Filed 11/30/16 P. v. Davall CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH CHANDLER DAVALL, Defendant and Appellant.	B265279 (Los Angeles County Super. Ct. No. KA105537)

APPEAL from a judgment of the Superior Court of Los Angeles County, Juan Carlos Dominguez, Judge. Affirmed.

Verna Wefald, 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, Steven E. Mercer and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Joseph Chandler Davall, convicted of multiple counts of sexual assault/rape of a child, as well as burglary and making criminal threats, contends the trial court erred in allowing the jurors to hear an admission he made to an officer shortly after his arrest. He further contends the prosecution failed to support admission of DNA evidence establishing his identity as the perpetrator of the assault with proper foundational and chain of custody evidence. Finally, he contends the court's failure to grant his motion for change of venue deprived him of a fair trial. Finding no legal error or abuse of discretion by the trial court, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Information*

Appellant was charged by amended information with aggravated sexual assault/rape of a child (count one, Pen. Code, § 261, subd, (a)(2)), aggravated sexual assault/sexual penetration of a child (count two, § 289, subd. (a)), forcible rape (count three, § 261, subd. (a)(2)), sexual penetration of a victim under 14 by a foreign object (count four, § 289, subd. (a)(1)(B)), assault with intent to commit a felony during commission of a first degree burglary (count five, § 220, subd. (b)), first degree burglary (count six, § 459), and criminal threats (count seven, § 422, subd. (a)).[1] As to counts

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[1] Undesignated statutory references are to the Penal Code.

three and four, it was alleged that appellant tied or bound the victim, personally inflicted bodily harm on a victim under 14 years old, and committed the offense during the commission of burglary within the meaning of section 667.61, subdivision (j)(1) and (e). It was further alleged that appellant was released on bail at the time of the commission of the offense, that he had previously been convicted of a serious and/or violent felony (criminal threats) within the meaning of section 667, subdivisions (a)(1) and (d) and section 1170.12, subdivision (b), and that he had been convicted of two prior felonies (criminal threats and grand theft) within the meaning of section 1203, subdivision (e)(4).

B. *Evidence at Trial*[2]

The victim, identified throughout the trial as "Jane Doe," testified that on March 21, 2014, she was 12 years old. At around 10 or 11 p.m., her father and his friend picked her up from a friend's house to take her home. During the drive, she saw a man she later identified as appellant walking down the street. She saw appellant again when she got out of the car in front of her house.

Doe was dropped off at home and left alone. She locked the door and went into her bedroom, where she spent some time on her cell phone before falling asleep. She was awakened by a clicking noise and a pain and tingling in her

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[2] All the evidence at trial was presented by the prosecution.

side. A man was on top of her, straddling her. He looked like the man she had seen on her way home and in front of her house. She screamed. The man told her to stop screaming, and put something over her head to cover her face. He turned her over and tied her hands behind her back. When she struggled, he punched her in the stomach multiple times. She heard the clicking sound and felt the tingling pain again. The man stuck his fingers inside her vagina before turning her on her back and raping her. When he was finished, he tied her legs together and said: "'Now, I know where you live. And I know what school you go to. So if you tell anybody about this, I will have my boys come back and kill you.'"

After the attacker left, Doe lay on her bed in shock, afraid he would return. She wanted to call someone, but discovered her cell phone was gone.[3] Doe's father came home shortly after the attack. Doe told him what had happened, and he took her to a police station. Doe made a report to Officer Eric Orosco, who testified she was upset, trembling, shaky and crying. The officer transported her to the hospital where she underwent a physical exam that included a sexual assault exam.

