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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL ALEXANDER VASQUEZ,

Defendant and Appellant.

B289726

(Los Angeles County
Super. Ct. No. BA451934)

APPEAL from a judgment of the Superior Court for Los Angeles County, Mildred Escobedo, Judge. Affirmed as modified.

Kevin D. Sheehy, 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, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found that defendant Samuel Alexander Vasquez kidnapped and raped a 14-year-old girl, a 16-year-old girl, and a 25-year-old pregnant woman. He was convicted of two counts of forcible rape of a child over the age of 14 (Pen. Code,¹ § 261, subd. (a)(2)), one count of forcible oral copulation of a minor over the age of 14 (§ 288a, subd. (c)(2)(C)), one count of forcible rape (§ 261, subd. (a)(2)), two counts of kidnapping to commit rape (§ 209, subd. (b)(1)), and one count of assault with a deadly weapon (§ 245, subd. (a)(1)). The jury also found to be true special allegations under section 12022.3, subdivision (b) and section 667.61, subdivisions (a), (c), (d)(2), (e)(1), (e)(3), and (e)(4).² The trial court sentenced defendant to three terms of life without the possibility of parole plus five years on three of the counts involving the minors, plus a term of 25 years to life plus 5 years on the rape count involving the adult victim.

Defendant raises two issues on appeal.

¹ Further undesignated statutory references are to the Penal Code.

² Section 12022.3, subdivision (b) provides for a sentence enhancement where the defendant is armed with a deadly weapon during the commission of certain offenses, including forcible rape or forcible oral copulation. Section 667.61 provides for increased sentences for persons who are convicted of certain offenses enumerated in subdivision (c) (such as forcible rape or oral copulation of a minor over the age of 14) when certain circumstances are present, such as where the defendant (1) kidnapped the victim and the movement of the victim substantially increased the risk of harm to the victim (§ 667.61, subd. (d)(2)); (2) kidnapped the victim in violation of section 209 (§ 667.61, subd. (e)(1)); (3) personally used a dangerous or deadly weapon in the commission of the offense (§ 667.61, subd. (e)(3)); or (4) has been convicted in the present case of committing one or more of the enumerated offenses against more than one victim (§ 667.61, subd. (e)(4)).

The first issue involves the adult victim, who refused to come to court to testify despite having been served with a trial subpoena. The trial court found that the adult victim was unavailable and, over the defendant's objection, the court allowed the victim's preliminary hearing testimony to be read to the jury. Defendant does not challenge that ruling on appeal. However, he contends the trial court committed reversible error by refusing defense counsel's request to instruct the jury that the adult victim refused to come into court and testify. We conclude there was no error.

The second issue involves an erroneously imposed (and stayed) parole revocation fine. As defendant contends, and the Attorney General concedes, imposition of a parole revocation fine is improper because defendant's sentence includes a term of life without the possibility of parole and no portion of the sentence constitutes a determinate sentence. Accordingly, we order that that fine be stricken and affirm the judgment as so modified.

BACKGROUND

Because the primary issue on appeal is a narrow one, our summary of the facts will be brief.

A. *The Crimes*

Sometime after 10:00 p.m. on September 27, 2016, 16-year-old Crystal S. got off a bus at Florence Avenue and Figueroa Street and started walking down Figueroa toward her house. She was wearing a backpack. Defendant, who was driving down Figueroa, asked if she

needed a ride. Crystal said “no” and kept walking. Defendant drove a little further, turned onto a street in front of her, and stopped the car. He came halfway out of the car, holding a knife, and told Crystal to get into the car. Frightened of what he would do if she did not comply, Crystal got into the car.

Defendant drove to several locations until he found a place where there were not many cars or lights. He stopped there, gave Crystal some pills and told her to move to the back seat and remove her clothes. Once Crystal removed her clothes, defendant got into the backseat, pointed his knife at her, and forced her to orally copulate him. After five or six minutes, defendant told her to lie on her back; he then got on top of her and had vaginal sex. When he was done, Crystal put her clothes back on, and defendant dropped her off near her house.³ Crystal called 911 and reported what had happened. A forensic nurse performed a sexual assault examination of Crystal, and collected samples from her vaginal areas; the DNA from those samples matched defendant’s DNA.

