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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ERIK YBARRA, Defendant and Appellant.	B232640 (Los Angeles County Super. Ct. No. NA081466)

APPEAL from a judgment of the Superior Court of Los Angeles County. James B. Pierce, Judge. Conditionally reversed and remanded with directions.

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Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey, Mary Sanchez, and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

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Erik Ybarra challenges his convictions on counts of kidnapping, rape, and forcible oral copulation. We conditionally reverse and remand for a hearing on the timeliness of the charges.

BACKGROUND

The information filed on December 17, 2009, charged Ybarra with one count of kidnapping for sexual purposes in violation of subdivision (d) of Penal Code former section 208[1] (count 1), one count of forcible rape in violation of subdivision (a)(2) of former section 261 (count 2), and one count of forcible oral copulation in violation of subdivision (c) of former section 288a (count 3). As to counts 2 and 3, the information also alleged under subdivisions (b), (c), and (e) of former section 667.61 that Ybarra had kidnapped the victim in violation of former section 207. It further alleged under subdivision (e)(4) of former section 1203 that Ybarra had been convicted of felonies twice in California.[2]

Ybarra pleaded not guilty and denied all allegations. The charges were tried to a jury, which convicted Ybarra on all counts.

The trial court sentenced Ybarra to a total of 27 years in state prison, calculated as follows: the upper term of 11 years as to count 1, plus the upper term of eight years as to count 2, plus the upper term of eight years as to count 3, all sentences to run consecutively. The court also credited Ybarra with 880 days of presentence custody (766 days actual time and 114 days good time/work time) and imposed various statutory fines and fees.

The evidence introduced at trial showed the following facts: On January 28, 1995, when T.A. was standing in the parking lot at a gas station, a man ordered her at knife point to get into his car. The man drove her to an alley, punched her in the face, pushed her out of the car, forced her to orally copulate him, and raped her vaginally. He then

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

[2] Because the charged crimes took place in 1995, the statutory citations in the information refer to the versions of those statutes that were in effect in 1995.

drove away, leaving her lying on the ground. A passing motorist took T.A. to a police station, from which she was taken to a hospital and given a rape examination, including the collection of vaginal fluid samples. Subsequent DNA analysis of those samples matched a DNA sample taken directly from Ybarra.

Ybarra testified in his own defense. He admitted having sex with T.A. but claimed it was consensual. He claimed that T.A. approached his car and told him that she was "working" (i.e., as a prostitute), they agreed on a price, she got into his car, and they drove to a different location because there was a heavy police presence in the area in which he picked her up. After they had sex and Ybarra paid her, he dropped her off at a nearby intersection. He did not have a knife and did not strike her. In her testimony during the prosecution's case in chief, T.A. admitted that she was convicted of prostitution in December 1995.

DISCUSSION

I. Statute of Limitations

Ybarra argues that count 1 is barred by the statute of limitations and that the record contains insufficient evidence to show whether counts 2 and 3 are untimely as well. We disagree with the first argument but agree with the second, and we accordingly remand for the trial court to conduct a hearing to determine whether counts 1 through 3 are timely.

Ybarra did not raise the statute of limitations as a defense in the trial court, but he argues that under *People v. Williams* (1999) 21 Cal.4th 335, 341 (*Williams*), he may raise the issue for the first time on appeal. Respondent does not dispute the point, and we agree with Ybarra.

The information charged Ybarra in count 1 with violation of subdivision (d) of former section 208, in count 2 with violation of subdivision (a)(2) of former section 261, and in count 3 with violation of subdivision (c) of former section 288a. The parties agree that all three charges are untimely unless the statute of limitations was tolled or extended

under subdivision (g) of former section 803.[3] That former statute provides as follows: "Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date on which the identity of the suspect is conclusively established by DNA testing, if both of the following conditions are met: [¶] (A) The crime is one that is described in subdivision (c) of Section 290. [¶] (B) The offense was committed prior to January 1, 2001, and biological evidence collected in connection with the offense is analyzed for DNA type no later than January 1, 2004, or the offense was committed on or after January 1, 2001, and biological evidence collected in connection with the offense is analyzed for DNA type no later than two years from the date of the offense." (Former § 803, subd. (g)(1).)