Carey Zuniga, a registered nurse with a specialty in forensics, conducted the exam. She observed scratches and abrasions on Doe's back, shoulder, hip, stomach, arm and

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[3] Her cell phone was later found in a bush outside the house.

knee. There was a small laceration on her hymen and another one near her vagina. Zuniga took a buccal (cheek) swab from Doe to have as a reference for her DNA. Zuniga then took swabs from Doe's neck, breasts, abdomen, thigh, external genitalia and vagina. Zuniga also took multiple photographs of Doe and her injuries, and placed marks on a drawing to show the location of injuries surrounding Doe's vagina.[4]

Maryam Nickooshiam, a senior criminalist for the Los Angeles County Sheriff's Department, received Doe's sexual assault kit from the evidence control section of the Sheriff's Department crime lab.[5] Nickooshiam screened the samples, finding evidence of blood, semen and sperm in the vaginal and external genitalia swabs. She then extracted and amplified the DNA to obtain a profile. The profile she obtained indicated the samples in the kit were from two contributors. On April 23, 2014, she received a buccal reference sample from appellant and profiled his DNA. She compared his DNA profile to the DNA profile she developed from the sexual assault kit samples. Asked to relate her conclusions, she stated: "[T]he DNA profile from the sample is a mixture consistent with two contributors . . . one of whom is Jane Doe, the [other] matches the profile from

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[4] The photographs and the drawing were introduced as Exhibits 2 through 12.

[5] The criminalist is sometimes referred to in the record as "Nookshiam." We adopt the version of her name used by the parties in their briefs.

Joseph Davall." She further stated that the probability of a random person matching the profile from the kit was one in 860 quadrillion.

Detective David Hardin testified that he ran a DMV records search in April 2014 after learning that appellant had become a suspect in the assault. He found a Chevrolet pickup truck registered to appellant. Detective Hardin entered the truck's license plate into a system that collects data from cameras mounted on light posts throughout the city of Claremont. The data showed that appellant's vehicle had entered and exited Claremont 43 times between 2012 and 2014. On March 21, 2014, at approximately 11:37 p.m. it was seen by a camera three-quarters of a mile from Doe's home.

Officer Rick Varney testified that appellant made an unsolicited statement to him when he was with appellant in a booking cell, taking a GPS device off appellant's ankle. Appellant said he knew why one of the detectives was angry with him: "'He must have two daughters that didn't like what I did.'"

C. *Verdict and Sentencing*

The jury found appellant guilty of all charges, and found the section 667.61 allegations true. The court found the prior serious conviction allegations to be true. Appellant was sentenced to state prison for a term of life without the possibility of parole, plus 11 years. This appeal followed.

DISCUSSION

A. *Voluntariness of Admission*

1. *Background*

Prior to trial, appellant sought to suppress his statement to Officer Varney during the booking process that one of the arresting detectives "must have two daughters that didn't like what I did." His counsel objected on the ground of relevance to the introduction of the statement appellant made to the officer in the booking cell. The court overruled the objection, finding the statement "[h]ighly probative" and "an admission."

After the ruling, appellant's counsel brought up another statement appellant made at the time of his arrest: "'Boy, you guys really kicked my ass. I am sore. I just should have made them put a bullet in it.'" Counsel objected to the introduction of this statement or of any testimony from the arresting officers describing their "take-down" of appellant or their perception that appellant was resisting. As defense counsel was explaining to the court the circumstances surrounding the statement -- it was made after detectives "tackled [appellant]" and "took him to the ground" -- appellant interjected: "They carried me by the handcuffs. [¶]. . . [¶] . . . They broke six of my ribs and punctured my lung and caused permanent damage to my eye." After discussion with the prosecutor, the court agreed that the statement regarding how he was arrested, as well as any evidence of the fact that appellant struggled with the arresting officers, would not be admitted unless defense

counsel "open[ed] the door" by suggesting appellant was "cooperative" and "submitted immediately." Appellant's counsel did not do so, and the evidence was not offered.

2. *Analysis*

Appellant contends the statement he made to Officer Varney was involuntary and made as the result of police coercion. (See *People v. McWhorter* (2009) 47 Cal.4th 318, 347 ["'A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. [Citation.]"].) Neither before nor during trial did appellant object to the admission of Officer Varney's testimony on the ground he now asserts. After the court overruled the relevance objection, his counsel sought to prevent the jury from hearing the remainder of his statement because it suggested that appellant resisted capture and tended to support consciousness of guilt. (See *People v. Garcia* (2008) 168 Cal.App.4th 261, 283 ["Evidence of a defendant's resistance to arrest, like evidence of flight, is admissible as evidence of the defendant's consciousness of guilt"].) Although appellant interrupted his counsel to claim he had been injured during the arrest, his counsel did not raise an objection based on coercion. Accordingly, no hearing was held concerning the voluntariness of the statement, no witnesses were sworn, no evidence was taken, and the trial court had no opportunity to resolve factual disputes or make the necessary factual findings. Appellant thus forfeited this

