Filed 8/31/17 P. v. White CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RICKELLDRICK T. WHITE, Defendant and Appellant.	B276509 (Los Angeles County Super. Ct. No. SA090627)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lauren Weis Birnstein, Judge. Affirmed.

Vanessa Place, 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, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Rene Judkiewicz, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Rickelldrick White (defendant) appeals his convictions at trial for (1) sexual penetration by a foreign object and (2) making criminal threats. Both offenses were committed against the same victim, with defendant making the criminal threats after having been arrested for the sexual penetration offense and while released on bail. We consider whether the trial court abused its discretion by joining both charges together for trial and, at trial, by excluding evidence of the victim's sexual history as a teenager.

I. BACKGROUND

A. The June 2015 Sexual Assault

Ronnie M. (Ronnie), originally from Mississippi, took a one-way bus trip to California, bringing only a suitcase and a backpack with him. After a stop in Fresno, an acquaintance dropped Ronnie off at a homeless outreach organization in Santa Monica.

The first night he arrived in Santa Monica, which was in June 2015, Ronnie was too overwhelmed to sleep. The following night, Ronnie did sleep "a couple hours" outside the Santa Monica main library, but he continued to have trouble sleeping because he was in "unfamiliar territory" and "it was all new . . . [and] overwhelming." During the next two evenings, Ronnie returned to the Santa Monica main library to spend the night. His sleep continued to be intermittent, and at the times when he would wake up during the night, Ronnie noticed another homeless man (later identified as defendant) staring at him.

On the evening of June 13, 2015, Ronnie decided against sleeping outside the library and instead chose to sleep in a public park near a senior center. He fell asleep among some bushes at

approximately midnight while wearing a rain jacket, two undershirts, jeans (with a belt), a pair of long underwear, and boxer shorts. Ronnie woke up about an hour later, and after about ten minutes, he fell back asleep in the same location.

At approximately 4:00 a.m., Ronnie awoke and felt defendant "holding" and "grasping" him while anally penetrating him with "something long and hard." Ronnie's belt was unbuckled and his jeans and underwear had been pulled down around his thighs, but Ronnie could not tell what was penetrating him because defendant was behind him. When Ronnie realized what was happening, he immediately turned around; pushed defendant away; and screamed at defendant, demanding to know "what the hell . . . he was doing." Defendant stared at Ronnie but said nothing. Ronnie yelled at defendant to get him to leave, and when defendant did not comply, Ronnie pushed him until defendant got up and walked away quickly while making a motion with his hands to indicate Ronnie should be quiet.

After defendant left, Ronnie cried and used his shirt to wipe his behind "because it felt like there was lubrication on and felt nasty." Not knowing what else to do, Ronnie continued to lay in the bushes until daylight came. At that point, Ronnie went back to the homeless outreach organization and "broke down." He cried and told a staff member at the organization what happened; the staff member contacted police officers who were already at the location for an unrelated reason.

Ronnie related the details of the sexual assault to the police officers, one of whom was Santa Monica Police Officer Sean Stockwell. Officer Stockwell observed Ronnie was trembling, extremely nervous, and visibly shaken "as if something . . .

traumatic had just happened to him." Ronnie led the police officers to the bushes where he had been sleeping and further described what had occurred. Ronnie showed the officers the shirt he used to wipe himself (which the officers collected as evidence), and the officers also found a used condom on the ground.

The police then took Ronnie to the Santa Monica Hospital Rape Treatment Center (the Center), where a nurse examined him and took swabs from his anus (and other parts of his body) for DNA testing. While at the Center, Officer Stockwell interviewed Ronnie in greater depth and observed Ronnie's emotions fluctuating among sadness, frustration, and anger—with Ronnie telling Officer Stockwell "he was really angry with himself that . . . [the assault] had happened to him and that he did not recognize this immediately while he was sleeping."

The police apprehended defendant the same day Ronnie reported the assault. A police officer transported defendant to the Center, and a nurse performed a sexual assault suspect examination on him, taking several swabs from his body.

