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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDY ADAN HERNANDEZ,

Defendant and Appellant.

2d Crim. No. B233734
(Super. Ct. No. 2009006861)
(Ventura County)

A jury found Randy Adan Hernandez guilty of crimes against two women. As to Tammy T., the jury found Hernandez guilty of kidnapping to commit oral copulation or rape (Pen. Code, § 209, subd. (b)(1)), assault with intent to commit oral copulation (§ 220) and second degree robbery (§§ 211, 212.5, subd. (c)). As to Stacie L., the jury found Hernandez guilty of assault with intent to commit oral copulation (§ 220) and false imprisonment by violence (§ 236).¹

The court sentenced Hernandez to life with the possibility of parole for kidnapping Tammy T. The court also sentenced Hernandez to a determinate term of 11 years and 8 months as follows: As to Tammy T., four years for assault with intent to commit oral copulation, and three years for robbery; as to Stacie L.,

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

four years for assault with intent to commit oral copulation and eight months for false imprisonment. The court ordered all terms to run consecutively.

We affirm.

FACTS

Stacie L.

On August 3, 2007, Stacie went to the Pacific View mall in Ventura after work. She finished her shopping, and was on her way to the bus stop to go home. Hernandez drove up to Stacie and got her attention by shouting, "Blaze it," a greeting to someone with whom one has smoked marijuana. Stacie knew Hernandez, but never dated or socialized with him.

Hernandez and Stacie discussed smoking marijuana. Hernandez offered her a ride home. She accepted and got into his car. They stopped at a liquor store to buy some rolling paper. As they drove away from the liquor store, Hernandez put his hand on Stacie's knee. Stacie pushed his hand away, and told him to keep his hands to himself. Hernandez put his hand on her knee a second time and she pushed it away again. Hernandez became angry, sped up the car, and began driving away from the direction of Stacie's home.

Stacie protested that she needed to go home. Hernandez told her, "You're going to give me a blow job first." Stacie told him to let her out of the car. He refused, stating that she "was going to go down on him first." Stacie begged to be let out of the car. Hernandez replied, "[I]f [she] wasn't going to go down on him, then [she] was going to have sex with him." Hernandez locked the car door.

As Hernandez slowed the car at an intersection, Stacie tried to get out. This angered Hernandez. He put her in a headlock, grabbed her head with his thumbs under her chin and pulled her toward him. Stacie thought he was going to "rip [her] head off." Stacie fought back and was able to break his grasp. She managed to unlock the door. She grabbed the car keys and Hernandez's cell phone, and ran away from the car.

Hernandez pursued Stacie into the Topper Liquor Store. Stacie told the store clerk to call the police. Hernandez demanded that Stacie return his car keys. The clerk appeared confused. He told Stacie to give Hernandez back his keys. Stacie threw the keys at Hernandez and ran out the back door with his cell phone. The back door of the Topper Liquor Store leads to the parking lot of the Topper Motel.

George Martinez was driving by when he saw Stacie run into the liquor store pursued by Hernandez. Martinez became concerned so he drove into the motel parking lot where Stacie was standing. She was crying and looked terrified. Martinez asked if she needed help. She replied, "You're not going to hurt me are you?" Martinez assured Stacie that he had eight sisters and two daughters, and was only there to help. Stacie agreed to let Martinez drive her home. On the way to her home, Stacie told Martinez that Hernandez had choked her and tried to make her perform sexual acts on him.

Once home, Stacie told her mother what happened. They contacted the police. Ventura Police Officer Gilbert Pusen took Stacie's report. Pusen noticed redness and small abrasions on Stacie's neck. Stacie gave Pusen Hernandez's cell phone. From pictures stored in the cell phone's memory, Stacie was able to identify Hernandez and the license plate number on his car.

Pusen contacted Hernandez and told him that his cell phone had been turned in. He asked if Hernandez could explain how he lost it. Hernandez said he went into a liquor store and put down his cell phone while reading a magazine. He forgot to take it with him when he left the store. Hernandez denied being at the Pacific View Mall.

