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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR GIBSON et al.,

Defendants and Appellants.

B269069

(Los Angeles County
Super. Ct. No. KA105469)

APPEALS from judgments of the Superior Court of Los Angeles County, Robert Martinez, Judge. Modified and, as modified, affirmed.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant Victor Gibson.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant Nicholas Gibson.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Margaret E. Maxwell and Thomas C. Hsieh,
Deputy Attorneys General, for Plaintiff and Respondent.

At the joint trial by separate juries of defendants and appellants Victor Gibson and Nicholas Gibson¹ for various sexual offenses, the trial court excluded evidence that the victim, Ashley, had made a prior false complaint of sexual abuse and that she had herself perpetrated a sex crime. On appeal, defendants contend that the court erred in excluding that evidence. The parties agree that the amount of penalty assessments imposed must be modified. We therefore modify the penalty assessments imposed but otherwise affirm the judgments as modified.

BACKGROUND

I. Procedural background

In 2015, Victor and Nicholas and a third man, Tuan Hoang Dinh, were jointly tried by separate juries for various sex offenses against Ashley.² On October 7, 2015, a jury found Nicholas guilty of count 4, forcible sodomy (Pen. Code, § 286, subd. (c)(2)),³

¹ To avoid confusion, we refer to defendants, who are brothers, by their first names.

² Dinh was acquitted of forcible oral copulation in concert, of forcible sodomy in concert, and of attempted forcible sodomy in concert. The jurors deadlocked on a count of forcible oral copulation, and the court declared a mistrial on that count.

³ All further undesignated statutory references are to the Penal Code.

count 6, forcible oral copulation in concert (§ 288a, subd. (d)(1)); and count 7, forcible sodomy in concert (former § 286, subd. (d)).⁴ On December 16, 2015, the trial court sentenced Nicholas to nine years four months in prison calculated as follows: the midterm of seven years on count 6 and two years four months on count 7. The court also imposed and stayed the midterm of six years on count 4.

On October 7, 2015, a jury found Victor guilty of count 1, forcible rape in concert (§ 264.1).⁵ On December 16, 2015, the trial court sentenced Victor to seven years on count 1.

As to both defendants, the trial court imposed fines, including a “sexual assault fine in the sum of \$300, plus penalties and assessments pursuant to section 290.3, plus a . . . 20 percent surcharge.”

II. Factual background

At the time of the crimes, the victim, Ashley, was just 17, but she had already had a troubled youth. When she was 13, she was diagnosed with bipolar disorder. As a teenager, she abused alcohol and drugs, using anything she could get her hands on

⁴ The jury found Nicholas not guilty of count 1, forcible rape in concert (§ 264.1), count 2, rape by foreign object in concert (§ 264.1) and the lesser offense of sexual penetration by a foreign object (§ 289), and count 8, forcible rape (§ 261, subd. (a)(2)).

⁵ The jury found Victor not guilty of count 2, rape by foreign object in concert (§ 264.1) and the lesser included offense of sexual penetration by a foreign object (§ 289), and count 3, forcible rape (§ 261, subd. (a)(2)). The jury could not reach a verdict on count 7, sodomy in concert, and the count was dismissed.

(Vicodin, Valium, cocaine, heroin, marijuana and methamphetamine).⁶ She went into treatment programs for her bipolar disorder and drug problems. In July 2009, when Ashley was 16, she attempted suicide because of “family issues.”

On October 4, 2009, Ashley was “rejected from the Navy.” Devastated, Ashley “wanted to forget. I wanted to drink.” Ashley and her girlfriend Lydia S. were returning from a market when they saw Victor outside his house. Ashley knew Victor as someone who would give her alcohol and marijuana. Nicholas and Dinh and a few others, male and female, were also at the Gibsons’ house. Everybody was drinking, and Ashley drank “a lot” of alcohol and smoked marijuana. When it got late, Lydia S. left, but Ashley stayed.

Victor took Ashley to the backyard, where he showed her how to play drums. They and others then went next door to listen to a band play. Ashley continued to drink.

Dinh asked Ashley if she wanted to see a piercing on his penis. Thinking he was not serious, she did not answer, but he showed his penis to her. Others were around when this happened.