DNA analysis of the swabs from the sexual assault examinations of defendant and Ronnie yielded incriminating evidence. The swab of Ronnie's anus contained DNA consistent with defendant's DNA profile, with a random match probability of one out of 2.4 sextillion (i.e., the probability a random person, not defendant, would have the same DNA profile found in the sample was one out of 2.4 sextillion). A swab of defendant's penile area indicated the presence of DNA consistent with Ronnie's DNA profile, with a random match probability of one out of 13 quadrillion. Semen was also recovered on the shirt Ronnie

used to wipe himself, and DNA consistent with both defendant and Ronnie was found on the shirt.

Defendant appeared in custody at a preliminary hearing on a charge of violating Penal Code section 289, subdivision (d),[1] which makes it a crime to sexually penetrate a victim with a foreign object while the victim is unconscious of the nature of the act. Ronnie testified at the preliminary hearing, as did two of the law enforcement officers involved in investigating the sexual assault, and defendant was held to answer.

B. The October 2015 Criminal Threats

Defendant posted bail and was released from pretrial custody on October 1, 2015. On October 19, 2015, defendant's case was called for jury trial, with defendant present and out of custody, but the trial was continued.

Two days later, on October 21, 2015, Ronnie and a friend Sarah Dean (Dean) were together in the quiet room of the Santa Monica public library when defendant walked in. Ronnie was "stunned and shocked" to see defendant. Defendant looked at Ronnie and called him a "bitch." Defendant then left the room, but he reentered shortly thereafter, approached Ronnie, and asked him "what [he] was looking at." Ronnie and Dean then left the quiet room and walked outside the library. Dean observed Ronnie was "trembling, and his face was white."

Defendant also exited the library and confronted Ronnie (Dean was still present and witnessed the confrontation). Defendant removed his shirt, clenched his fists, and repeatedly

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[1] Undesignated statutory references that follow are to the Penal Code.

threatened to "whoop [Ronnie's] ass." Dean called the police. Before walking off back toward the library's entrance, defendant twice told Ronnie, "I'm gonna kill you, bitch." Throughout the confrontation with defendant, Ronnie felt "afraid" and "in a panic."

As a result of this incident, the Los Angeles County District Attorney filed additional charges against defendant in a separate criminal case. The trial court held another preliminary hearing (at which Ronnie and Dean testified), and defendant was held to answer on charges of making criminal threats, in violation of section 422, and two counts of dissuading a witness: one a misdemeanor under section 136.1, subdivision (b)(2) and the other a felony under section 136.1, subdivision (c)(1).[2]

C. Consolidation of the Charges for Trial

After defendant's second preliminary hearing, the prosecution moved to join all the charges against defendant for trial together. The facts of the June 2015 sexual penetration and the October 2015 threats as summarized in the prosecution's joinder motion are in all material respects the same as our recitation of the facts of both incidents in this opinion (which is taken from the testimony later at trial).[3] The prosecution argued

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[2] Prior to trial, the district attorney dismissed the misdemeanor witness dissuasion count.

[3] Ronnie's testimony at the preliminary hearings was, in relevant part, substantially the same as his later trial testimony. We note, though, that Ronnie's preliminary hearing testimony was that he felt defendant's fingers in his anus, whereas at trial Ronnie testified he was unsure of what defendant used to perpetrate the sexual penetration.

the two cases against defendant were "connected together in their commission" because they involved the same victim and because the facts of the sexual penetration charge would be admissible at a trial on the criminal threats and witness intimidation charges. In the prosecution's view, the facts of the sexual assault case "are particularly probative on the issues of intent, motive and knowledge of the defendant" because the sexual assault (1) provided the motive for why defendant later threatened Ronnie and (2) would help prove the reasonable and sustained fear elements of the criminal threats charge. The prosecution further asserted defendant could show no actual prejudice that would result from consolidation of the cases.

The defense opposed the motion, arguing there was "no factual content [that] connect[ed]" the sexual assault and criminal threats cases apart from a common victim. In addition, the defense contended joining the charges for trial would be prejudicial because the jury would use the "extremely weak" evidence of the criminal threats to infer defendant had committed the charged sexual assault, which the defense contended was also supported by only "very weak" evidence.

