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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAMIEN WASHINGTON, Defendant and Appellant.	B233370 (Los Angeles County Super. Ct. No. BA379157)

THE COURT:*

A jury convicted appellant Jamien Washington of forcible rape in violation of Penal Code section 261, subdivision (a)(2)[1]. The trial court found true the allegation that appellant had suffered two prior convictions of serious or violent felonies within the meaning of sections 667, subdivisions (e) through (i), 1170.12, subdivisions (a) through (d), and 667, subdivision (a)(1). The trial court found appellant had suffered three prior prison terms within the meaning of section 667.5, subdivision (b).

After denying appellant's *Romero* motion[2], the trial court sentenced appellant to a total term of 35 years to life. The sentence consisted of 25 years to life for the rape

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* BOREN, P. J., DOI TODD, J., ASHMANN-GERST, J.

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

2 *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

conviction under the Three Strikes Law and five years each for the two prior serious felony convictions.

We appointed counsel to represent appellant on this appeal. After examination of the record, counsel filed an "Opening Brief" containing an acknowledgment that she had been unable to find any arguable issues.

At appellant's trial, Charlotte H. testified that, on June 22, 2002, she was a post-graduate student at the University of Southern California (USC). Before beginning her university education, she had worked as a legal prostitute in Nevada. On the day in question, she went to the computer lab in Waite Phillips Hall to check her email. Because it was summer, there were no classes in the building and few people. Charlotte realized she needed to use the restroom and decided to use the one on the fourth floor where she normally had her classes, because she would be more comfortable. As she was using one of the stalls, she heard the restroom door open. She then saw two men's shoes showing through the opening from the adjacent stall, facing in her direction. There was complete silence for approximately five minutes. The person in the next stall left the stall, and Charlotte decided to "face the music." When she opened the door of her stall, appellant was standing outside.

Appellant told Charlotte to give him all her money or he would kill her. Appellant then rifled through Charlotte's belongings. She tried to leave, but appellant was in front of her, and the space was very narrow. He kept putting his hands around her neck and threatening to kill her. He put his hands inside her bra and asked if she had any money there. He put his hands down her pants and his finger in her vagina. He told her to take off her clothing, and he also undressed. Every time she tried to leave, appellant would put his hands on her neck and say he would kill her. Appellant had Charlotte lie on the floor, and he began to penetrate her. Appellant was not lubricated, and Charlotte "reverted back to [her] work habits" and told him to use some water. She tried to appear compliant so that she would not be killed. Charlotte began to manipulate appellant and pretended to moan so that he would finish faster, and this irritated appellant.

After appellant finished, he told Charlotte to go back in the stall. She heard appellant put his clothing back on. She heard the bathroom doors open and close and the hallway exit door close. She waited a short time and put on her pants and shirt and ran down to the computer lab. She told personnel to call campus security because she had been raped. She was later interviewed by the Los Angeles Police Department (LAPD) and underwent a sexual assault examination.

Detective Michael Zolezzi was assigned Charlotte's case when he worked the cold case special section. In 2009, he learned that a cold hit had identified the DNA obtained in Charlotte's sexual assault examination as appellant's. A forensic DNA analyst from Orchid Cellmark testified at appellant's trial that she tested the vaginal swabs taken from Charlotte and obtained female and male DNA profiles, which were reported to the LAPD. The female profile matched the blood sample from Charlotte. USC police arrested appellant, and appellant's saliva was obtained for DNA analysis. An LAPD criminalist testified that she compared appellant's and the female DNA profile to the profiles obtained by Orchid Cellmark. Appellant's DNA profile matched that of the male profile from Charlotte's rape kit, as analyzed by Orchid Cellmark.

In 2009, Detective Zolezzi showed Charlotte a photographic lineup, and she selected appellant's photograph as that of the rapist. Charlotte also identified appellant at trial.

Heather Skidmore testified that she was attending USC on November 16, 1998. She was studying outside while sitting on a step when she was approached by an individual who asked her for the time. As she looked at her watch, he lifted up his shirt to show her a gun in his pants. He said, "Look, I have a gun. Give me your wallet." Skidmore got up and ran into her classroom building. Campus security and the police were called. The police caught the person, and Skidmore identified him in a field showup. She identified appellant as this person at trial. She also saw him in court when she was subpoenaed to testify against him, although she did not have the opportunity to do so. She later learned appellant had shown her a replica gun.

Appellant testified that in 2002 he lived 10 to 15 blocks from the USC campus. He went to the campus from time to time to play basketball. On June 22, 2002, he went across campus to use the restroom after the game. He crossed paths with Charlotte, and they greeted each other. They got on the elevator to go to the fourth floor, and she asked him to go with her. She said he was handsome. She told him to go in the restroom with her, and they both used the facilities. When they came out, "it got kind of hot and heated in there." She started touching appellant, and he did the same to her. They undressed, and she told him to use some water on his penis. They had sex for 20 to 30 minutes. When it was over, he left. He believed they exchanged telephone numbers. He did not rape Charlotte. Appellant acknowledged that he entered into a plea bargain on the charge of attempted robbery of Skidmore but said he did not ask her for anything.