Pusen told Hernandez there were witnesses to the assault and a surveillance video. Hernandez admitted he lied and changed his story. He said he was at the Pacific View Mall when he saw a woman, whom he did not know, walking to the bus stop. He offered her a ride home and she accepted. On the way, she became demanding and abusive. He pulled over and told her to get out. She

got angry, grabbed his car keys and cell phone, and ran into a liquor store. He followed her into the store and demanded the return of his keys. She threw his keys at him and fled out the back door with his cell phone. He said he lied initially because his phone is insured and he did not want anyone to get in trouble.

Tammy T.

On February 7, 2009, at about 1:30 p.m., Tammy T. was waiting for a bus in Ventura. She had a cast on her foot. Hernandez stopped in front of the bus stop, got out of the car, opened the passenger door, and pushed Tammy into the car. She hit her head on the steering wheel, knocking her unconscious.

When Tammy awoke, she was leaning over the center console toward the driver's seat. Her pants had been pulled down and her sweater had been pulled up. Hernandez sat in the driver's seat with his erect penis exposed. He had one hand on the steering wheel and the other hand between Tammy's legs, rubbing up and down. Hernandez kept asking her, "Don't you want to have sex with a good looking guy." At one point, he told Tammy to "give him head."

Tammy pulled down her sweater and pulled up her pants. She fought with Hernandez. She told him to leave her alone and unlock the car door. She tried to get out of the passenger door and window, but both were locked.

Hernandez drove in and out of various driveways, apparently looking for a place to stop. He kept asking Tammy, "Are you sure you don't want to have sex with a good looking guy?" He stopped the car near a jungle gym. He took \$62 from Tammy's purse and her cigarettes.

Tammy threatened to hit Hernandez with the cast on her foot and break out the car window. Finally, Hernandez unlocked the passenger door. As Tammy turned to leave, he pulled down her pants from behind and pushed her out of the car. As Hernandez drove away, Tammy memorized the license number.

Tammy began walking. She claimed she walked about two miles. She stopped in front of a house where Keith O'Leary lived. O'Leary was returning home with his 12-year-old son. Tammy told O'Leary that she struggled with

someone who would not let her out of his car. She did not go into details because O'Leary's son was present. She showed O'Leary scratches on her face. O'Leary described Tammy's injuries as a red mark, almost like a rug burn.

Tammy borrowed a pen from O'Leary which she used to write down Hernandez's license number. O'Leary gave her money for the bus, and she walked away.

Tammy took the bus home and told her boyfriend what happened. Her boyfriend called for assistance. Paramedics took her to the hospital where she was treated and released.

Tammy spoke to the police at the hospital. She gave them details of the incident and provided Hernandez's license number. She told the police Hernandez had band aids on his face. A police officer saw Hernandez driving his car in a parking structure at the Pacific View Mall. He noticed Hernandez had band aids on his face.

Uncharged Conduct

On January 22, 2009, Brandi M. was walking on her way to work with her 12-year-old daughter. Her daughter was on her way to school. Hernandez drove up to her and asked what she was doing, where she was going, and what time she got off work. Brandi had seen Hernandez before, and he asked the same questions.

Brandi noticed Hernandez looking at her daughter. She brought her daughter into work with her and waited for Hernandez to leave.

When Brandi's daughter could not wait any longer, she left by herself. She returned soon thereafter, and told Brandi that Hernandez was in the parking lot and wanted to talk to her.

Brandi walked out into the parking lot with her daughter. Hernandez asked Brandi to "Come party." Brandi was angry and told him, "No." She continued to walk with her daughter. Hernandez drove up again. Brandi flagged

down a passing police officer and Hernandez left. The officer told Brandi that she did not believe a crime had been committed.

Defense

Dr. Eric Moll is an emergency room physician who examined Tammy. He did not see any signs of head trauma and a CAT Scan revealed none. He testified, however, that a person can suffer head trauma without there being any objective evidence that it occurred. Dr. Moll also testified he doubted Tammy walked two miles in her foot cast.

DISCUSSION

I

Hernandez contends the trial court erred in admitting evidence of noncriminal conduct.

Evidence Code section 1101, subdivision (a) makes evidence of a person's character inadmissible when offered to prove his conduct on a specified occasion. Subdivision (b) of the section, however, allows evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact, such as motive, intent or identity, other than his disposition to commit such an act.