The trial court granted the motion to consolidate the cases. The court found the crimes were connected together in their commission, explaining the criminal threats case "can't be understood in isolation unless the sexual assault evidence is combined," and that it "makes logical sense to combine the two cases." The court also rejected the defense suggestion of extreme prejudice from joining the charges for trial, finding "there is a different level perhaps of the emotional responses [to both cases], but both are felonies and both [are] serious situations."

Trial subsequently proceeded over the course of eight days. Toward the end of trial, and after holding an Evidence Code section 782 hearing outside the presence of the jury (discussed in greater detail *post*), the court ruled the defense would not be permitted to cross-examine Ronnie about a single instance in which, at age 19 (15 years before trial), he had sex with a man.

During closing argument, the defense contended the sexual assault was actually a case of "buyer's remorse" (i.e., Ronnie "went along with it" and became upset only afterward). The defense also argued defendant's threats were communicated without any intent to carry them out. The jury deliberated and found defendant guilty on the sexual penetration by foreign object and criminal threats charges, but acquitted defendant on the sole remaining witness dissuasion charge. The trial court later sentenced defendant to eight years in state prison.

II. DISCUSSION

Both of the trial court rulings that defendant challenges on appeal were correct. Consolidation of the sexual penetration by a foreign object case with the criminal threats case was proper because both offenses were connected in their commission and the evidence of both crimes was cross-admissible. The prosecution that resulted from defendant's commission of the sexual penetration offense was an obvious motive for the subsequent criminal threats, and the sexual penetration offense was also probative of defendant's intent in making the threats and Ronnie's fear upon hearing them. In addition, the trial court's conclusion that Evidence Code section 352 (and the Evidence Code's rape shield law) should be invoked to preclude defendant from cross-examining Ronnie about a same-sex sexual

experience he had at age 19 was also well within the trial court's discretion.

A. The Trial Court Correctly Consolidated the Charges for Trial

"Section 954 provides that 'two or more different offenses' may be charged in the same pleading if the offenses are either 'connected together in their commission' or 'of the same class.' This 'statute permits the joinder of different offenses, even though they do not relate to the same transaction or event, if there is a common element of substantial importance in their commission, for the joinder prevents repetition of evidence and saves time and expense to the state as well as to the defendant.' [Citation.]" (*People v. Armstrong* (2016) 1 Cal.5th 432, 455 (*Armstrong*); see also § 954 [court may order cases consolidated if they are connected together in their commission or both involve the same class of crimes].) "Because it ordinarily promotes efficiency, joinder is the preferred course of action." (*People v. Scott* (2011) 52 Cal.4th 452, 469; see also *People v. Soper* (2009) 45 Cal.4th 759, 781-782 (*Soper*).) Our review of the trial court's decision to consolidate the two cases against defendant requires us to engage in a three-step process.

We initially consider whether the statutory joinder requirements were satisfied, i.e., whether the two cases involved charges of the same class or whether the charges in the two cases were connected together in their commission. (*Armstrong*, *supra*, 1 Cal.5th at p. 455; *Soper*, *supra*, 45 Cal.4th at p. 771.) Offenses are connected together in their commission if they are linked by a common element of substantial importance. (*People v. Landry* (2016) 2 Cal.5th 52, 76.)

If statutory joinder was proper, we next consider whether defendant clearly established—at the time the court made its pre-trial ruling—that "there [was nevertheless] a substantial danger of prejudice requiring that the charges be separately tried." (*Soper*, *supra*, 45 Cal.4th at p. 773; accord, *Armstrong*, *supra*, 1 Cal.5th at pp. 455-456.) In assessing the potential for prejudice, "[w]e first consider whether evidence of each of the offenses would be cross-admissible in 'hypothetical separate trials.' [Citation.]" (*Armstrong*, *supra*, at p. 456.) "If the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges." (*Soper*, *supra*, at pp. 774-775.) The *absence* of cross-admissibility, however, is not similarly dispositive. (*Id.* at p. 775.) Instead, where the evidence is not cross-admissible, "we proceed to consider 'whether the benefits of joinder were sufficiently substantial to outweigh the possible "spill-over" effect of the "other-crimes" evidence on the jury in its consideration of the evidence of defendant's guilty of each set of offenses.' [Citations.]" (*Ibid*; see also *People v. Simon* (2016) 1 Cal.5th 98, 123 ["A defendant seeking severance of properly joined charged offenses must make a stronger showing of potential prejudice than would be necessary to exclude evidence of other crimes in a severed trial"].) In a non-capital case like this one, that requires an assessment of "(1) whether some of the charges are particularly likely to inflame the jury against the defendant[, and] (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges . . . ." (*Soper*, *supra*, at p. 775.)