A few weeks later, at around 11:00 p.m. on October 18, 2016, Denice B. (who was 25 years old) left a friend’s house and was walking near Figueroa Street and 90th Street, hoping that someone would offer

³ While defendant was driving Crystal back toward her house, he asked her whether she wanted to be his girlfriend or his whore; she was scared, and said she would be his girlfriend. He told Crystal not to tell anyone, and asked for her phone number so he could phone her. Crystal gave her correct number to him because she was afraid he was going to call her right there to see if she was lying. Defendant called and texted Crystal several times in October. Crystal showed the text messages to the police.

her a ride home. Defendant drove up and stopped, and Denice asked him for a ride. He agreed, and she got into the front passenger seat of his car. Defendant drove down the street to Vermont and 90th Street, then stopped and pulled out a knife. Defendant told Denice to get into the back seat, and either he or she took off all of her clothes. Denice was lying on the back seat, face down, and defendant got on top of her and put his penis in her vagina.⁴ When he was done, he said he could not do anything with her, and let her go.⁵ Denice got out of the car, put her clothes back on and ran to Manchester and Vermont, where she called 911. In that 911 call, which was played for the jury, Denice told the operator that she had been robbed of some money and raped at knifepoint. Denice was examined by a forensic nurse, who collected samples from her vagina; the DNA from those samples matched defendant's DNA.

At around 4:00 p.m. on October 28, 2016, 14-year-old Clarissa S. was walking home from school on Flower Street at around 70th Street when defendant grabbed her from behind and put her in the front seat of his car. Defendant then drove the car to a different location, pulled her into the back seat, and told her to take off her clothes. He had a syringe and was trying to put it in Clarissa's arm, but she pulled back and would not let him; he told her, "Fine, then let it hurt then." He laid

⁴ At some point Denice, who was two or three months pregnant, told defendant she was pregnant; she did not remember if defendant said anything in response.

⁵ Denice testified that while they were in the back seat, defendant took money from her.

Clarissa down on the seat, on her back, and defendant got on top of her and put his penis in her vagina. After he finished, Clarissa sat up, and defendant took out a knife, put it against her neck, and told her that he knew where she lived and knew everything about her. When defendant moved a little, Clarissa was able to open the car door and roll out of the car onto the sidewalk; defendant jumped into the front seat and started driving.

Two people who were driving nearby saw Clarissa, mostly naked, on the sidewalk crying and calling for help. Both drivers stopped to help her; one of them called 911. Clarissa was taken to the hospital, where she was examined by a forensic nurse, who collected samples from Clarissa's neck, breasts, and vaginal area; DNA from the sample collected from Clarissa's right breast matched defendant's DNA.

B. *The Trial, Verdict, and Sentence*

Both Crystal and Clarissa testified at trial; Denice did not. Although the District Attorney's office had served Denice with a subpoena to appear at trial, Denice refused to appear. The trial court declared her unavailable, and her testimony from the preliminary hearing was read to the jury.

Defendant testified in his defense. He admitted that he had sex with Crystal, Clarissa, and Denice, but testified that the sex was consensual. He said that all three approached him and agreed to have sex with him for money, although he did not actually pay any of them. He admitted he had a knife, which he used for work, but he denied using it to threaten anyone. Finally, he testified that when he was

interviewed by the police he denied picking up any young woman for sex because he was told that one of the women was 14 years old and he was afraid he was going to get a long prison sentence.⁶

The jury found defendant guilty of kidnapping to commit rape of Crystal (count 1); forcible rape of a child over 14 years, i.e., Crystal (count 2); forcible oral copulation of a minor over 14 years, i.e., Crystal (count 3); kidnapping to commit rape of Clarissa (count 4); forcible rape of a child over 14, i.e., Clarissa (count 5); assault with a deadly weapon on Clarissa (count 6); and forcible rape of Denice (count 14). The jury also found to be true the following allegations: that defendant was armed with a deadly weapon in the commission of the offense within the meaning of section 12022.3, subdivision (b) (counts 1, 2, 3, 4, 5); that defendant kidnapped the victims and the movement of the victims substantially increased the risk of harm to the victims within the meaning of section 667.61, subdivisions (a) and (d)(2) (counts 2, 3, 5); that defendant kidnapped the victims in the commission of the rapes within the meaning of section 667.61, subdivisions (a) and (e)(1) (counts 2, 3, 5, 14); that defendant personally used a dangerous weapon in the commission of the rapes within the meaning of section 667.61, subdivisions (a) and (e)(3) (counts 2, 3, 5, 14); that defendant committed an offense against more than one victim within the meaning of section 667.61, subdivisions (a) and (e)(4) (counts 2, 5, 14).

