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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ANGEL BAUDEL GUERRA,

Defendant and Appellant.

2d Crim. No. B280210
(Super. Ct. No. 14C-23522)
(San Luis Obispo County)

Angel Baudel Guerra appeals a judgment following his conviction for rape of an intoxicated woman (Pen. Code, § 261, subd. (a)(3)[1]), forcible rape (*id.*, subd. (a)(2)), and rape of an unconscious woman (*id.*, subd. (a)(4)). We conclude, among other things, that the trial court did not err in instructing the jury on evidence the People introduced about an uncharged sexual offense. We affirm.

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

FACTS

Melissa Doe testified that on November 9, 2000, she was 14 years old. She remembers that date because it was the day she "skipped school[,] . . . went to a party and got raped." She and a girl named Angelina "left the campus" and went to a party at a house she had not been to before and did not know whose house it was. There were seven or eight people at the party. Melissa Doe testified, "We sat on the couch and they gave us a couple beers." She drank the beer and "blacked-out drunk."

Later Melissa Doe and some of the girls left the party to go back to school. They got into Guerra's car. Guerra drove them part way, stopped at a stop sign and said he would not drive further "unless [Melissa Doe] kissed him." Melissa Doe had never met Guerra before that day. She initially said "no," but she kissed him because the "girls had to get to school." She was feeling "[p]retty drunk" and she "blacked out."

When Melissa Doe "came to," she was sitting on a bed in Guerra's house. Someone had taken her pants off. Her girlfriend and Jorge C. were in that room.

Melissa Doe testified that she was "raped on" the bed. She remembered that "[she] was laying on the bed" and "someone was on top of [her] holding [her] down by [her] arms." She said Guerra's penis was "inside [her]" in her "vagina." She tried "pushing" him away, but he would "push back." He was wearing a "hood" and she could not see his face.

Later she asked Guerra "what happened." He said, "Oh, you and Jorge [C.] got wild." Because of this remark, she thought Jorge C. may have raped her. Guerra's parents were in the house. Guerra told Melissa Doe she could leave the house by going out a sliding glass door into the backyard.

When Melissa Doe arrived home, she went to the bathroom and noticed that "there was blood running down [her] leg and brown stuff." Her "vagina was sore." She told her mother, "I think I was raped." Prior to this incident, she was a virgin. She did not "consent" to have "sex with anyone." Her mother called the police. Melissa Doe "went through a full SART [Sexual Assault Response Team] exam."

At trial the parties stipulated that "the vaginal swabs taken during the SART exam from Melissa Doe's vaginal cavity were tested and that the DNA sperm was found to belong to the defendant, Angel Guerra."

Debra Farwell, a SART nurse, testified: 1) Melissa Doe's hymen had "a tear," an "opening that was not normal"; 2) there was "fresh bleeding" which indicates "a fresh injury"; 3) there was a lasceration on her "posterior fourchette"; 4) there was "redness on the inside of the labia"; and 5) there were signs of "blunt force trauma." These findings were consistent with the history given by Melissa Doe.

Police Officer Daniel Hackett testified he received information that a DNA sample matched Guerra. He said he contacted Guerra "to give [Guerra] the opportunity to tell [him] if [Guerra] had intercourse with the victim." Guerra repeatedly denied having intercourse with her. Hackett said, "So if you had sex with her and it's consensual, now is the opportunity for you to say, 'okay, yeah, we had sex,' it was consensual . . . ." Guerra said, "[N]o, I didn't have sex with her."

Testimony of Kira Doe

The People introduced evidence about a 2003 uncharged sexual assault Guerra committed against Kira Doe.

Kira Doe testified that she was in Guerra's car. He offered to drive her home. When Guerra drove past her home, she asked him, "Why aren't you stopping?" Guerra did not respond. She said, "I will get out here." Guerra said, "No." He grabbed her arm and would not let her out.

Guerra told her, "I'm not going to take you home unless you have sex with me." She did not "want to have sex with him" and had "no romantic interest in him." He drove to an area "in the middle of nowhere." She got out. He then "made [her] get back in the car" by "intimidating" her.

Guerra leaned over, put both hands on "each side of [her] seat," prevented her from moving and then he "groped" her. He touched her "up the side of [her] body" from her hip to "[her] breasts." She told him "multiple times" to stop, but what she said "didn't mean anything" to him. She punched him in his leg with her key. Guerra "slammed [her] head into the window." A man driving a truck drove by and stopped. Kira Doe got out of Guerra's car and went to the truck. The truck driver drove her home.

The Defense Case

Guerra did not testify.

Jorge C. testified that Melissa Doe was "overly friendly" at the party. He said she was "hugging the males that were there, trying to sit on [his] lap, trying to sit down on [his] friend Adam's lap." But she did not make any advances toward Guerra. Jorge C. said he was at the party for an hour and a half. He did not see Melissa Doe drink alcohol. On cross-examination, he admitted that he saw her on the bed "pretty much passed out." He told police that "she was pretty loaded."