Finally, if joinder was proper and there was no sufficient showing of prejudice at the time the trial court ruled, we "'still must determine whether, in the end [and in light of the evidence as presented at trial], the joinder of counts or defendants for trial resulted in gross unfairness depriving the defendant of due process of law. [Citations.]' [Citation.]" (*Soper*, *supra*, 45 Cal.4th at p. 783; accord, *People v. Arias* (1996) 13 Cal.4th 92, 127 ["Even if the ruling was correct when made, we must reverse if [a] defendant shows that joinder actually resulted in 'gross unfairness,' amounting to a denial of due process"] (*Arias*).)

When undertaking the first two stages of our inquiry (concerning statutory joinder and any indications of "spill-over" prejudice when the trial court ruled), we apply the abuse of discretion standard of review. (*Armstrong*, *supra*, 1 Cal.5th at pp. 455-456; *Soper*, *supra*, 45 Cal.4th at p. 774.) As stated by our Supreme Court, a trial court's ruling will be found to have been "a prejudicial abuse of discretion only if that ruling" falls outside the bounds of reason. (*Soper*, *supra*, at p. 774.)

1. Statutory joinder was proper because the offenses are connected together in their commission

Defendant argues the statutory requirements for joinder went unsatisfied in this case because the crimes were not connected together in their commission. In defendant's view, "the criminal threats case against appellant could be completely understood in isolation; moreover, the sexual assault case absolutely could be—and should have been." That is not our view, nor is it a tenable position under applicable authority.

The sexual assault crime and the criminal threats crimes[4] were connected together in their commission because they were perpetrated against the same victim, and one at least arguably served as the motive for the other. That is, Ronnie's decision to report the sexual assault and to testify against defendant during the resulting criminal prosecution gave defendant a powerful motive to later threaten Ronnie—after defendant had been released on bail and just two days after a court appearance in the sexual assault case.[5] As our Supreme Court has held in analogous circumstances, the existence of a motive connecting distinct crimes is sufficient to establish the offenses can be properly joined for trial. (*Armstrong*, *supra*, 1 Cal.5th at p. 455 [separate murder and assault charges properly joined under section 954 because "[the] defendant's admissions to [the assault victim] regarding both shootings provided defendant with a motive to intimidate her"]; *People v. Valdez* (2004) 32 Cal.4th 73, 119 ["Although the murder itself occurred almost two years prior to defendant's escape [from custody], the offenses were nonetheless connected [together in their commission] because the

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[4] Although the witness dissuasion charge was also tried to the jury, we generally forego further references to it in light of the jury's not guilty verdict and because it is immaterial for purposes of our analysis.

[5] The jury's acquittal of defendant on the witness dissuasion charge does not in any way undermine the plausible existence of this motive. The jury could have believed, for instance, that defendant threatened Ronnie simply because he was angry at him for instigating the criminal prosecution, but not because he intended to dissuade him from reporting the crime or testifying against him.

escape occurred as defendant was being returned to 'lock-up' following his arraignment on the murder charge. The apparent motive for the escape was to avoid prosecution for the murder"].)

2. The evidence was cross-admissible, which dispels any suggestion of prejudice from joinder

As our discussion thus far has foreshadowed, evidence of defendant's sexual penetration of Ronnie with a foreign object would be cross-admissible in a trial on the criminal threats charge as motive evidence. The evidence was also cross-admissible to prove the sustained fear and intent elements of a criminal threats charge.