The trial court sentenced defendant as follows. On count 1, the court imposed life imprisonment plus five years under section 12022.3,

⁶ A videotape of defendant's interview with the police was played for the jury.

subdivision (b), but stayed the sentence under section 654. On count 2, the court sentenced defendant to life without the possibility of parole under section 667.61, subdivision (l), plus 5 years under section 12022.3, subdivision (b). On count 3, the court imposed an additional term of life without the possibility of parole under section 667.61, subdivision (l), plus 5 years under section 12022.3, subdivision (b). On count 4, the court imposed a term of life imprisonment plus 5 years under section 12022.3, subdivision (b); that sentence was stayed under section 654. On count 5, the court imposed a third term of life without the possibility of parole under section 667.61, subdivision (l), plus 5 years under section 12022.3, subdivision (b). On count 6, the court imposed the upper term of 4 years, stayed under section 654. On count 14, the court imposed a 25-years-to-life sentence under section 667.61, subdivision (a), plus an additional 5 years under section 12022.3, subdivision (b). In addition, the court imposed various fines and assessments, including a \$300 parole revocation fine.

Defendant timely filed a notice of appeal from the judgment.

DISCUSSION

A. Instruction Regarding Denice's Refusal to Testify at Trial

Denice testified at the preliminary hearing, at which defendant was represented by counsel. Defense counsel conducted an extensive cross-examination. At trial, the prosecutor informed the court that Denice was refusing to come to court to testify, even though the prosecutor's office had "resubpoenaed her." The prosecutor stated that she had spoken with Denice several times over the telephone, and every

time Denice refused to come to court. The prosecutor also had a statement that Denice had written on the back of the subpoena; Denice wrote that she did not want to appear because she did not “want to talk about those things that man has done to me,” and that she was “trying to forget and get those memories out of my mind.” The prosecutor indicated that, because the court could not force a sexual assault victim to appear and testify, she planned to have someone from her office read Denice’s preliminary hearing testimony.

Defendant’s attorney objected. He noted that he was not the attorney at the preliminary hearing, and argued that there are differences between trial testimony and preliminary hearing testimony, and that allowing the preliminary hearing testimony to be read to the jury would deny defendant his confrontation rights.

The court delayed ruling on whether to allow Denice’s preliminary hearing testimony to be read to the jury, and asked the prosecutor for a further showing that Denice was unavailable so that her prior testimony could be admitted. Defense counsel then asked, “And in the event that the People satisfy the burden that the court puts on them to introduce a written statement, will the court make an instruction to the jury that the victim has refused to come in and testify?” The court responded that it would not, and instead would “simply say she’s unavailable[,] because the issue here is not her refusal, it is availability.”

Later, after reviewing the case law, the trial court concluded that the prosecutor had made an adequate showing to declare Denice unavailable, and ruled that her preliminary hearing testimony could be

read to the jury. Denice’s entire testimony was then read to the jury.⁷ At the beginning of the reading, the court told the jury, “Ladies and Gentlemen, Denice B. is not present. So they are doing a role play for you so that you can hear the testimony that is being presented on her behalf.” The prosecutor interjected, saying, “And this was sworn testimony.” The court then reiterated, “Sworn testimony.” At the end of the trial, the court included the following instruction in the jury instructions: “The testimony that Deni[c]e B has given under oath was read to you because she is not available. You must evaluate this testimony by the same standards that you apply to a witness who testified here in court.”

On appeal, defendant contends the trial court erred by not instructing the jury that Denice refused to appear at trial despite having been properly served with a trial subpoena. We find no error.

Defendant argues that a trial court has “inherent authority” to instruct the jury on an uncontested fact, and that Denice’s refusal to come to court was an uncontested fact. (Citing, among other cases, *People v. Hicks* (2017) 4 Cal.5th 203, 212.) He is correct that the court has such authority. But the court is not *required* to give such an instruction. (*Ibid.*) Instead, the trial court’s duty is to “instruct on

⁷ The trial court initially ruled that testimony regarding her prior arrests for solicitation was not admissible because defendant failed to timely file a motion to introduce prior sexual conduct evidence under Evidence Code section 782. After the prosecutor introduced Denice’s testimony with her testimony regarding her prior sexual conduct redacted, the court reconsidered its ruling and allowed defense counsel to read the previously redacted testimony to the jury.

general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.)

Defendant asserts that an instruction that Denice refused to comply with a subpoena and testify was necessary for the jury's understanding of the case because her refusal was "a *highly material* fact bearing directly on Denice B.'s bias or interest in the outcome of the trial, and on the lack of reliability or credibility of her preliminary hearing testimony." He fails to explain, however, how the fact that Denice refused to comply with the trial subpoena because she was "trying to forget" what defendant had done to her and did not "want to talk about those things" had any bearing on her alleged bias, interest in the outcome of the trial, reliability, or credibility. In any event, Denice's preliminary hearing testimony itself made clear that Denice did not want to talk about what defendant did and that she was trying to forget it. Her answers to the prosecutor's questions were short, and details had to be coaxed out of her. For example, when she was asked what happened when she was looking for a ride on the night of the incident, she responded, "I don't really want to talk about it. I just got in a car. A knife was put. I got raped." She also repeatedly testified that she did not remember when asked about some of the details of what happened. Thus, the instruction defendant requested was unnecessary for the jury's understanding of the case.