Here the trial court found the evidence relevant to show identity, intent and common plan or scheme. The evidence is at least relevant to show identity. To prove identity, the charged crime and the uncharged acts must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.)

Hernandez's approach to Brandi was quite similar to his approach to Stacie. In both instances, he drove up to a woman on foot and enticed or attempted to entice her into his car. In the case of Stacie, he talked about marijuana. In the case of Brandi, he asked her to "Come party."

It is true, the evidence was that he simply forced Tammy into his car. But the evidence is still relevant to the crimes charged in which Stacie was the victim.

Nor did the trial court abuse its discretion under Evidence Code section 352. That statute authorizes the trial court to exclude evidence where its probative value is outweighed by a substantial danger of undue prejudice. (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 404-405.)

Here the trial court found the danger of undue prejudice was minimal. Hernandez's encounter with Brandi was not criminal. Although Hernandez's behavior with Brandi was certainly boorish, it paled in comparison to the crimes with which he was charged.

Hernandez claims for the first time on appeal that undue prejudice lies in Brandi's testimony that he was looking at her daughter and that he wanted her daughter to get into his car with her. Hernandez has forfeited the argument for failure to object. (*People v. Partida* (2005) 37 Cal.4th 428, 431.)

Moreover, all of Hernandez's remarks were directed at Brandi, not her daughter. In addition, Brandi admitted on cross-examination that she did not tell the police Hernandez wanted her daughter to get into his car with her.

In any event, if the trial court erred in admitting the evidence, the error was not prejudicial. The evidence against Hernandez was overwhelming. Stacie and Tammy essentially corroborated each other's testimony. They both described very similar treatment by Hernandez once they got in his car. There was no evidence that either woman knew the other.

Moreover, the trial court gave a limiting instruction. It told the jury not to conclude from the evidence that the defendant has a bad character, and that the evidence was admitted only to show identity, intent, plan or scheme. (CALCRIM No. 375.) We presume the jurors followed the instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 622.)

II

Hernandez contends the imposition of consecutive sentences for kidnapping and assault of Tammy violated section 654. He also contends the imposition of consecutive sentences for the false imprisonment and assault of Stacie violate section 654.

Section 654 prohibits multiple punishment for a single act or omission. Although a single act may give rise to multiple verdicts of guilty on multiple counts, the trial court may impose sentence only on the count carrying the highest punishment. (*People v. Lui* (1996) 46 Cal.App.4th 1119, 1135.) Hernandez points out that section 654 also applies to multiple acts committed during an indivisible course of conduct with a single objective. (Citing *Neil v. State of California* (1960) 55 Cal.2d 11, 19.)

Hernandez argues Tammy's kidnapping and assault were committed with the single objective of committing a sexual offense. He similarly argues that Stacie's false imprisonment and assault were committed with the single objective of committing a sexual offense. Thus Hernandez concludes section 654 applies.

But the trial court sentenced Hernandez under section 667.6, subdivision (c). That subdivision provides in part: "[A] full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion. A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e)." Subdivision (e)(9) of the section lists assault with intent to commit a sexual offense in violation of section 220. Section 220 includes assault with intent to commit rape and oral copulation.

A sentence imposed under 667.6, subdivision (c) is not subject to the limitations of section 654. (*People v. Hicks* (1993) 6 Cal.4th 784, 795-797.) Thus, the trial court was authorized to impose full consecutive sentences for the kidnapping and assault and the false imprisonment and assault counts.

III

Hernandez contends the seven years to life sentence the court imposed for kidnapping is unauthorized.

At the oral pronouncement of sentence, the trial court stated the sentence on the kidnapping count as "seven-years-to-life." Hernandez points out the only authorized sentence is life with the possibility of parole. (§ 209, subd. (b).) The People concede as much, but point out the abstract of judgment correctly states the sentence as life with the possibility of parole. Thus, there is nothing to correct.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Charles W. Campbell, Judge
Superior Court County of Ventura

Linda C. Rush, 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, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, Mark E. Weber, Deputy Attorney General, for Plaintiff and Respondent.