Filed 5/9/17 P. v. Alexander CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>PHILLIP ALEXANDER,<br><br>Defendant and Appellant. | B268634<br>(Los Angeles County<br>Super. Ct. No. BA431065) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis B. Rappe, Judge. Affirmed as modified.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found appellant Phillip Alexander guilty of forcible rape (Pen. Code, § 261, subd. (a)(2)).[1] In a bifurcated proceeding, the jury found true the allegations that appellant had two prior serious felony convictions within the meaning of the "Three Strikes" Law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), namely, two counts of robbery, and that these two counts involved two separate victims. The jury also found true the allegation that appellant had one prior serious felony conviction for robbery within the meaning of section 667, subdivision (a)(1).

The trial court sentenced appellant to state prison for a total term of 30 years to life, consisting of 25 years to life pursuant to the Three Strikes law, plus five years pursuant to section 667, subdivision (a)(1).

Appellant contends the trial court erred in admitting certain evidence and sentencing him pursuant to the Three Strikes law, and that the abstract of judgment should be corrected to reflect a Three Strikes sentence. We agree with this last contention and otherwise affirm the judgment.

## FACTS

### Prosecution Case

#### A. Background

In March 2014, C.B. was 14 years old. She lived part-time with her father, F.B., and her older brother at their father's apartment in Los Angeles. The rest of the time she lived with her paternal grandmother. F.B.'s apartment was located on the ground floor of the apartment building. Appellant's sister lived in an upstairs apartment, and appellant visited her often.

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

Sometimes appellant would go over to F.B.'s apartment. C.B. and appellant had greeted each other in the past.

**B. The Rape**

On March 11, 2014, around 9:00 p.m., appellant, F.B., and about five other men were at F.B.'s apartment, recording a rap song. C.B. was outside by herself in a "brick barbecue area" at the back of the apartment building. It was "pitch black" there. She was crying and thinking about her aunt, who was in jail.

Appellant walked past C.B. and threw out some trash. He asked her what was wrong, and she said she did not want to talk about it. Appellant asked her again what was wrong and C.B. started to walk away. Appellant then grabbed her arm and pulled her toward him. C.B. was wearing a shirt, tights and underwear. Appellant was standing behind her and pulled down her tights and underwear. She tried to pull her tights back up, but could not because appellant had his hand on her shoulder and was "forcing [her] back down so [she] could not come back up." Appellant's other hand was on her waist. C.B. was crying and told appellant to stop. He did not respond.

Appellant bent C.B. forward, then inserted his penis into her vagina "from behind." It "hurt[] badly." C.B. tried to stand up, but appellant was too strong. Appellant asked her if it hurt and if she wanted him to stop. She said, "Yes, stop," but appellant did not stop or otherwise respond. She smelled alcohol. She could not yell because she was sick and her throat was "really sore."

Using her foot, C.B. eventually "pushed off" of a brick and broke away from appellant. She pulled up her tights as she ran. She heard her father calling her name. She ran past her father into their apartment.

F.B. saw appellant "coming out the back" area of the apartment building. It looked like appellant had come from the same general area as C.B. Appellant went to his sister's apartment and returned to F.B.'s apartment about five or 10 minutes later.

Once inside the apartment, C.B. went "straight to the restroom." She saw blood in her urine, and felt pain in her vagina. Because she felt "nasty" and "scared," she took a shower and cried. When she came out of the bathroom, she saw appellant enter her father's apartment. Scared, she went into her father's bedroom, which was the closest room to the bathroom, closed the door, and turned off the lights. She threw the underwear she had been wearing into a "dirty clothes hamper" in her father's bedroom. C.B. shared this hamper with her father and her brother.

C.B. was crying and her father went into the bedroom and asked her what was wrong. She was too afraid to tell her father what had happened because appellant was in the apartment. Appellant and the others left the apartment around 3:00 a.m. After they left, C.B. went into her own bedroom and went to sleep.

