Filed 10/18/16 P. v. Salazar CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. PABLO SALAZAR, Defendant and Appellant.	B264957 (Super. Ct. No. 2011033402) (Ventura County)

Pablo Salazar appeals his conviction by jury of three acts of forcible lewd act on a child under the age of 14 (Counts 1-3; Pen. Code, § 288, subd. (b)(1))[1], and aggravated sexual assault (oral copulation) (Count 4; § 269, subd. (a)(4)) with special findings that he had substantial sexual conduct with the victim (§ 1203.066, subd. (a)(8)). Appellant was sentenced to 41 years to life state prison and contends, among other things, that the trial court erred in denying his motion for an evidentiary hearing to introduce evidence of the victim's sexual history. (Evid. Code, § 782; *People v. Daggett* (1990) 225 Cal.App.3d 751.) We affirm the judgment and direct the superior court clerk to

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

correct clerical errors in the April 22, 2015 sentencing minute order and abstract of judgment.

Facts and Procedural History

Appellant sexually assaulted his half-sister, S.S., between 2009 and 2011 when she was nine to 11 years old. On August 27, 2011, S.S. (age 11) told her mother that appellant had touched her and that her vagina itched. S.S. said that appellant touched her private areas on other occasions.

The Simi Valley Police took S.S.'s statement and had S.S. undergo a forensic medical exam. S.S. reported that appellant sexually assaulted her at three different locations. The first incident was in a converted garage on Cochran Street in Simi Valley. S.S. was in the fourth or fifth grade. Appellant ordered S.S. to bend down on all fours and pulled her pants and underwear down to her knees. Appellant said "it was going to be real fast" and touched S.S.'s vagina and squeezed her breast. S.S. told him to stop. Appellant continued another minute and allowed S.S. to get dressed.

The second molestation occurred at S.S.'s house on Adam Road in Simi Valley. Appellant locked the front door, pulled down S.S.'s shorts and underwear, and exposed his penis. Appellant rubbed his penis against S.S.'s vagina for about two minutes, allowed her to get dressed, and gave her money. He told her not to tell anyone.

The third and fourth sexual assaults occurred at their aunt's house in Simi Valley. Appellant took S.S. to the house, played video games with his friend, and told the friend to leave the room. Appellant locked the door, ordered S.S, to get down on her hands and knees, and said "It'll just be real fast . . . It won't hurt." Appellant pulled her pants and underwear down, and forced his penis into S.S.'s anus about an inch. S.S. experienced instant pain. Removing his penis, appellant rubbed it against S.S.'s vagina and groped her breasts.

S.S. asked appellant to stop and was permitted to get dressed. Appellant then ordered S.S. to suck his penis. When S.S. said

"no," appellant forced his penis in her mouth, pushing her head back and forth.

On September 8, 2011, the police had S.S. make a pretext phone call. S.S. told appellant that she had to go to the doctor because of what he did. S.S. explained, "When you put your dick in my butt that made me itchy." Appellant replied, "I'm really, really sorry" and "I'm a bad guy." S.S. said, "I feel bad [']cause your my brother and you made me put my mouth on your dick. And I feel bad because you squeezed my boobs too. You shouldn't do that stuff [']cause I'm your sister and I'm only 11." Appellant asked for forgiveness and promised to make it up to her. Approximately two minutes later, appellant called back and offered to buy S.S. a toy or an ice cream gift card.

Appellant met with Simi Valley Police Detective Casey Nicholson and said that S.S. asked him to have sex but he refused to "do it" with her. Appellant claimed that none of the sexual activities discussed in the pretext phone happened. When asked if he put his penis in S.S.'s mouth or anus, appellant admitted that his penis probably touched S.S.'s butt cheek.

At trial, appellant admitted hugging S.S. and groping her breasts. Appellant said they both ended up on the ground and that S.S.'s pants and underwear somehow came off. Appellant exposed his penis and got behind S.S. who was on all fours. Appellant stated that his penis touched S.S.'s butt cheek in the "heat of the moment" and that S.S. told him to stop.