contention. (*People v. Ray* (1996) 13 Cal.4th 313, 339 [voluntariness of defendant's admissions, confessions or other statements generally will not be addressed for first time on appeal]; accord, *People v. Maury* (2003) 30 Cal.4th 342, 387-388, disapproved in part on other grounds in *Barnett v. Superior Court* (2010) 50 Cal.4th 890; *People v. Mayfield* (1993) 5 Cal.4th 142, 172.)

Moreover, were we to address the substance and accept as true appellant's unsworn statement that he suffered the described injuries, we would not find the admission coerced. Appellant's alleged injuries occurred when he was evading arrest. There was no evidence the arresting officers attempted to question him or obtain an admission or confession from him. Officer Varney encountered appellant after he was arrested and booked, and interacted with him only in order to remove a GPS device. There was no evidence that Officer Varney interrogated appellant or that appellant felt compelled to speak with the officer because of his alleged injuries. Accordingly, there is nothing in the record to suggest the statement was involuntary or the result of coercion. (See *People v. McWhorter*, *supra*, 47 Cal.4th at p. 347 ["'Although coercive police activity is a necessary predicate to establish an involuntary confession, it "does not itself compel a finding that a resulting confession is involuntary."'" [Citation.] The statement and the inducement must be causally linked"']; *People v. Williams* (2010) 49 Cal.4th 405, 437 ["A confession is not involuntary unless the coercive police conduct and the defendant's

statement are causally related"]; *People v. Linton* (2013) 56 Cal.4th 1146, 1176 [""[C]oercive police activity is a necessary predicate to establish an involuntary confession,"" but a confession is not involuntary unless the coercive activity was "the 'motivating cause' of the defendant's confession"].)

B. *Chain of Custody for DNA Evidence*

1. *Background*

As discussed, Zuniga, the forensic nurse who examined Doe immediately after the assault, testified that she swabbed Doe's cheek to obtain a clear sample of her DNA, and then used swabs on various points on Doe's body in the expectation of collecting the DNA of her assailant. Zuniga further testified that once the swabs were dry, she packed them into boxes and envelopes that she personally labeled. She then sealed the boxes and envelopes and, along with the photographs she had taken and the drawing she had marked, placed them inside a sexual assault kit, sealed the kit and initialed the seal. Zuniga testified she gave the kit to "the officer," whom she identified as Officer Orosco. During her testimony, she was shown the photographs and drawing from the kit and identified them as the ones she had sealed inside it.

Officer Orosco testified he left the hospital to take Doe back to her family before the sexual assault kit was ready to be transported, and that he asked Officer Garrett Earl to pick up the kit. Officer Earl testified he took the kit from

the nurse and transported it to the station to be booked into evidence. He filled out the property control card, and prepared a report stating he had picked up the kit and booked it.

After Zuniga testified she gave the sexual assault kit to Officer Orosco, but before the officers clarified that it was Officer Earl who transported the kit from the hospital to the police station, the prosecutor explained that she did not plan to call the person who took the kit from the station to the Sheriff's Department crime lab because "Officer Earl will be able to indicate the manner in which it was sealed" and Nickooshiam "will testify . . . that she received it still sealed." Defense counsel objected, contending this was an inadequate foundation and would not establish the chain of custody. She also indicated that properly establishing the transfer from Zuniga to police officials would require the prosecution to re-call the nurse to "say who she gave it to." The court stated: "I'm not following you . . . . If you think that there is a break in the chain, you can certainly inquire, and you can certainly argue to the jurors that the evidence is not trustworthy because there was . . . a break in the chain. . . . But before [we] get to that, I have to hear what the issue is. . . . [I]f I understand, it didn't go from . . . Zuniga to Orosco[] . . . .[¶] . . . [¶] It went directly from Zuniga to Earl[.]"