**C. The Next Day**

On the following morning, C.B. was crying and her brother asked her what was wrong. She told him that someone had "touched" her. Her brother woke up their father and told him what C.B. had said. F.B. called 911. A recording of the call was played for the jury. C.B. can be heard in the background saying, "[T]he guy was in here!"

C.B.'s grandmother picked her up from her father's apartment. After the grandmother drove C.B. to the

grandmother's nearby house, she told C.B. to write down what had happened to her. When the police arrived, C.B. gave them what she had written, which the prosecutor read to the jury.

One of the responding officers, Los Angeles Police Department (LAPD) Officer Elva Coates, testified that C.B. appeared to have been crying; her eyes were red, she had "[k]ind of [a] runny nose," and she was "just very sad." Officer Coates interviewed C.B. in the presence of her mother, who had since arrived.

After the interview, Officer Coates drove C.B. and her mother to F.B.'s apartment building. Other officers brought appellant outside, and C.B. identified him from the police car. According to Officer Coates, "As soon as the officers brought [appellant] out . . . [C.B.] said something to the effect of, 'Oh, my God, that's him.' And she kind of like hid . . . behind our partition in the vehicle and . . . in her mom's lap. [¶] . . . [¶] She was definitely shaken up."

After appellant was arrested, C.B. went into her father's apartment and retrieved her underwear from the hamper. She gave the underwear to her mother, and her mother put the underwear in a bag and handed the bag to a police officer.

The police took C.B. to a hospital, where she underwent a sexual assault response team (SART) examination. The SART nurse did not observe any physical injuries, but testified that this finding did not negate sexual assault. The nurse collected swabs from C.B.'s vaginal area and cervix and did a vaginal lavage, which she described as "when you insert Q-tips inside the vagina and it has a saline inside and you squirt it inside and you collect it after."

The same day, a nurse practitioner conducted a SART examination on appellant.

**D. Forensic Evidence**

A DNA analyst with the LAPD Crime Lab analyzed the swabs from C.B.'s SART examination. No sperm was found. Male DNA was detected on the cervix swab and in the vaginal lavage. A DNA analyst at Bode Technology in Virginia performed additional "Y-STR" DNA testing on samples from C.B.'s cervix swab and vaginal lavage, and concluded that appellant could not be excluded as a donor of the "epithelial fraction of both the cervix swab and the vaginal lavage." Based on a statistical calculation, one "would expect to see [appellant's] Y-STR profile in approximately 0.155 percent of U.S. African-American males," or, put another way, 99.845 percent of U.S. African-American males "would be excluded or not have that Y-STR profile." The same Y-STR profiles are shared by paternal relatives.

A criminalist in the Serology DNA Unit of the LAPD Crime Lab found a mixture of a DNA profile on the swabs that had been collected from appellant's fingernails. Both appellant's and C.B.'s DNA profiles were included in the mixture. Based on a statistical calculation, "the mixture containing a profile from [appellant] and [C.B.] . . . is seven quintillion times more probable than a mixture containing [appellant] and someone chosen at random."

A screener for biological fluids with the Serology DNA Unit of the LAPD Crime Lab analyzed the underwear that C.B. had worn. The presence of the enzymes acid phosphatase and P-30 was observed on the "interior surface in the crotch area" of the underwear. Acid phosphatase and P-30 are present "at very high concentrations in semen [as] compared to other [bodily] fluids." On cross-examination, the screener confirmed that there are "no

identifying characteristics" of these enzymes that "would be able to tie it to an individual."

**Defense Case**

Appellant's sister testified that on the night of the assault, appellant and his girlfriend spent the night at her apartment, which was located across a common area and upstairs from F.B.'s apartment. She saw appellant leave her apartment to take out the trash. "[A] couple [of] seconds" later, she saw him at F.B.'s apartment. Appellant returned to her apartment at about 10:30 p.m. Appellant's girlfriend gave similar testimony.