"The prosecution need not, as we know, prove motive. [Citations.] Nevertheless, motive is relevant, and a strong motive provides powerful evidence." (*People v. Moore* (2016) 6 Cal.App.5th 73, 85.) Here, defendant threatened Ronnie after the anal penetration offense and while defendant's prosecution for that crime was pending; indeed, defendant had been in court for what was to be the setting of trial on the sexual penetration charge just two days before making the threats. That is strong evidence of a motive to threaten, and ample authority establishes that such a motive is sufficient to establish cross-admissibility.[6]

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[6] The criminal threats evidence would also be admissible as evidence that defendant committed the sexual penetration offense because the threats would tend to show defendant's consciousness of guilt. (*Armstrong*, *supra*, 1 Cal.5th at p. 459 ["Evidence of the second shooting would have been highly probative in a trial concerning the homicide of [the first victim] . . . because whoever killed [the first victim] had a motive to kill his brothers[ ] and . . . because the subsequent shooting

(*Armstrong*, *supra*, 1 Cal.5th at p. 457 [evidence of three crimes cross-admissible because a desire to avoid prosecution on some of the crimes provided a motive for the commission of the other crimes].)

Defendant does not deny the sexual penetration evidence could be a motive for committing the criminal threats offense, but he argues there can be no cross-admissibility because "motive was not an element" of the criminal threats charge and is thus "not relevant." The argument is meritless; there is no requirement that evidence of other bad acts must directly establish an element of an offense to be admissible—as the reasoning in *Armstrong*, *Arias*, and other cases demonstrate. (*Armstrong*, *supra*, 1 Cal.5th at p. 457; *Arias*, *supra*, 13 Cal.4th at pp. 127-128; see also Evid. Code, § 1101, subd. (b) ["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 . . .) other than his or her disposition to commit such an act"]; *People v. Thompson* (2016) 1 Cal.5th 1043, 1114-1115 ["[T]he trial court was on firm ground in concluding the evidence was admissible on the issue of

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would have tended to show [the] defendant's consciousness of guilt, which in turn would be probative of his identity as the perpetrator of the first shooting . . ."]; *Arias*, *supra*, 13 Cal.4th at pp. 127-128 ["[T]here was evidence that the kidnapping and robbery of Judy N. was impelled by [the] defendant's need for money and transportation to escape apprehension for the Beacon crimes, which occurred 13 days earlier. Hence, the Beacon incident supplied evidence of motive for the Judy N. robbery, which in turn indicated consciousness of guilt in the Beacon matter"].)

motive. . . . Although motive is not an element of either of the charged offenses, it was an intermediate fact that was probative of defendant's intent, and "'the intermediate fact of motive" may be established by evidence of "prior dissimilar crimes"'"].)

The sexual penetration evidence would also be cross-admissible in a trial on the criminal threats charge because the evidence is probative of (a) whether defendant made the statements about killing Ronnie and "whoop[ing his] ass" with the specific intent that the statements should be taken as a threat, and (b) whether Ronnie was in sustained fear as a result of the threats. (See, e.g., *People v. Toledo* (2001) 26 Cal.4th 221, 227-228 [to prove criminal threats in violation of section 422, the prosecution must establish, among other things, that "the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out'" and the victim "caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety'"].) Perhaps it goes without saying, but evidence that Ronnie was being threatened not merely by a random passerby but by a person he described as "the man that had raped me" gave the jury a stronger basis to conclude that defendant intended his statements as threats and that Ronnie's asserted fear in hearing the threats was both real and sustained.

Because we conclude the evidence of both crimes was cross-admissible, we likewise conclude there was no prejudice to defendant that would prevent consolidating the two cases. (*Soper*, *supra*, 45 Cal.4th at pp. 774-775; *Arias*, *supra*, 13 Cal.4th at p. 128 ["We . . . agree that the two incidents were cross-admissible. 'On that ground alone, there was no abuse of

discretion' in denying severance"].) Moreover, even if we considered the issue of prejudice independent of our view on cross-admissibility, we still would hold defendant did not carry his burden to demonstrate prejudice from the consolidation of the cases for trial. The strength of the evidence on both charges was not dramatically different; there was very strong evidence of identity on both (DNA for the sexual penetration charge and two eyewitnesses for the criminal threats charge), and the remainder of the elements turned to a substantial degree on whether the jury believed Ronnie's testimony (that he was unconscious at the time of the sexual penetration and that he was in reasonable, sustained fear as a result of defendant's threats). (See *Soper*, *supra*, at p. 781 ["[A]s between any two charges, it always is possible to point to individual aspects of one case and argue that one is stronger than the other. A mere imbalance in the evidence, however, will not indicate a risk of prejudicial 'spillover effect,' militating against the benefits of joinder . . ."].) And with regard to whether either of the charges were particularly likely to inflame the jury against defendant, we agree with the trial court: "[T]here is a different level perhaps of the emotional responses [to both cases], but both are felonies and both [are] serious situations."