Evidence Code section 782 Motion:
Victim's Prior Sexual History

Appellant argues that the trial court abused its discretion in denying his Evidence Code section 782 motion to introduce evidence of S.S.'s prior sexual history to show that S.S. was confused, mistaken, or lying about the molestations. The motion was based on *People v. Daggett* (1990) 225 Cal.App.3d 751, in which we held that "[a] child's testimony in a molestation case involving oral copulation and sodomy

can be given an aura of veracity by [her] accurate description of the acts. This is because knowledge of such acts may be unexpected in a child who had not been subjected to them. [¶] In such a case it is relevant for the defendant to show that the complaining witness had been subjected to similar acts by others in order to cast doubt upon the conclusion that the child must have learned of these acts through the defendant." (*Id.*, at p. 757.)

The Rape Shield Law generally bars questioning a sexual assault victim about specific instances of his or her prior sexual activity. (Evid. Code, § 1103, subd. (c); *People v. Bautista* (2008) 163 Cal.App.4th 762, 781.) But the general rules gives way when evidence of the complaining witness's prior sexual history is "offered to attack the credibility of the complaining witness as provided in [Evidence Code] Section 782." (Evid. Code, § 1103, subd. (c)(5).) Evidence Code section 782 requires the proponent of the evidence to file a written motion accompanied by an affidavit containing an offer of proof. (Evid. Code, § 782, subd. (a).) "If the trial court finds that the offer of proof is 'sufficient,' it must conduct a hearing out of the presence of the jury and allow the alleged victim to be questioned "'regarding the offer of proof . . . .'"" (*People v. Sims* (1976) 64 Cal.App.3d 544, 553-554.) If the court finds that the evidence is relevant under Evidence Code section 782 and is not inadmissible under Evidence Code section 352, it may make an order stating what evidence may be introduced and the nature of the questions to be permitted. (Evid. Code, § 782 subd. (a)(4).) "Great care must be taken to insure that this exception to the general rule barring evidence of a complaining witness' prior sexual conduct . . . does not impermissibly encroach upon the rule itself and become a 'back door' for admitting otherwise inadmissible evidence." (*People v. Rioz* (1984) 161 Cal.App.3d 905, 918- 919.)

Here the offer of proof was that S.S. was sexually assaulted by two men during the same time period. At the September 7, 2011 forensic interview, S.S. said that appellant molested her and also

disclosed that she had been molested by her mother's ex-boyfriend, Ruben Cruz, and by a neighbor, Patrick Hedrick. Appellant argued that the molestations were relevant to show that S.S. was mistaken, confused, or lied when she reported appellant's molestation. The trial initially ruled that an adequate showing had been made for an Evidence Code section 782 hearing but re-visited the issue three days later.

Denying the motion, the trial court found that appellant had made videotaped statements in which he admitted engaging in some type of sexual conduct with S.S. The trial court ruled that appellant "hasn't presented any evidence whatsoever" that S.S. was "untruthful or confused about the incidents or had some motive to make up these allegations against the defendant." "I haven't heard the Defense raise any specifics other than there were some similarities. And that may be enough in some circumstances, but I think in balancing all the evidence that I've heard so far, balancing the defendant's right[s] versus the victim's rights, I'm not sure that the defense has met their burden."[2]

No abuse of discretion occurred. "The purpose of an Evidence Code section 782 hearing is to establish the truth and probative value of the offer of proof, not to allow a fishing expedition based on sketchy and unconfirmed allegations." (*People v. Mestas* (2013) 217 Cal.App.4th 1509, 1518.) The trial court is vested with broad discretion to weigh the proffered evidence and to resolve the conflicting interests of the victim-witness and the defendant. (*Id.*, at p. 1514.) It "'need not even hold a hearing unless it first determines that the defendant's sworn offer of proof is sufficient.'" (*Ibid.*)

---

[2] The trial court noted that Hedrick pled guilty to sexual assault of a child and was sentenced to state prison. "It actually bolsters the credibility of the victim." The mother's boyfriend, Cruz, absconded to Mexico and was never prosecuted. The trial court ruled: "One person has pled guilty and is serving a prison sentence and the other one disappeared. [¶] So I haven't seen any evidence that the victim is making up the allegations . . . [I]n fact, all the evidence has been to the contrary."

The molestation by Cruz (the mother's ex-boyfriend) was dissimilar in that it involved forcible sodomy on a bed as Cruz watched television. Cruz ejaculated, ordered S.S. to take a shower, and threatened to hurt S.S. if she told anyone. On a second occasion, Cruz ordered her to come to him and reached up her shirt and groped her breast. None of the molestations by appellant involved a bed, an ejaculation, a shower, or threats to harm S.S. In the pretext call, S.S. told appellant that he should not have made her put her mouth on his penis or squeezed her breasts. Appellant responded, "I know, I'm sorry. Can you forgive me?" Appellant was interviewed several days later and admitted it was possible that his penis went inside S.S.'s anus.