Wayne Givehand (Givehand) had lived at the apartment building since 2011. He had a prior conviction for armed robbery. On the night of the assault, Givehand, appellant, and three other men were at F.B.'s apartment making a rap video. At some point, Givehand saw C.B. sitting at the back of the apartment building. She was with a Jamaican boy who was standing between her legs. According to Givehand, C.B. had a reputation at the apartment building for being dishonest.

Suzanna Ryan, a forensic DNA consultant, opined that it is possible for skin cells to be transferred under a person's fingernails "just through contacting an item." With regard to the Y-STR testing, defense counsel asked her whether the 0.155 percent figure "translate[s] into a proportion . . . like one in so many African-American males are expected to have that profile[.]" She answered in the affirmative, testifying that the probability is "one in 645."

## DISCUSSION

### I. Admission of Underwear Evidence

Appellant contends the trial court abused its discretion in allowing evidence of the acid phosphatase and P-30 enzymes

found in the crotch area of C.B.'s underwear (the underwear evidence). He argues the underwear evidence was inadmissible for two reasons: (1) there was a gap in the chain of custody and therefore the evidence lacked a proper foundation, and (2) the probative value of the evidence was substantially outweighed by its prejudicial effect under Evidence Code section 352. We disagree.

***A. Relevant Proceedings***

During her initial cross-examination, C.B. testified that she did not see her mother or grandmother hand to the police a bag containing her underwear. LAPD Officer Stephen Buehler, who responded to the house of C.B.'s grandmother, testified that while he was waiting outside the house during C.B.'s interview with Officer Coates, C.B.'s mother handed him a black plastic bag that she said contained the underwear C.B. had worn during the attack. Officer Buehler testified that the bag was secured in a police vehicle, and subsequently "transferred over to the nurse who conducted the rape kit and then she . . . package[d] it and provide[d] it back to [the police] all secure." The underwear was booked into evidence.

Prior to the prosecutor calling to the stand Albert Mendoza (Mendoza), the screener with the Serology DNA Unit of the LAPD Crime Lab who analyzed C.B.'s underwear, defense counsel objected: "[T]he chain of custody of the underwear was at issue before the police got it and those were handed to them in a bag by [C.B.'s] mother and I don't know who had contact with her underwear before Mendoza got it."

The prosecutor recalled C.B. to the stand. She testified that after she took her shower, she threw her underwear in the dirty clothes hamper in her father's bedroom. The next morning,

the police drove her and her mother from her grandmother's house to her father's apartment, where she retrieved the underwear from the clothes hamper. She gave the underwear to her mother. She could not recall whether the underwear was put in a bag at the apartment or her grandmother's house. She saw her mother hand the bag to the police.

On cross-examination, C.B. testified that since her prior testimony she had thought "really hard[]" about what happened with her underwear and how she and her mother got it.

After hearing argument from counsel, the trial court ruled that the underwear evidence was admissible, finding that the evidence of possible contamination went to the weight of the evidence and not its admission.

On cross-examination, Mendoza was asked whether the underwear being left overnight in a hamper with other clothing created "a risk of cell transfer contamination from other laundry?" He responded, "It possibly could." On redirect, Mendoza was asked how much contact he would expect the underwear to have "with the other articles of clothing in order to make that transference." He responded: "[I]n our lab generally to transfer it we wet a piece of paper and press it flat with heavy weights on top for about twenty minutes, fifteen[] minutes, thirty minutes in order for it to transfer but it's quite wet. [¶] If it was dry it would be very little transfer, if any." On recross-examination, Mendoza agreed that "if the underwear was wet or moist . . . the weight is not necessary for the transfer[.] [¶] It just helps the transfer[.]"