The next morning, before witnesses were called, defense counsel asked for "a continuing objection in regards to lack of foundation and chain of custody in regards to the

DNA expert testifying about the DNA samples that they received," again focusing on the fact that "[w]e heard testimony that the DNA samples were taken by . . . nurse Zuniga and then given to an officer named Orosco." The prosecutor confirmed that Officer Earl would testify that he received the sealed sexual assault kit from Zuniga and booked it, and that Nickooshiam would testify she received and analyzed the sealed kit, but that no other witnesses would be called to establish chain of custody. Defense counsel stated she was "making an objection as to that." The court noted the objection. Officers Orosco and Earl testified as described above. The prosecution then called Nickooshiam.

Prior to describing the testing and analysis performed on the DNA samples, Nickooshiam was asked if she received a sexual assault kit from "Jane Doe is what we're calling her . . . ." Nickooshiam asked for the lab number, checked her notes and responded "Yes. I did receive that item." She said it came from the crime lab's "evidence control section," and that when she picked it up, it was in an envelope, "intact, closed, sealed with red evidence tape, and initialed." A short time later the prosecutor asked Nickooshiam to confirm that she received "the [sexual assault] kit on Jane Doe" and Nickooshiam confirmed she had. Nickooshiam also was asked if she "receive[d] a buccal reference sample from Joseph Davall." She responded she did, and went on to explain the testing she performed to match the reference sample obtained from appellant to the second DNA profile

found on the swabs from the sexual assault kit assembled by Zuniga. Defense counsel raised no objection to any of the questions asked of the criminalist by the prosecutor. Nor did she cross-examine Nickooshiam.

2. *Analysis*

Appellant contends the prosecutor failed to provide evidence establishing an unbroken chain of custody for either the DNA evidence from the sexual assault kit or the buccal sample from appellant.[6] We conclude the prosecutor established all vital links in the chain of custody of the DNA samples in the sexual assault kit and that appellant forfeited any objection to the chain of custody of his buccal swab.

In order to challenge the adequacy of a showing of chain of custody on appeal, an objection to the evidence must appear in the trial record. (*People v. Hall* (2010) 187 Cal.App.4th 282, 292.) The objection must have been timely made and stated in a way as to make clear the specific

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[6] Appellant's brief primarily addresses the omissions in the chain of custody of the DNA sample identified as coming directly from his buccal swab. The only discussion of alleged deficiencies in the chain of custody of the DNA samples in the sexual assault kit focuses on Zuniga's testimony that she gave the kit to Officer Orosco, and the absence of testimony from the party who transported the kit from the station to the Sheriff's Department crime lab. We asked for, and received, supplemental briefing on the evidence supporting that the sexual assault kit examined by Nickooshiam was the same kit assembled by nurse Zuniga.

ground. (*Ibid.*; see Evid. Code, § 353; *People v. Baldine* (2001) 94 Cal.App.4th 773, 779 ["Chain-of-custody issues are present whenever physical evidence capable of submission to the jury is introduced at trial. Objections related to the chain of custody are waived if not timely asserted"].) Once an objection based on failure to establish chain of custody has been raised, """[t]he burden on the party offering the evidence is to show to the satisfaction of the trial court that . . . it is reasonably certain that there was no alteration."""" (*People v. Catlin* (2001) 26 Cal.4th 81, 134.) """The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received."""" (*Ibid.*) """Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight." [Citations.]' [Citations.]" (*Ibid.*) "'While a perfect chain of custody is desirable, gaps will not result in the exclusion of the evidence, so long as the links offered connect the evidence with the case and raise no serious questions of tampering.'" (*Ibid.*, quoting Mendez, Cal. Evidence (1993) § 13.05, p. 237; accord, *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 311, fn. 1 ["[I]t is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. . . . [N]ot . . . everyone who laid hands on the evidence must be

called. . . . '[G]aps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility'"].) A trial court's exercise of discretion in admitting such evidence is reviewed on appeal for "abuse of discretion. (*People v. Catlin*, *supra*, at p. 120.)