At bottom, defendant's argument against consolidation amounts to an argument that joinder of the charges was unfair because the cross-admissible evidence somewhat strengthened the case against him. As our Supreme Court observed in *Soper*, however, "the benefits of joinder are not outweighed—and severance is not required—merely because properly joined charges might make it more difficult for a defendant to avoid conviction compared with his or her chances were the charges to

be separately tried." (*Soper*, *supra*, 45 Cal.4th at p. 781.) The trial court's decision was not an abuse of discretion.

3. No due process violation occurred

Even if, as we have concluded, joinder of the separate cases was not an abuse of the trial court's discretion at the time it ruled on a joinder motion, we still must assess whether the subsequent trial resulted in "gross unfairness depriving the defendant of due process of law." (*Soper*, *supra*, 45 Cal.4th at p. 783.) Defendant bears the "high burden" of making that showing. (*Ibid.*; *People v. Merriman* (2014) 60 Cal.4th 1, 49.) There is no due process violation where the evidence of each crime is "straightforward and distinct" and "independently ample" to support defendant's conviction of both crimes. (*Soper*, *supra*, at p. 784.)

There was no gross unfairness here. As we have already highlighted, the evidence of both crimes was straightforward and there was significant corroborating evidence—including, on the sexual penetration charge, the testimony of Dean and Officer Stockwell about Ronnie's demeanor following the crime. In addition, the trial court instructed the jury that each offense was a separate crime that required separate consideration, and the jury's not guilty verdict on the witness intimidation count demonstrates it heeded that instruction. The trial proceedings accordingly reveal no violation of due process guarantees.

B. The Trial Court Did Not Abuse its Discretion in Excluding Evidence of Ronnie's Sexual History

1. Background

While trial was underway, defense counsel moved to admit certain evidence of Ronnie's past sexual conduct pursuant to

Evidence Code section 782. That statute prescribes a procedure that must be followed when a defendant seeks to introduce such evidence in a prosecution (like this one) involving a section 289 charge. A defendant must file a written motion accompanied by a declaration that makes an offer of proof, and if the court finds the offer of proof is sufficient, the court must hold a hearing outside the presence of the jury to permit questioning of the victim. (Evid. Code, § 782, subds. (a)(1)-(a)(3).) "At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the [victim] is relevant . . . and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted." (Evid. Code, § 782, subd. (a)(4).)

During defendant's cross-examination of Ronnie, he testified the sexual penetration offense left him "embarrassed" because he had no idea why he didn't wake up and because he had not been with a woman in over a year. When asked what he meant by that statement, Ronnie said, "It means I'm straight, and I had somebody who is gay rape me."

Defendant's Evidence Code section 782 motion emphasized Ronnie had previously disclosed to the investigating detective that he had "experimented with homosexuality."[7] Defendant contended the disclosure was "evidence of [Ronnie's] sexual orientation at the time of the [crime]" regardless of whether

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[7] At a sidebar conference during the defense's cross-examination of Ronnie, the prosecutor informed the court the investigating detective just told her that Ronnie had previously remarked that he had "experimented with homosexuality."

Ronnie "stated on the [witness] stand that he was a heterosexual, which may be true now . . . ." The defense position was that Ronnie's "sexual orientation [was] directly relevant to whether the encounter [with defendant] was consensual and occurred while [Ronnie] was awake and able to resist if he had wanted to."