***B. Applicable Law***

With regard to chain of custody claims, our Supreme Court has explained: "In a chain of custody claim, '"[t]he burden on the

party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] 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. Left to such speculation the court must exclude the evidence. [Citations.] 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.] The trial court's exercise of discretion in admitting the evidence is reviewed on appeal for abuse of discretion." (*People v. Catlin* (2001) 26 Cal.4th 81, 134 (*Catlin*); see also *People v. Lucas* (2014) 60 Cal.4th 153, 285 ["any minor defects in the chain of custody go to its weight"].)

"'Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion, or consumption of time. [Citation.]' . . . 'A trial court's discretionary ruling under Evidence Code section 352 will not be disturbed on appeal absent an abuse of discretion.' [Citation.]" (*People v. Clark* (2016) 63 Cal.4th 522, 586.) "Under the abuse of discretion standard, 'a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.)

### *C. Analysis*

#### *1. Chain of Custody*

Appellant argues that while the prosecutor attempted to establish a chain of custody by recalling C.B. to testify about what she did with her underwear, her testimony "did not explain what happened to the underwear from the time she left [it] in the hamper at approximately 9:30 p.m. until it was handed over to an officer at some conflicting time the next day. This left a fatal gap in the chain of custody at a critical point." We disagree. The evidence showed that the clothes hamper in which C.B. put her underwear was located in her father's bedroom, and that she shared this hamper with only her father and her brother. When C.B. retrieved her underwear the next morning, it was still in the hamper where she had left it. We agree with the People that this clothes hamper was not the type of space where third parties would be expected to go. Moreover, the acid phosphatase and P-30 enzymes were found on the inside crotch area of C.B.'s underwear. As noted by the trial court, "[I]f the rape occurred[, C.B.] would be likely to have th[ese] substance[s] in the area in which [they were] found."

Appellant also argues that "[g]iven the fact [C.B.] shared the hamper with her father and brother, and Mendoza's testimony that the enzyme was from . . . an unidentified male, the court could not have been certain of the material's reliability." But as noted above, the requirement for admission is "reasonable certainty" (*Caitlin, supra*, 26 Cal.4th at p. 134), not absolute certainty. Where, as here, there is no more than the "barest speculation" of contamination, the trial court properly admitted the underwear evidence and "let what doubt remains go to its weight." (*Ibid.*)

### *2. Probative Value*

Appellant argues that the probative value of the evidence was "non-existent, while the prejudicial effect was enormous." Again, we disagree. The underwear evidence had probative value. As the trial court found, if the enzymes had been "found in the waistband or something like that that might be less probative but, certainly, the fact that it's in the [crotch] area that you would expect it to be if [C.B.] was, in fact, raped does have some significance in this case." While appellant characterizes this evidence as being "extremely inflammatory," it was no more inflammatory than the finding of appellant's Y-STR profile on C.B.'s cervix swabs and vaginal lavage, or the finding of C.B.'s DNA under appellant's fingernails.

We conclude the trial court did not abuse its discretion in admitting the underwear evidence.

## II. Third Strike Sentence

Appellant contends the trial court abused its discretion in imposing a third-strike sentence because he suffered his two prior strikes in the same case based on the same incident.

The record shows that appellant was convicted by plea in 2005 of two counts of robbery in Los Angeles Superior Court case number BA271286, with an enhancement for personal use of a deadly weapon. He was sentenced consecutively on both counts. In the instant case, the jury found true the allegations that appellant had two prior serious felony convictions within the meaning of the Three Strikes law and that the two robbery counts involved separate victims. At a hearing on appellant's motion to dismiss one of his prior strikes, defense counsel stated that appellant "entered into a store when he was twenty years old with a false gun, which is not the issue, but he had one

individual who walked into the back of the store. There was a second defendant who took another individual and walked him back to the store." The trial court noted that "you've got aiding and abetting conduct by [appellant] and you've got him with his own conduct." The court denied appellant's motion and imposed a third strike sentence.