With respect to the DNA samples in the sexual assault kit, Zuniga provided detailed evidence concerning her collection of the swabs during her examination of Doe, the manner in which she prepared them prior to placing them into the kit, and the efforts she undertook to ensure the kit was securely sealed before it left her custody to prevent tampering. Officer Earl testified that he took the sealed kit to the police station. No one testified concerning the trip from the station to the Sheriff's Department crime lab, but when asked to identify the source of the DNA she initially analyzed, Nickooshiam stated the first set of swabs came from a sexual assault kit readily identifiable to her as victim Doe's. There was no evidence of tampering, as the envelope was "intact, closed, sealed with red evidence tape, and initialed."

At trial, appellant's counsel raised no objection to any part of Nickooshiam's testimony; nor did she question how the criminalist was able to identify the kit. Counsel's earlier objection to admitting DNA evidence from the kit was based on Zuniga's confusion over the identity of the officer to whom she delivered the kit and the prosecutor's failure to call the party who transported it to the crime lab. As the Supreme Court has said "'gaps [in the chain of custody] will not result

in the exclusion of the evidence, so long as the links offered connect the evidence with the case and raise no serious questions of tampering.'" (*People v. Catlin*, *supra*, 26 Cal.4th at p. 134; see, e.g., *People v. Hall, supra,* 187 Cal.App.4th at pp. 294-296 [not error to admit blood sample showing defendant's intoxication although no evidence indicated who took the sample or who transported it to crime lab where criminalist received sealed envelope properly labeled with, among other things, defendant's name, and gave detailed testimony as to procedures generally followed in collecting blood samples]; *Wagner v. Osborn* (1964) 225 Cal.App.2d 36, 42 [admission of blood sample not error; "although all persons who handled the envelope containing the specimen were not called as witnesses, the chain of possession was nevertheless substantially established and the proof adequate to sustain the foundation for admissibility"]; cf. *Dobson v. Industrial Acc. Com*. 1952) 114 Cal.App.2d 782, 784 [blood sample purporting to be defendant's inadmissible where toxicologist testified he received for analysis labeled specimen in sealed envelope in the mail, but no evidence offered to show who took the sample or under what conditions].) Here, all vital links in the chain of custody were accounted for. The minor gaps identified by defense counsel at trial went to "weight[] rather than . . . admissibility."

Appellant seeks to rely on *People v. Jimenez* (2008) 165 Cal.App.4th 75 (*Jimenez*), where the appellate court reversed the conviction of a defendant whose DNA was

purportedly found on the handlebars of a bicycle used by a bank robber to escape. There, the defendant was identified as a potential suspect early in the investigation. The swabs from the handlebars and the defendant's cheek were taken by police officials at the station. The technician or technicians who took the swabs and placed them into envelopes for transport to the lab did not testify. The sergeant who testified could say only that he made arrangements with a technician to obtain a swab from the defendant and someone gave instructions for it to be sent to a lab for analysis. Over the defendant's foundational objections, the criminalist testified that in all probability, the DNA identified as coming from the handlebars was the defendant's. (*Id*. at pp. 79-80.) The Court of Appeal concluded there were too many unanswered questions to sustain the admission of the DNA evidence, including the identity of the party or parties who labeled and sealed the swabs at the police station, the manner in which the swabs were segregated to minimize the possibility of inadvertent substitution, and whether the seals remained unbroken until the criminalist performing the analysis opened them. (165 Cal.App.4th at p. 80.) Characterizing the chain of custody as "nothing more than a link here, a link there, with little more than speculation to connect the links into a chain," the court held the foundation for the introduction of the evidence inadequate. (*Id*. at p. 81.)

