a total of 548 days. The judgment is affirmed in all other respects. Upon remittitur issuance, the superior court clerk is to prepare an amended abstract of judgment that reflects: defendant's 2 life sentences for torture, counts 7 and 18; the $300 restitution fine (§ 1202.4, subd.); the $300 parole revocation restitution fine (§ 1202.45); a $360 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)); a $480 court operations assessment (§ 1465.8, subd. (a)(1); the $500 sex offenses fine (§ 290.3); the $2,000 restitution (§ 1202.4, subd. (f)(2)); and 477 days of presentence custody credit plus 71 days of conduct credit for a total of 548 days.

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TURNER, P.J.

We concur:

KRIEGLER, J. KUMAR, J.*

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*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.