The charged crimes were committed in 1995. Therefore, in order for the charges against Ybarra to be timely, they must be among the crimes described in subdivision (c) of former section 290,[4] and the biological evidence collected from T.A. must have been analyzed for DNA type no later than January 1, 2004.

As to count 1, Ybarra argues that the charged crime is not listed in subdivision (c) of former section 290. He reasons as follows: Among the crimes described in subdivision (c) of former section 290 is a violation of "Section 207 or 209 committed with intent to violate Section 261, 286, 288, 288a, or 289." Former section 209[5] prohibits the kidnapping of "any individual to commit . . . rape . . . [or] oral copulation." (Former § 209, subd. (b)(1).) In 1995, however, when the charged offenses were committed, the crime of kidnapping to commit rape or oral copulation was codified in former

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[3] This issue is governed by the version of subdivision (g) of section 803 that was in effect when the information was filed in 2009. (See § 803.6.) All subsequent references to former section 803 are to that version.

[4] The applicable version of section 290 is the one that was in effect in 2009, when the information was filed. All subsequent references to former section 290 are to that version.

[5] The applicable version of section 209 is the one that was in effect in 2009, when the information was filed. All subsequent references to former section 209 are to that version unless otherwise indicated.

section 208, subdivision (d).[6] The information correctly charged Ybarra under the statutes that were in effect in 1995, when the charged crimes were committed, so it charged him with kidnapping for sexual purposes under former section 208, not the 1995 version of section 209. But former section 208 is not listed in former section 290, so, according to Ybarra, it is not subject to the tolling provisions of former section 803.

The argument lacks merit. The tolling provisions of former section 803 apply if the charged crime "is one that is described in subdivision (c) of Section 290." (Former § 803, subd. (g)(1)(A).) Count 1 of the information charges Ybarra with kidnapping for sexual purposes, which is described in subdivision (c) of former section 290. The tolling provisions of former section 803 therefore apply to count 1. It does not matter that the information (correctly) charges kidnapping for sexual purposes under former section 208 (where it was codified in 1995, when the crimes were committed) rather than under former section 209 (where it was codified in 2009, when the information was filed), and it does not matter that subdivision (c) of former section 290 fails to refer to former section 208. Subdivision (c) of former section 290 need not identify by section number every code provision in which the crime was ever codified. Count 1 charged Ybarra with kidnapping for sexual purposes, and that crime is described in subdivision (c) of former section 290, so the tolling provisions of former section 803 apply.

As to counts 2 and 3, Ybarra argues that the record contains insufficient evidence that the samples taken from T.A. in 1995 were analyzed for DNA type no later than January 1, 2004. If sound, the argument would apply to count 1 as well.

"[W]hen the charging document indicates on its face that the action is time-barred, a person convicted of a charged offense may raise the statute of limitations at any time. If the court cannot determine from the available record whether the action is barred, it should hold a hearing or, if it is an appellate court, it should remand for a hearing." (*Williams, supra*, 21 Cal.4th at p. 341.) Ybarra did not raise the statute of limitations until this appeal. Both at the preliminary hearing and at trial, the prosecution did not

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[6] All subsequent references to section 208 are to the version in effect in 1995.

attempt to prove the facts necessary to trigger the tolling provisions of former section 803. Having reviewed the record of the preliminary hearing and the trial, we cannot determine from the available record whether the three counts alleged in the information are barred, so we remand for a hearing on the issue.

II. Propensity Evidence

At trial, the prosecution presented evidence of two previous sexual offenses allegedly committed by Ybarra. The first occurred in 1988 and involved victim C.G. It appears from the record that Ybarra was arrested but never charged in connection with that incident. C.G. could not be located to testify at trial in this case, but a police officer who arrived at the scene when the alleged offense was in progress testified to what he observed.

The second incident occurred in 1995 and involved victim S.T. Ybarra was arrested and charged with rape on the basis of that incident, and S.T. identified him in her testimony at the preliminary hearing in that case. Ybarra's counsel in that case negotiated a plea agreement, and Ybarra pled guilty to sexual battery in violation of section 243.4a. S.T. died some time before trial in the instant case, but the prosecution read her preliminary hearing testimony to the jury.