Here, in contrast, the evidence established that nurse Zuniga prepared and labeled the swabs taken from Doe, and

that she immediately put them, along with pictures of Doe, in a sealed envelope to prevent deliberate or inadvertent contamination or substitution. The evidence further established that Officer Earl transported the sealed kit to the police station. Although the storage facilities at the station and the crime lab were not described, the fact that the envelope arrived at its destination intact, sealed and initialed suggests that tampering was not a serious concern. Moreover, unlike the situation in *Jimenez* where the significant evidence was collected by police technicians after the defendant became a suspect, the DNA evidence in the sexual assault kit was put together in a hospital by a nurse at a time when no suspect had been identified and appellant was not in custody. Thus, no one would have had reason -- or opportunity -- to contaminate the sexual assault kit evidence with appellant's DNA. (See *People v. Hall*, *supra*, 187 Cal.App.4th at p. 296 ["Medical personnel . . . have no 'skin in the game' when collecting biological samples; they have no incentive to alter evidence. Thus, . . . blood draw[n] in a hospital environment by medical personnel, as opposed to in a police station by [a] police technician, substantially lessens the basis for any suspicion that a sample has been substituted"].) From the chain of custody evidence presented, it was reasonably certain that there had been no alteration or substitution of evidence to bolster the case against appellant, and that the evidence analyzed by Nickooshiam was the evidence collected by Zuniga. On this record, the court did not abuse its discretion in overruling

appellant's objection and admitting the DNA evidence from the sexual assault kit.

After testifying concerning her analysis of the DNA samples in the sexual assault kit, Nickooshiam testified without objection that she received a buccal sample from Joseph Davall. While no evidence was offered of the circumstances under which the sample was collected from appellant, Nickooshiam testified she received it in April 2014, approximately a month after the assault. Appellant contends this evidence should have been excluded. However, as discussed above, defense counsel's foundational and chain of custody objections at trial were limited to the DNA samples in the sexual assault kit. The first mention of appellant's buccal swab occurred during Nickooshiam's testimony. She was asked if she "receive[d] a buccal reference sample from Joseph Davall." She responded "I did." Defense counsel raised no foundational or chain of custody objection to the question, and did not object when Nickooshiam explained obtaining appellant's DNA profile from the sample and comparing it to the DNA profiled obtained from the swabs in the kit. Had such an objection been raised, the prosecutor would undoubtedly have been able to provide the necessary information concerning the circumstances under which appellant's sample was obtained. Counsel's failure to object at trial strongly suggests she had no reason to doubt the authenticity of the sample taken from appellant or to question the adequacy of the chain of custody. (See *People v. Diaz* (1992) 3 Cal.4th 495, 560 ["[I]t is not

uncommon or improper for counsel, in . . . criminal trials, to avoid unnecessary delay by stipulating to the chain of custody" where counsel understands opposing counsel will be readily able to "supply the links missing from the custody chain."]; *People v. Lucas* (1995) 12 Cal.4th 415, 445-446 ["[F]laws in the chain [of custody] are often mere technical omissions that competent [defense] counsel may consider unworthy of extended debate. [Citation.] In fact, an objection on chain of custody grounds may be less productive for defendant than a decision to permit the prosecutor to establish a shoddy chain of custody that can be pointed out to the jury in the hope of giving rise to a reasonable doubt"].) Appellant forfeited any objection concerning the foundation or chain of custody of his buccal DNA sample.

C. *Change of Venue*

1. *Background*

The crime took place in Claremont. Trial was held in the Los Angeles County Superior Court in Pomona. Prior to trial, appellant moved for a change of venue. He contended there was a reasonable likelihood that a fair and impartial trial could not be held there because the charges were serious, and publicity was "widespread." As evidence of this, he submitted four articles from the Claremont Courier published in April, May, June, and October 2014, stating that appellant had been arrested for raping a 12-year old girl and had, in the past, been charged with various other crimes in San Bernardino, Riverside and Ventura counties,

including assault with intent to rape, public intoxication, indecent exposure, grand theft and reckless driving. One article included a summary of Doe's testimony at the preliminary hearing. Appellant also presented evidence that the Claremont Courier had 4,520 paid subscribers, a readership of 9,492, and web traffic of 6,000 visitors each week, and that Claremont had a population of approximately 35,500.

The prosecutor opposed the motion, contending that jurors who had been exposed to case-related media could be weeded out during voir dire.