The next thing Ashley could remember was being on the front porch with Victor, Nicholas and Dinh. She was sitting on a lawn chair, and Victor was touching her breasts over her shirt. Ashley told him to stop, but he told her she would “‘like it if you just try it.’” She repeated, “‘Stop. Please stop,’” but Victor put his hands under her clothes, rubbed her vagina and thrust his

⁶ Ashley sometimes took her mother’s Vicodin pills, and Ashley did not recall if she had falsely accused her mother of giving her drugs.

fingers into her vagina. Nicholas held her down while Victor pulled off her pants, shorts and underwear. Victor then put his penis in her vagina for 10 to 15 minutes, while Ashley was telling him to stop. Victor said it would be fun to tell his friends he had sex with a lesbian.

Then, while Victor held Ashley by her shoulders, Nicholas inserted his penis into Ashley's anus. Ashley told Nicholas to stop and that it hurt. Nicholas then vaginally raped her.

Ashley noticed Dinh in the background, masturbating. Dinh forced her to orally copulate him.

After, Ashley slept at Victor's house. She did not want to go home because she did not want to get into trouble with her mother and because Ashley was ashamed. She called Lydia S. and told her everything was fine. The next morning, October 5, Victor walked Ashley to school.

At school, a classmate, Jessi Alvarez, noticed that Ashley was upset. When Alvarez asked Ashley what was wrong, Ashley said that Victor had raped her. Alvarez took Ashley to the counselor's office. The police were called, and Officer Carlos Molina responded. Although Ashley told the officer what had happened, she did not mention that Dinh had forced her to orally copulate him.

On October 9, 2009, a SART nurse examined Ashley. Ashley reported to the nurse that she had 17 beers "within the time of the assault" but no drugs, although she did have marijuana two days before the examination. Her anal area was sore, and she was constipated. Ashley also told the nurse that Dinh forced her to orally copulate him and that Victor and Nicholas had vaginally penetrated her with their penises, Victor for approximately 20 minutes. Nicholas had also penetrated her

vagina with his finger and had put his penis partway into her anus. During this time, Dinh was “jacking off.” Ashley had told Victor to stop, but Nicholas held her back in a chair. Dinh put his penis in Ashley’s mouth for five to ten minutes. She was uncertain if any of the men ejaculated.

The nurse saw no bruising on Ashley’s body. However, Ashley’s cervix was red and irritated, which was consistent with sexual activity. Ashley’s anal area was red and bruised and discolored, which was consistent with injury and the history Ashley gave.⁷

About eight months after the sexual assaults, a detective interviewed Victor in June 2010.⁸ Victor denied having sexual intercourse with Ashley and denied that Dinh and Nicholas were there that night.

The case was not pursued further until 2014. Detectives reinterviewed Victor.⁹ This time, Victor admitted he had sex with Ashley, but claimed it was consensual.

Nicholas was also interviewed in April 2014.¹⁰ At first, Nicholas said that Ashley had been drunk and “horny.” Nicholas

⁷ DNA evidence was introduced, but because Victor and Nicholas conceded they had sex with Ashley, we do not discuss that evidence in detail. In short, Victor’s DNA profile matched semen on Ashley’s clothes.

⁸ This evidence was introduced in Victor’s case only.

⁹ Victor testified. Thereafter, the video of that interview was played for all juries.

¹⁰ The video of that interview was played for Nicholas’s jury only.

saw Victor having sexual intercourse with Ashley, and Nicholas pulled out his penis and Ashley “kind of started giving me head.” Nicholas tried to penetrate Ashley anally, but “it didn’t work.” Ashley told him to stop, and he did, but only after trying one last time to put his penis in her anus. He denied having vaginal sex with her. Nicholas saw Dinh grab Ashley’s head and “forcibly” “put his dick in her mouth.” Ashley started to cry, so Nicholas told his brother to make sure she was okay. Nicholas admitted to Officer Molina, “I did what I did. I’m not proud of it. It really, actually, kind of makes me sick to my stomach.”