The molestations by the neighbor (Hedrick) were dissimilar in that Hedrick orally copulated S.S. in his house and shed. Appellant did not orally copulate S.S. Although Hedrick rubbed his penis against S.S.'s vagina, he did not penetrate S.S. or molest S.S. in her home. There was no evidence that S.S. confused appellant's molestations with those of Hedrick or Cruz. The stated purpose for the sexual history evidence was to show that S.S. could not have knowledge of certain sexual practices other than as a result of a prior molestation. (*People v. Daggett*, *supra*, 225 Cal.App.3d at p. 757.) Appellant could not make the requisite showing because he admitted having sexual contact with S.S. years before the Cruz and Hedrick molestations. Appellant told the police that, in the ninth grade, he "came close" to putting his penis in S.S.'s mouth. S.S. was only six or seven years old at the time.

With respect to count 3 (sodomy), appellant told the police that S.S. saw his penis and "I came close to doing it with her." Detective Nicholson asked, "you think maybe your penis touched her butt cheek?" Appellant replied, "Probably. I'm telling you straight up honest I think it did."

The trial court reasonably concluded that the alleged similarities in the Hedrick and Cruz molestations did not outweigh Evidence Code section 352 concerns that the evidence, which was

offered solely to determine S.S.'s credibility, would embarrass S.S., mislead the jury, confuse the issues, and result in the undue consumption of time. (*People v. Woodward* (2004) 116 Cal.App.4th 821, 832.) "By narrowly exercising the discretion conferred upon the trial court in this screening process, California courts had not allowed the credibility exception in the rape shield statutes to result in an undermining of the legislative intent to limit public exposure of the victim's prior sexual history. [Citations.] Thus, the credibility exception has been utilized sparingly, most often in cases where the victim's prior sexual history is one of prostitution. [Citation.]" (*People v. Chandler* (1997) 56 Cal.App.4th 703, 708.)

Appellant argues that he was denied the constitutional right to present "a complete defense" but it is settled that the neutral application of state law evidentiary rules does not violate a defendant's right to present a defense. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) We reject the argument that the exclusion of a victim's sexual history under the Rape Shield Law denies a defendant a fair trial. (*People v. Mestas*, *supra*, 217 Cal.App.4th at p. 1517.) "'That limited exclusion no more deprives a defendant of a fair trial than do the rules of evidence barring hearsay, opinion evidence, and privileged communications.' [Citation.] Therefore, because the trial court may properly exclude all such evidence without violating a defendant's fair trial rights, there is no merit in the argument that not admitting some of the evidence under Evidence Code section 782 deprives the defendant of a fair trial." (*Ibid.*)

Appellant's due process argument is equally without merit. "'Although the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right.' [Citation.] 'A trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable

jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted. [Citations.]' [Citation.]" (*People v. Bautista*, *supra*, 163 Cal.App.4th at p. 783.) Although S.S.'s credibility was a central issue at trial, examination of S.S. about the Hedrick and Cruz sexual assaults would not have had a significant impact on appellant's defense or the jury's impression of S.S.'s credibility. (*Ibid*.)

Harmless Error

Assuming arguendo that the trial court erred in denying the Evidence Code section 782 motion for an evidentiary hearing, the alleged error was harmless. (*People v. Daggett*, *supra*, 225 Cal.App.3d at p. 758 [applying *People v. Watson* (1956) 46 Cal.2d 818 harmless error analysis].) Appellant admitted having sexual contact with S.S. and stated that he exposed his penis and touched S.S.'s buttocks with his penis. The jury listened to the recorded police interview in which appellant admitted that, years earlier, he "came close" to putting his penis in S.S.'s mouth when she was six or seven years old. The jury also heard the recorded pretext call in which appellant apologized for putting his penis in S.S.'s mouth and groping her breasts.

S.S. gave detailed testimony about the molestations and said that appellant paid her money to be quiet. This was corroborated by the pretext phone call in which appellant tried to buy S.S.'s silence and said he would get her a toy or "a gift card to like an ice cream place." It was damning evidence. The alleged error in the exclusion of Evidence Code section 782, impeachment evidence, was harmless under any standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson*, *supra*, 46 Cal.2d 818, 836.)