The court denied the motion for a change of venue. The court observed that the Claremont Courier had a total readership of under 10,000, that Claremont was just one of approximately 13 municipalities from which jurors were drawn, and that the pool of jurors available to the court consisted of a population of approximately 1.4 million.

2. *Analysis*

Under section 1033, subdivision (a), the court shall order a change of venue to another county "when it appears there is a reasonable likelihood that a fair and impartial trial cannot be had in the county [where the criminal action is pending]." "The phrase 'reasonable likelihood' in this context 'means something less than "more probable than not,"' and 'something more than merely "possible."'" (*People v. Proctor* (1992) 4 Cal.4th 499, 523, quoting *People v. Bonin* (1988) 46 Cal.3d 659, 673.) "In ruling on such a motion, . . .

the trial court considers as factors [1] the gravity and nature of the crime, [2] the extent and nature of the publicity, [3] the size and nature of the community, [4] the status of the victim, and [5] the status of the accused." (*People v. Proctor*, *supra*, at p. 523.) The defendant bears the burden of proving that the factors favor the requested change of venue. (*Ibid.*)

"'On appeal after a judgment following the denial of a change of venue, the defendant must show both that the court erred in denying the change of venue motion, i.e., that at the time of the motion it was reasonably likely that a fair trial could not be had, and that the error was prejudicial, i.e., that it [is] reasonably likely that a fair trial was not in fact had. [Citations.]'" (*People v. Proctor*, *supra*, 4 Cal.4th at p. 523, italics omitted, quoting *People v. Edwards* (1991) 54 Cal.3d 787, 807.) The first part of the showing "requires our independent determination of the weight of the five controlling factors described above. [Citations.]" (*People v. Proctor*, *supra*, at p. 524.) "With regard to the second part of the showing, in order to determine whether pretrial publicity had a prejudicial effect on the jury, we also examine the voir dire of the jurors. [Citations.]" (*Ibid.*) "This is because posttrial review of an order denying a motion to change venue is retrospective. Thus, even if a trial court were to err in denying a motion to change venue, the showing of error would not in itself justify reversal on appeal. The defendant must also demonstrate that, in view of what actually occurred at trial, it is reasonably likely that a fair trial was not in fact had." (*People v. Howard* (1992) 1 Cal.4th 1132,

1168.) In voir dire, the trial court "explore[s] the matter of pretrial publicity with each prospective juror and excuse[s] those who had significant exposure." (*Id*. at p. 1169.) Review of the record of voir dire allows the appellate court to independently assess prejudice. (*Ibid*.)

Here, appellant was charged with a very serious offense. That factor alone is not dispositive. (*People v. Proctor*, *supra*, 4 Cal.4th at p. 524; see *People v. Davis* (2009) 46 Cal.4th 539, 578 [fact that crime involved kidnapping and murder of young child and false imprisonment of her friends did not compel change of venue; prospective jurors would sympathize with victims' fate no matter where trial was held].) Regarding the status of appellant and the victim, neither appeared to be well-known in the community, and even if well-known in Claremont, that was one of 17 communities from which prospective jurors were drawn. Appellant presented evidence of some pretrial publicity, but that evidence indicated the news reports appeared in a paper with a small circulation and a circle of readers that numbered less than 10,000. When compared to the 1.4 million population of the community from which prospective jurors were drawn, the numbers were insignificant. (See *People v. Jennings* (1991) 53 Cal.3d 334, 363 ["'The larger the local population, the more likely it is that preconceptions about the case have not become imbedded in the public consciousness.' [Citation.] . . . The key is whether it can be shown that the population is of such a size that it

'neutralizes or dilutes the impact of adverse publicity.' [Citation.]"].)

With respect to the final factor we are to consider -- whether pretrial publicity had an actual impact on the jurors and prospective jurors -- appellant presented no evidence. He did not include the voir dire in the record on appeal. Nor did he present evidence that he exhausted his peremptory challenges or objected to the seated jury's composition. (See *People v. McCurdy* (2014) 59 Cal.4th 1063, 1080.) In the absence of any evidence that any juror had read the news reports or otherwise heard of the case, we have no basis to conclude that appellant was prejudiced by the denial of his motion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.