DISCUSSION

I. Exclusion of evidence of the victim’s conduct

Defendants contend that the trial court erred in excluding evidence that Ashley had falsely accused her father of sexually abusing her and that she had forced a woman at knifepoint to orally copulate a man.¹¹ We conclude that no error occurred.

A. *Additional background*

Two evidentiary issues were raised in limine. The first was the admissibility of sexual abuse allegations Ashley had made against her father.¹² The second was the admissibility of a December 2010 incident in Santa Monica in which Ashley allegedly forced the female victim at knifepoint to orally copulate

¹¹ Victor appeals only the exclusion of evidence of Ashley’s prior complaint of sexual abuse by her father; Victor does not appeal the exclusion of evidence of Ashley’s alleged sex crime. Nicholas appeals both.

¹² It is unclear whether Ashley had claimed her father raped her or made claims of other sexual abuse.

a man. As to these issues, the People filed a written “list of proposed 402 issues” requesting that the evidence be excluded. Defendant Dinh also filed a motion under Evidence Code section 782 “to allow us to speak about her prior” sexual conduct.¹³

At the hearing on the motions, the prosecutor argued that evidence Ashley had made prior false sexual abuse claims should be excluded, under Evidence Code section 352, because there was “nothing to show” the claims were false. In response to defense counsel’s (Dinh) argument that police departments and the Department of Children and Family Services had cleared father of charges and that the People had failed to turn over police reports and “D.A. reject[s]” which would show that father had been “exonerated,” the prosecutor pointed out that Ashley’s father had not been “exonerated”—there was simply insufficient evidence to file charges.

The trial court indicated that the issue was “intertwined with” the second issue regarding the Santa Monica incident and asked the defense for argument. Defense counsel argued that even if Ashley’s “prior sexual conduct” did not come in, the defense should still be allowed to impeach her “based on moral turpitude.” According to counsel, the two incidents showed a modus operandi or “pattern” with Ashley involving alcohol, drugs and sex. The prosecutor responded that Ashley and the “third party” “in the room” denied the allegations in the Santa Monica case and the evidence would consume an undue amount of time and confuse the issues before the jury.

¹³ The written motion is not part of the record on appeal. We ordered the superior court file, but it did not contain a written motion.

The trial court, referring to the Evidence Code section 782 motion, pointed out that such a motion requires an affidavit filed under seal, and there was no indication, as to the Santa Monica case, who would testify as to what took place and whether it was against the will of the victim. As to Ashley's allegations against her father, the court said it did not have a declaration from father: "I don't know what his position is. Is he going to testify?" And if father did testify, he would need to be advised of his right against self-incrimination. The court further noted that neither incident "ended in prosecutions or in outright admissions of their fabrication." The court thus expressed its concern that the jury, in addition to dealing with the guilt or innocence of the three defendants, would also have to address Ashley's "guilt or innocence" in accusing her father of sexual abuse and as a perpetrator in the Santa Monica matter. The court concluded that Evidence Code section "782 has not been complied with."¹⁴

Dinh's counsel responded that the prior false claims did not fall under Evidence Code section 782. The trial court agreed, stating, "It's inadmissible under 782." And then the court added that if the defense could verify "in some fashion the falsity of any of the claims" such as the father coming in and saying he did not do it, and the victim or other percipient witness from the Santa Monica incident coming in, then the court would consider admissibility under Evidence Code section 352. Although the court indicated it did not need to get to the 352 issue yet, if it

¹⁴ Although the court said that Evidence Code section 782 had not been complied with, the court also cited *People v. Tidwell* (2008) 163 Cal.App.4th 1447 for the proposition that the section does not apply to complaints of rape.

were to do so at that moment, it would find that the issues would involve an undue consumption of time.

Thereafter, just before counsel gave opening statements, the trial court reminded counsel not to ask about Ashley's allegations against her father or about the Santa Monica incident, "with the understanding that if there is some turn of circumstances counsel may approach the bench, make an offer of proof as far as getting in to those specific areas."

B. *No error occurred.*

Defendants contend that the trial court improperly excluded this evidence and that its exclusion denied them of their due process right to present a complete defense. We disagree.