We note that defendant also asserts in his appellant's opening brief that the trial court's failure to give his requested instruction

deprived him of his right to due process and his constitutional right of confrontation. Neither argument has merit.

Defendant argues that his right to due process was violated because the prosecution was allowed to place Denice's preliminary hearing testimony before the jury with no explanation for her absence at trial, which left the jury "with a neutral, uncorrected, and *materially false impression* that Denice B.'s absence from the courtroom had nothing to do with her deliberately refusing to honor a subpoena and appear in court, or with her deliberately avoiding the courtroom scrutiny of the jury and the rigors of confrontation and cross-examination by defense counsel." He bases this argument on *Alcora v. Texas* (1957) 355 U.S. 28 (*Alcora*), in which the Supreme Court reversed a judgment in a murder case because a key witness's testimony left a false impression that affected the jury's ability to properly assess his credibility.

Alcora bears no resemblance to this case. In *Alcora*, the defendant admitted he killed his wife, but claimed it was in the heat of passion after he saw her kissing another man, whose name was Castilleja. (*Alcora, supra*, 355 U.S. at pp. 28-29.) The prosecution presented the testimony of Castilleja, who witnessed the killing. Castilleja testified that he and the victim had nothing more than a causal friendship. (*Id.* at p. 29.) Although the prosecutor knew that, in fact, Castilleja and the victim had been having a sexual relationship, he did nothing to correct the false testimony. (*Id.* at pp. 30-31.) The Supreme Court held the defendant was not accorded due process because Castilleja's testimony,

which was elicited by the prosecutor knowing it was false, gave the jury a false impression of the facts. (*Id.* at pp. 31-32.) In the instant case, there is no suggestion that the jury was given false information; as a matter of law and fact, Denice was unavailable to testify at trial, which is exactly what the jury was told. (See *People v. Cogswell* (2010) 48 Cal.4th 467, 479 [because sexual assault victim who refused to appear and testify at trial despite having been served with a subpoena could not be held in contempt to enforce the subpoena, the court properly found she was unavailable].)

Defendant's right of confrontation argument is similarly unsupported by the law he cites. He contends that the trial court's failure to instruct that Denice refused to appear at trial "deprived [him] of his Sixth Amendment right of confrontation—to show a *prototypical form of bias* on the part of the witness,' and thereby '*to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.*'" (Quoting *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680.) But unlike in *Van Arsdall*, where the trial court refused to allow defense counsel to cross-examine a prosecution witness about the dismissal of a criminal charge against him after he agreed to speak with the prosecutor about the murder for which defendant was being tried (*id.* at p. 676), there was no restriction on defendant's cross-examination of Denice at the preliminary hearing, and the entire cross-examination was read to the jury.⁸ In any event, it

⁸ In his appellant's opening brief, defendant noted that "the defense was trying to persuade the jury that Denice B. was an experienced prostitute with prior arrests for plying her trade, who had been conned by [defendant] into

is difficult to discern how the trial court's *failure to instruct that Denice refused to appear at trial* could possibly violate defendant's constitutional right of confrontation.

B. *Imposition of Parole Revocation Fine*

As noted, when sentencing defendant, the trial court imposed and stayed a \$300 parole revocation fine. Defendant contends this fine is unauthorized under section 1202.45 because he received a sentence that included a term of life without the possibility of parole. (Citing *People v. Oganessian* (1999) 70 Cal.App.4th 1178, 1181-1186.) The Attorney General agrees that the fine is unauthorized because no portion of defendant's sentence constitutes a determinate sentence. (Citing *Oganessian, supra*, 70 Cal.App.4th at pp. 1183-1186 and *People v. Brasure* (2008) 42 Cal.4th 1037, 1075.) We agree, and order that the parole revocation fine be stricken.

having consensual commercial sex (without the use of force, fear, or a knife) that went unpaid by him.” The implication is that he was hampered in presenting this defense by his inability to cross-examine Denice at trial. But in Denice's cross-examination at the preliminary hearing, defense counsel challenged Denice's account of the events in such a way as to imply that she had solicited sex from defendant. In fact, counsel ended his cross-examination by asking Denice how many times she had been arrested for solicitation—Denice responded, “Probably two times, three times. I don't know.”—and by directly asking whether she had attempted to solicit defendant to exchange sex for pay.

DISPOSITION

The judgment is modified to strike the parole revocation fine. The trial court is directed to prepare an amended abstract of judgment to include this modification and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed as modified.

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WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.