Ybarra objected to admission of the evidence concerning both incidents. The trial court admitted the evidence under subdivision (a) of Evidence Code section 1108, which provides that "[i]n 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."

On appeal, Ybarra argues that Evidence Code section 1108 on its face violates due process. He also recognizes, however, that the California Supreme Court has held that Evidence Code section 1108 does not violate due process (*People v. Falsetta* (1999) 21 Cal.4th 903, 911), and he concedes that we are bound by that holding (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). We accordingly reject Ybarra's argument that Evidence Code section 1108 on its face violates due process.

Ybarra also argues that the trial court abused its discretion by determining that the evidence of the two prior incidents was admissible under Evidence Code section 352 and hence under Evidence Code section 1108. Under Evidence Code section 352, the trial 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." The court's ruling on the admission or exclusion of evidence under Evidence Code section 352 "'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' (*People v. Jordan* (1986) 42 Cal.3d 308, 316 [228 Cal.Rptr. 197, 721 P.2d 79].)" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

In *Falsetta*, the Supreme Court stated that, in deciding whether to admit evidence of prior sexual offenses under Evidence Code section 1108, "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." (*Falsetta*, *supra*, 21 Cal.4th at p. 917.)

Evaluated in light of the factors listed in *Falsetta*, the trial court's ruling was not arbitrary, capricious, or patently absurd. The probative value of the evidence was high, because it tended to show that Ybarra has a propensity to commit violent sexual assaults. (See *Falsetta*, *supra*, 21 Cal.4th at p. 915.) Ybarra does not identify any significant risk of undue prejudice—he points out that he was unable to cross-examine the alleged victims because they did not testify and that the incidents occurred between 15 and 20 years ago, but neither of those points shows a risk of undue prejudice. It was not an abuse of discretion for the court to determine that the probative value of the evidence was

not substantially outweighed by the probability that it would create a substantial danger of undue prejudice. We therefore reject Ybarra's argument.

III. Confrontation Clause Rights

Ybarra also argues that the trial court violated his rights under the Confrontation Clause by allowing the transcript of S.T.'s preliminary hearing testimony to be read to the jury. We conclude that the record on appeal does not support his argument.

As Ybarra acknowledges, the admission of S.T.'s preliminary hearing testimony did not violate his confrontation rights if S.T. was unavailable at trial and Ybarra had an adequate opportunity to cross-examine her at the preliminary hearing. (*People v. Carter* (2005) 36 Cal.4th 1114, 1172-1173; *Crawford v. Washington* (2004) 541 U.S. 36, 57.) It is undisputed that S.T. was deceased at the time of trial. It is also undisputed that Ybarra's counsel cross-examined her at the preliminary hearing.

Ybarra argues nonetheless that the admission of S.T.'s testimony violated his confrontation rights because his opportunity for cross-examination was not adequate, because there were "numerous times that defense counsel's cross-examination was truncated on objections from the prosecutor." The record before us does not support the argument. In the reporter's transcript of Ybarra's trial, the reading of S.T.'s testimony occupies 78 pages, of which 57 are cross-examination. No objections or rulings on them were read to the jury, so we do not know how many objections the prosecution raised, how many were sustained, how many of those rulings might have been erroneous, or how those rulings might have constrained Ybarra's counsel's cross-examination.

On this record, then, which reveals that the cross-examination of S.T. was more than twice as long as the direct examination and which fails to show that any objections during cross-examination were erroneously sustained or unduly interfered with the cross-examination, we must reject Ybarra's argument that his opportunity to cross-examine S.T. at the preliminary hearing was inadequate. We therefore likewise must reject his argument that the admission of S.T.'s preliminary hearing testimony violated his confrontation rights.

DISPOSITION

The judgment is conditionally reversed. On remand, the trial court shall conduct a hearing to determine whether the charges in the information were timely filed. If the trial court determines that the charges were timely, then the trial court must reinstate the judgment of conviction and sentence. If the trial court determines that the charges were untimely, then it must dismiss them. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.