The evidence was not improperly excluded. Instead, the record shows that the court did *not* preclude defendants from introducing evidence that Ashley had lied about her father sexually abusing her and of the Santa Monica incident. Although the trial court ruled at the 402 hearing that the evidence could not come in, the court twice made it clear it would reconsider the issue if an appropriate offer of proof was made. First, at the 402 hearing, the court said that "the father can come in and say he didn't do it[.]" "as could the victim in the Santa Monica [case] or any percipient witness[.]" subject to Evidence Code section 352.¹⁵ Second, just before opening statements were given, the trial court made it clear it was not absolutely precluding the evidence. The court reiterated that if "some turn of circumstances" occurred, counsel "may approach the bench, make an offer of proof as far as

¹⁵ Although, the court intimated that it did not appear such evidence would pass muster under Evidence Code section 352, the court did not make a ruling under that section.

getting in to those specific areas.” But no offer of proof was ever made. (See generally *People v. Miranda* (2011) 199 Cal.App.4th 1403, 1425 [prior complaint of rape only relevant if false; but evidence of falsity was “uncertain”].) Although the record references a written motion filed by Dinh, no such motion and accompanying affidavit are in the record. And although defense counsel had indicated at the 402 hearing that father said Ashley’s allegations against him were false, there was no clear representation father would come in and so testify. Similarly, there was no offer of proof that any person connected to the Santa Monica incident would testify or how the defense might establish Ashley’s conduct in that case.

Defendants, therefore, are incorrect in their assertion that the court precluded them from admitting the evidence and from putting on a complete defense and introducing significant impeachment evidence.¹⁶ Rather, defendants’ due process rights and right to present a complete defense were in no way diminished by the court’s rulings. (See generally *Holmes v. South Carolina* (2006) 547 U.S. 319, 324, 326-327 [although this right can be abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to

¹⁶ As to defendants’ right to present a defense, including impeachment evidence, they did present evidence relevant to Ashley’s credibility. Aside from the extensive evidence about her drug and alcohol problems, there was evidence of her alleged mental instability. Evidence was introduced, for example, that Ashley had lied about having a baby and giving the baby up for adoption, and a former friend testified that Ashley was untrustworthy. Also, two other men who had been at the party that night testified that Ashley had said she wanted to have sex with a man.

purposes they are designed to serve, ordinary rules of evidence generally do not impermissibly infringe on accused's right to present a defense]; *People v. Lucas* (2014) 60 Cal.4th 153, 270, disapproved on another ground by *People v. Romero and Self* (2015) 62 Cal.4th 1, 53-54, fn. 19; *People v. Cornwell* (2005) 37 Cal.4th 50, 82, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)¹⁷

II. Penalty assessments

In addition to fines, the trial court imposed penalties and assessments under section 290.3 in the amount of \$870 plus a 20 percent surcharge fee of \$60. The parties agree that the assessments amounted only to \$810, as follows: \$300 (§ 1464, subd. (a)(1)); \$60 (§ 1465.7); \$150 (Gov. Code, § 76000, subds. (a)(1), (e)); \$90 (Gov. Code, § 70372); a surcharge of \$60 (Gov. Code, § 76000.5); \$30 (Gov. Code, § 76104.6, subd. (a)(1)), and \$120 (Gov. Code, § 76104.7).

¹⁷ Because we conclude that defendants failed to make an offer of proof, the applicability of Evidence Code section 782 is irrelevant. Nonetheless, that section did not apply to at least Ashley's allegedly false complaint her father had sexually abused her. (*People v. Tidwell, supra*, 163 Cal.App.4th at p. 1454.) The inference the trier of fact is to draw from the victim's prior false complaint of rape relates to the victim's credibility, not her willingness to engage in sexual activity. (*Id.* at p. 1456; *People v. Miranda, supra*, 199 Cal.App.4th at p. 1424; *People v. Franklin* (1994) 25 Cal.App.4th 328, 335.)

DISPOSITION

The judgments are modified to reflect that the amounts of penalty assessments are \$810. The clerk of the Superior Court is directed to prepare modified abstracts of the judgments detailing the penalty assessments as set forth in this opinion and to forward the modified abstracts to the Department of Corrections and Rehabilitation. The judgments are affirmed as modified.

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BACHNER, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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