Counts 1-3: Upper Term Sentences

Appellant contends that the trial court erred in imposing upper term sentences on counts 1 through 3.[3] Appellant forfeited the error by not objecting at the sentencing hearing. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) On the merits, there was no sentencing error. The trial court imposed eight-year midterm sentences on counts 1 and 2, and a 10-year upper term on count 3. The probation report, which was read and considered by the trial court, listed six aggravating factors, any one of which justified an upper 10-year term on count 3.[4] (*People v. Black* (2007) 41 Cal.4th 799, 815.) The trial court found that "the victim was particularly vulnerable and that she was your younger

---

[3] Selecting count 1 as the principal term, the trial court imposed an eight-year midterm (§ 288, subd. (b)(1)), a consecutive eight-year midterm on count 2 (§ 288, subd. (b)(1)), and a consecutive 10-year upper term on count 3 (§ 288, subd. (b)(1)) for a total determinate term of 26 years. On count 4 for aggravated sexual assault (oral copulation) of a child under the age of 14 (§ 269, subd. (a)(4)), the trial court imposed a consecutive indeterminate term of 15 years to life. The April 22, 2015 sentencing minute order and abstract of judgment erroneously state that eight year "upper terms" were imposed on counts 1 and 2.

[4] The probation report listed the following aggravating factors: (1) the victim was particularly vulnerable, and was defendant's younger sister and on occasion was left in appellant's care; (2) the crimes involved planning, sophistication in that appellant "would pay the victim when . . . commit[ting] the sexual abuse, and as to Count[s] 3-4, appellant lied and claimed that the victim's aunt would be present when he took the victim and her to dinner. Instead appellant took [S.S.] to his residence where he proceed[ed] to assault her"; (3) appellant took advantage of a position of trust and confidence as the victim's half-brother; (4) appellant engaged in violent conduct which indicate[d] a serious danger to society; (5) on counts 3-4, appellant was on Conditional Revocable Release when he committed the offenses; and (6) S.S. contracted a venereal disease, causing her pain and suffering.

sister. She was left in your care." It found that the offenses involved planning and sophistication, that appellant abused a position of trust and confidence, and that appellant is "a serious danger to society and a continuing danger to [his]sister." There was no sentencing error.

Dual Use of Facts

Appellant contends that the consecutive terms on counts 1 through 3 and the 10-year upper term on count 3 are based on an improper dual use of facts. (Cal. Rules of Ct., rule 4.425.) Appellant forfeited the error by not objecting. (*People v. Scott*, *supra*, 9 Cal.4th at p. 353; *People v. Powell* (2011) 194 Cal.App.4th 1268, 1297–1298 [failure to articulate reasons for consecutive sentence]; *People v. De Soto* (1997) 54 Cal.App.4th 1, 8–9 [dual use of facts to impose upper term and enhancement].) On the merits, there was no sentencing error because the trial court found multiple aggravating factors. Only a single aggravating factor is required to impose an upper term (*People v. Castellano* (1983) 140 Cal.App.3d 608, 615) and the same is true when imposing a consecutive sentence (*People v. Davis* (1995) 10 Cal.4th 463, 552).

Assuming, arguendo, that some of the aggravating factors overlap, the alleged error is harmless. (*People v. Avalos* (1984) 37 Cal.3d 216, 233; *People v. Sanchez* (1994) 23 Cal.App.4th 1680, 1684.) Resentencing is not required where there are disparate facts among those recited which justify the imposition of both an upper term and a consecutive sentence. (*People v. Osband* (1996) 13 Cal.4th 622, 728.)

Full, Separate and Consecutive Terms on Counts 3 and 4

Appellant argues that the trial court erred in imposing full, separate, and consecutive terms on counts 3 and 4 pursuant to section 667.6, subdivision (d). The trial court found that that the crimes involved separate acts, were committed at different times in separate places, and that appellant had ample time to reflect after he committed count 3 (sodomy). After appellant put his penis in S.S.'s anus and rubbed his penis against her vagina, he allowed S.S. to get dressed.

Appellant then ordered S.S. to suck his penis, grabbing her head and forcing his penis into her mouth.