On November 30, 2011, we advised appellant that he had 30 days within which to personally submit any contentions or issues that he wished us to consider. On December 15, 2011, appellant filed a brief in which he appeals on the grounds that: (1) the statute of limitations bars his conviction for violating section 261; (2) the People failed to prove that the sexual intercourse was not consensual and that it was accomplished by force, violence, duress, menace, or fear; (3) appellant did not receive a fair trial because a videotape of the computer lab was destroyed, and it would have shown the victim was not in the lab when she said she was, proving appellant's innocence; (4) appellant did not receive a fair trial because the victim initially said she did not fear for her life but said on the stand that she did; and (5) the testimony of the victim from his prior conviction was highly prejudicial and not probative in this rape case when he pleaded guilty to attempted robbery in the prior case. Appellant also requests a new attorney be appointed to represent him on appeal.

Appellant's first issue on appeal is without merit. Under section 801.1, subdivision (b), the statute of limitations for any crime listed in section 290, subdivision (c) (of which rape is one) is 10 years. (§ 801.1, subd. (b), 290, subd. (c).) The victim

was raped on June 22, 2002, and appellant was arraigned on January 12, 2011, well within the statutory limitation period.

We also reject appellant's second and fourth issues. The evidence established that appellant accomplished the rape by means of fear, and that it was not consensual. The victim acknowledged that she told police in 2002 that she never feared for her life. She explained at trial that she had said this "in the sense that [she] kept [herself] calm throughout and kept it from escalating." Her attacker was soft-spoken and not so aggressive, but she felt that if she lost control, his soft-spoken demeanor would change to aggression, and he would kill her. The victim testified that, during the commission of the offense, "[t]he whole time I feared for my life . . . the whole thing was terrifying, somebody coming into the bathroom, a man coming in and I can't escape. I mean, I was in fear for my life the entire time." She added that she did not know why she would have said the opposite, but she remembered saying it.

It is well settled that, unless a statutory corroboration requirement applies, the testimony of a single witness is sufficient to prove a fact. (See Evid. Code, § 411 ["Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"]; *People v. Young* (2005) 34 Cal.4th 1149, 1181 [testimony of a single witness, unless physically impossible or inherently improbable, is sufficient to support a conviction]; *People v. Hampton* (1999) 73 Cal.App.4th 710, 722.) It is the exclusive function of the trier of fact to assess the credibility of witnesses and draw reasonable inferences from the evidence. (*People v. Young*, *supra*, at p. 1181.) The jury clearly believed Charlotte's testimony that she was afraid for her life during the entire incident and accepted her explanation for her previous statement.

Appellant's third issue has no merit. In *California v. Trombetta* (1984) 467 U.S. 479, 488 (*Trombetta*), the United States Supreme Court held that the prosecution's duty to preserve evidence is limited to matters "that might be expected to play a significant role in the suspect's defense." (Fn. omitted; *People v. Beeler* (1995) 9 Cal.4th 953, 976.)

Detective Zolezzi stated on cross-examination that he met with USC personnel and discussed with them whether there was a videotape from the computer lab that might have shown that Charlotte did in fact go to the lab that day. Detective Zolezzi discovered that there had been a video in 2002 and that a detective had reviewed it. There was, however, no trace of that video ever being booked into evidence. He agreed that "most likely" someone was negligent in not doing so.

We conclude that, in addition to such a video being of little exculpatory value in relation to the rape, there was no evidence of bad faith in the failure to preserve the videotape. Although the state's good or bad faith in failing to preserve evidence is ordinarily irrelevant to assessing whether its conduct amounted to a due process violation (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57 (*Youngblood*)), it is of great significance when the challenge to the state's conduct is based on the failure to preserve potentially exculpatory evidence—that is, "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Ibid*.) In such a case, """"unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."""" (*People v. Catlin* (2001 26 Cal.4th 81, 160, quoting *Youngblood*, at p. 58; see also *People v. Zapien* (1993) 4 Cal.4th 929, 964.) Negligent destruction of (or failure to preserve) potentially exculpatory evidence, without evidence of bad faith, will not give rise to a due process violation. (*Youngblood*, at p. 58.)

Finally, appellant argues that Skidmore's testimony was highly prejudicial and not probative in this rape case when the offense against Skidmore was attempted robbery. We disagree. Before trial, the People moved to admit evidence of two prior convictions—one from 1996, and the Skidmore incident. The trial court ruled that the 1996 incident was too remote, but found the evidence of the attempted robbery more probative than prejudicial. The fact that the incident occurred on campus bolstered its probative value. Since motive and intent were clearly at issue, the People were entitled to show that the defendant had criminal intent when he approached Charlotte.

Evidence Code section 1101, subdivision (b) provides, "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than his or her disposition to commit such an act." The trial court may exclude or admit this type of evidence pursuant to Evidence Code section 352 which provides: "The 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 trial court's determination will not be disturbed on appeal absent a clear showing of an abuse of discretion. [Citations.]" (*People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1610.) As the trial court indicated in making its ruling, "[t]he prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial."'" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Here, the evidence of appellant's conduct with Skidmore was not more inflammatory than that of the offense he committed on Charlotte, and the evidence was highly probative given the circumstances of this case.

We have examined the entire record, and we are satisfied that appellant's attorney has fully complied with her responsibilities and that no arguable issues exist. (*People v. Wende* (1979) 25 Cal.3d 436, 441.) Appellant's request for a new attorney on appeal is denied.

The judgment is affirmed.

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