Appellant argues that his sentence conflicts with the rationale of *People v. Vargas* (2014) 59 Cal.4th 635 (*Vargas*). In *Vargas*, our Supreme Court considered "whether two prior convictions arising out of a single act against a single victim can constitute two strikes under the Three Strikes law," and concluded "they cannot." (*Vargas*, *supra*, at p. 637.) The *Vargas* court stated that "[t]he typical third strike situation . . . involves a criminal offender who commits a qualifying felony after having been afforded two previous chances to reform his or her antisocial behavior, hence the law's descriptive baseball-related phrase, '"Three Strikes and You're Out."' [Citation.]" (*Id*. at p. 638.) The court noted, however, that "in a case in which an offender's two previous qualifying felony convictions were for crimes so closely connected in their commission that they were tried in the same proceeding, we held that such convictions can nevertheless constitute two separate strikes because the Three Strikes law does not require that prior convictions, to qualify as strikes, be brought and tried separately. [Citation.] Similarly, in a case in which the offender's previous two crimes could not be separately punished at the time they were adjudicated because they were committed during the same course of conduct (§ 654), we held such close factual and temporal connection did not prevent the trial court from later treating the two convictions as separate strikes when the accused reoffended." (*Vargas,* at p. 638.)

The *Vargas* court found that the case before it "present[ed] a more extreme situation: Defendant's two prior felony convictions—one for robbery and one for carjacking—were not only tried in the same proceeding and committed during the same course of criminal conduct, they were based on the same act, committed at the same time, against the same victim." (*Vargas, supra*, 59 Cal.App.4th at p. 638.) The *Vargas* court concluded that "this is one of the extraordinary cases . . . in which the nature and circumstances of defendant's prior strike convictions demonstrate the trial court was required to dismiss one of them because failure to do so would be inconsistent with the spirit of the Three Strikes law." (*Id.* at p. 649.)

Subsequently, in *People v. Rusconi* (2015) 236 Cal.App.4th 273 (*Rusconi*), review denied, the court noted that *Vargas* applied "in the unusual circumstance presented when a defendant's single act committed against a single victim gives rise to multiple felony convictions." (*Rusconi*, *supra*, at pp. 277–278.) Accordingly, the *Rusconi* court concluded that "the holding in *Vargas* does not extend to offenders . . . who have suffered multiple convictions growing out of a single act but who violently injure more than one victim." (*Id.* at p. 281.) *Rusconi* reasoned: "[T]he distinction between the culpability of criminals who injure one victim and the far greater culpability of criminals who injure more than one victim, and the latter's subjection to multiple punishments, was well settled long before adoption of the three strikes law in 1994. [Citation.] It is not reasonable to believe the authors of the three strikes law nonetheless intended that, under the new law, violent offenders who injure multiple victims should be treated like offenders who only injure one individual. Such a dramatic and lenient departure from the severe punishment the

law had already recognized the perpetrators of multivictim violence deserve would be at direct odds with the overall purpose of the three strikes law." (*Id.* at pp. 280–281.)

We likewise conclude that *Vargas* is inapplicable here, where appellant's prior robbery convictions involved more than one victim. Moreover, appellant's prior strike convictions were not based on a "single act." As the trial court noted, appellant was the direct perpetrator as to one of the robbery victims, and aided and abetted his codefendant as to the other victim. Thus, appellant's argument that *Rusconi* is flawed because it focused on the number of victims rather than the number of acts is unavailing.

**III. Correction of Abstract of Judgment**

Appellant contends, and the People agree, that the abstract of judgment should be corrected to reflect that appellant was sentenced under the Three Strikes law—by checking box 8 on the abstract—as orally pronounced by the trial court. "When an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, this court has the inherent power to correct such clerical error on appeal." (*People v. Jones* (2012) 54 Cal.4th 1, 89.)

## DISPOSITION

The abstract of judgment is modified to reflect that appellant was sentenced pursuant to the Three Strikes law. The clerk of the superior court is directed to forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.*
GOODMAN

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