The evidence supports the finding that appellant had a reasonable opportunity to reflect. (*People v. King* (2010) 183 Cal.App.4th 1281, 1325 [separate occasion finding: re-insertion of finger in victim's vagina with other hand for another 25 seconds].) A finding that the defendant committed the sex crimes on separate occasions "does not require a change in location or an obvious break in the perpetrator's behavior. . . ." (*People v. Jones* (2001) 25 Cal.4th 98, 104.) Appellant had the opportunity to stop after he sodomized the victim but chose not to. "Once a trial judge has found under section 667.6, subdivision (d), that a defendant committed offenses on separate occasions, we may reverse only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior. [Citations.]" (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1092.) The trial court did not err in imposing full, separate, and consecutive sentences on counts 3 and 4.

Cruel and/or Unusual Punishment

Appellant argues his sentence of 41 years to life is cruel and/or unusual punishment under the Eighth Amendment of the United States Constitution and article 1 section 17 of the California Constitution. Under the Eighth Amendment, "'the courts examine whether a punishment is grossly disproportionate to the crime.' [Citation.] 'Under the California Constitution, a sentence is cruel or unusual if it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human dignity.' [Citation.]" (*People v. Johnson* (2013) 221 Cal.App.4th 623, 636.) Because it is the function of the legislative branch to define crimes and prescribe punishments (*In re Lynch* (1972) 8 Cal.3d 410, 414), appellant bears a "considerable burden" to show the requisite disproportionality. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.) Such

findings "have occurred with exquisite rarity in the case law." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.)

Appellant did not argue cruel and/or unusual punishment at sentencing hearing and forfeited the issue. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) On the merits, the evidence shows that appellant violated a position of trust, engaged in substantial sexual conduct by force, and transmitted a venereal disease to the victim. Appellant makes no showing that a sentence of 41 years to life is disproportionate to the crime or the offender. (See *Harmelin v. Michigan* (1991) 501 U.S. 957, 962 [sentence of life without the possibility of parole for possession of 672 grams of cocaine, a serious crime, but far less heinous than the crimes committed by appellant].)

Appellant argues that he is a moderate-low risk sex offender, that count 1 was committed when he was a juvenile, that he had a dysfunctional family life, and that his prior criminal record is minor (petty theft). The trial court was not persuaded. Lewd conduct with a child under the age 14 is a serious crime. Appellant was convicted of three counts of lewd conduct and aggravated assault of a child, all involving his half-sister. Appellant not only minimized his actions, but claimed that S.S. asked him to do it. In the words of the trial court, appellant "committed probably the most horrible act that any human being can commit against another person. Probably more horrible than a homicide." Appellant's sentence is not disproportionate to the offenses, does not shock the conscience, and does not offend fundamental notions of human dignity. (See *People v. Meneses* (2011) 193 Cal.App.4th 1087, 1092-1094 [15-year-to-life sentence for man convicted of single lewd act with 12–year–old cousin resulting in pregnancy not cruel or unusual]; *People v. Estrada* (1997) 57 Cal.App.4th 1270, 1273 [25 years to life for rape during burglary constitutionally permissible]; *People v. Crooks* (1997) 55 Cal.App.4th 797, 805-806 [same]; *Cacoperdo v. Demosthenes* (9th Cir. 1994) 37 F.3d

504, 507-508 [40 year sentence for child molestation not extreme or grossly disproportionate].)

Conclusion

Appellant makes no showing that he was denied a fair trial or that the trial court committed sentencing error. As our Supreme Court has stated on several occasions, "[a] defendant is entitled to a fair trial, not a perfect one. [Citation.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 454.)

We affirm the judgment and direct the superior court clerk to amend the April 22, 2015 sentencing minute order and abstract of judgment to reflect that an eight-year midterm sentence was imposed on count 1 for forcible lewd act upon a child under the age of 14 (§ 288, subd. (b)(1)) and a consecutive eight-year midterm sentence was imposed on count 2 (§ 288, subd. (b)(1)). The superior court clerk is directed to forward copies of the amended sentencing minute order and abstract of judgment to the Department of Corrections and Rehabilitation. The sentence remains the same: 41 years to life state prison.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Gilbert A. Romero, Judge

Superior Court County of Ventura

Richard C. Gilman, 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, Victoria B. Wilson, Supervising Deputy Attorney General, Carl N. Henry, Deputy Attorney General, for Plaintiff and Respondent.