In accordance with Evidence Code section 782, the trial court held an evidentiary hearing outside the presence of the jury; Ronnie testified. He stated he had anal sex with a man when he was 19 years old (he was 34 years old at the time of trial), but he had not had any other sexual encounters with men since that time. Defense counsel asked Ronnie if the reason he previously testified he had not been with a woman for over a year was due to confusion "about whether [he was] straight or homosexual." Ronnie responded that he was not confused about his sexuality, nor had he thought about "experimenting again with homosexuality" since age 19; Ronnie said he was confused "because I woke up with my pants down, being raped . . . ."

The trial court barred the defense from questioning Ronnie about his same-sex encounter in his teens. The court reasoned that "under [Evidence Code sections] 352 and 782 . . . , the probative value [of the proffered evidence] on the credibility of the victim is miniscule and completely more prejudicial than probative." The trial court explained "something that happened 15 years ago does not make this man a homosexual" and any inquiry into his past sexual history should be excluded under Evidence Code 352 because there was "a great likelihood that the

admission of something that was a one-time event 15 years ago is very likely to mislead or confuse the jurors."[8]

2. Analysis

A defendant generally cannot question the victim of a sexual assault about his or her prior sexual activity. (*People v. Bautista* (2008) 163 Cal.App.4th 762, 781.) More specifically, evidence of the sexual history of a complaining witness in a section 289 prosecution is not admissible when offered by the defendant "in order to prove consent by the complaining witness." (Evid. Code, § 1103, subd. (c)(1).)

Thus, insofar as the defense sought to introduce the evidence to establish Ronnie consented to the sexual penetration with a foreign object, the evidence was inadmissible. But defendant took the position that Ronnie's prior instance of being with a man was relevant to credibility generally, i.e., that Ronnie testified he was straight and the episode years earlier would impeach that testimony and undermine Ronnie's claim to have been asleep when the sexual penetration began.

Evidence Code section 352 grants courts discretion to 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." This discretion gives the trial court "broad

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[8] The trial court also noted there had not been "one iota of testimony that this was a consensual encounter," but the court said it might consider revisiting its ruling if that were to change (it did not).

power to control the presentation of proposed impeachment evidence" to prevent criminal trials from turning into '"'"wars of attrition over collateral credibility issues.' [Citation]'"' (*People v. Mills* (2010) 48 Cal.4th 158, 194-195 [cross-examination of a witness about whether he had a history of domestic violence against murder victim, ostensibly to impeach the witness's testimony that the victim was otherwise uninjured on the night of her death, properly precluded as, at best, collateral impeachment that would necessitate undue consumption of time] (*Mills*).) While a criminal defendant has a constitutional right to "present all relevant evidence of *significant* probative value in his favor," the proffered evidence must have "'more than "slight relevancy" to the issues presented.'" (*People v. Jennings* (1991) 53 Cal.3d 334, 371-372 [cross-examination of witnesses in a robbery and murder case about whether they had committed "felonious perjury" when failing to reveal their income from prostitution when applying for welfare benefits properly precluded; inquiry would "impeach the witnesses on collateral matters and was only slightly probative of their veracity"].)

We review the trial court's Evidence Code section 352 determination for abuse of discretion. (*Mills*, *supra*, 48 Cal.4th at p. 195) Applying that standard, the trial court did not err in excluding the proffered evidence because the evidence was not, in fact, impeaching. That Ronnie had engaged in anal sex with a man on one occasion roughly 15 years prior to the sexual penetration offense does not contradict his testimony that he identifies as a "straight" man. Furthermore, even if defendant were correct that there is at least some tension between Ronnie's testimony that he is straight and his acknowledgement that he had once been with a man years ago, the effort at impeachment

can, at best, be considered collateral and thus well within the trial court's discretion to exclude pursuant to Evidence Code section 352. (*Mills*, *supra*, at p. 195 [trial courts have broad authority to control the presentation of proposed impeachment evidence on collateral credibility matters].) The defense impeached Ronnie's testimony in at least one other more material aspect,[9] and any attenuated inconsistency between his "straight" testimony and his experience at age 19 would have added little to the jury's credibility calculus while at the same time raising thorny issues likely to confuse the jury and require an undue consumption of time.

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[9] The defense contrasted Ronnie's testimony that he had not used any drugs around the time of the sexual penetration with the indication on his sexual assault examination report that he used marijuana within 96 hours of the penetration offense.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

LANDIN, J.*

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