Dr. David Fennell, a psychiatrist, testified that "if a person has shown signs of an alcoholic blackout and can't recall periods of time," the person's memory is "going to be inherently unreliable." There is "not a test we could administer" to determine whether the memory is accurate or not. It is difficult to determine accuracy because "you hit the brain with a psychoactive substance that disrupts memory." On cross-examination, Fennell said he had not interviewed Melissa Doe. He was asked if he had reviewed all of the reports relating to this case. He responded that he had read "some" of them. He said sexual predators look for people who are in "weakened states," such as "a highly intoxicated young girl."

Objection to a Jury Instruction

The trial court indicated that based on Kira Doe's testimony it would instruct jurors about the 2003 uncharged sexual incident under CALCRIM No. 1191 [evidence of uncharged sexual offenses].[2] (Evid. Code, § 1108.) It would ask them to decide whether her testimony showed Guerra committed assault with intent to commit rape.

The prosecutor noted that pursuant to a plea agreement in that 2003 case, Guerra was convicted of false imprisonment (§ 236) and sexual battery (§ 243.4). She said Guerra completed probation and was allowed to withdraw his plea to the sexual battery offense.

Defense counsel objected to the proposed jury instruction. She requested the trial court to "change the language under [CALCRIM No.] 1191 from the crime of assault with intent to commit rape to sexual battery."

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[2] All references to CALCRIM No. 1191 are to former CALCRIM No. 1191.

The trial court said, "I have considered the option of instructing with CALCRIM 1191 and stating sexual battery . . . . [But] it's clear to the court, if believed, Kira Doe's testimony supports a conclusion that the defendant was not going to return her to her home unless she had sex against her will. In the court's opinion, that's a threat of force or violence. So I think, if believed, it is best described in accordance with CALCRIM 1191 . . . [as] assault to commit rape."

DISCUSSION

Instructing the Jury about an Uncharged Sexual Offense Against Kira Doe

Guerra notes the trial court instructed the jury on his uncharged sexual offense against Kira Doe. (Evid. Code, § 1108; CALCRIM No. 1191.) He claims it committed reversible error by describing that offense as "assault with intent to commit rape" in that instruction. We disagree.

Evidence of a defendant's character or propensity to commit crimes is generally excluded. (Evid. Code, § 1101.) But "'[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code] Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352.'" (*People v. Loy* (2011) 52 Cal.4th 46, 60.) "The Legislature has determined that this evidence is "'particularly probative'" . . . ." (*Id.* at p. 61.) Consequently, "propensity evidence" may "be used in cases involving sexual offenses." (*People v. Lopez* (2007) 156 Cal.App.4th 1291, 1295; Evid. Code, § 1108.)

The trial court instructed the jury with CALCRIM No. 1191 stating,

"The People presented evidence that the defendant committed, against KIRA DOE, *the crime of Assault with Intent to Commit Rape*, that was not charged in this case. This crime is defined for you in these instructions.

"You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

"If the People have not met this burden of proof, you must disregard this evidence entirely.

"If you decide that the defendant committed the uncharged offense, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit rape, as charged here. If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of rape. The People must still prove each charge beyond a reasonable doubt.

"Do not consider this evidence for any other purpose." (Italics added.)

Pursuant to a plea agreement, Guerra was convicted of false imprisonment and sexual battery involving Kira Doe. Guerra claims that "after successfully completing probation, the sexual battery conviction was dismissed, and the sexual offender registration requirement terminated." He contends the court's

statement that he committed assault with intent to commit rape was improper because it was "a greater crime than the one for which he [had] been convicted." (Italics omitted.) He notes that the sexual battery conviction was a misdemeanor.

The People contend the trial court's description of Guerra's offense as assault with intent to commit rape was accurate. They claim that under *People v. Lopez*, *supra*, 156 Cal.App.4th 1291, 1) the trial court could properly describe the uncharged offense based on Guerra's *conduct* as shown by Kira Doe's testimony, and 2) it was not required to describe the uncharged offense based on Guerra's ultimate plea agreement. We agree.

In *People v. Lopez*, *supra*, 156 Cal.App.4th 1291, the defendant was charged and convicted of assault and rape of his half-sister. At trial the prosecution introduced evidence of an uncharged prior sexual offense he committed involving his cousin as propensity evidence. (Evid. Code, § 1108.) The testimony of two witnesses showed the defendant had committed assault with the intent to commit rape against his cousin. But, as a result of a plea bargain in that case, he was only convicted of false imprisonment. On appeal the defendant contended that because he was convicted of false imprisonment based on a plea bargain, the evidence of the incident involving his cousin should have been excluded because false imprisonment was not a sex offense crime.

The Court of Appeal disagreed. It said, "[T]here are a variety of reasons why a defendant who commits a sexual offense may not be convicted of a sexual offense. We cannot discern any reason why the discretion exercised by the prosecutor when charging or accepting a plea to a charge in the first prosecution should become a bar to the use of evidence of the prior act in a subsequent prosecution. The issue is, and should be, whether the

prior act is a sexual offense." (*People v. Lopez*, *supra*, 156 Cal.App.4th at pp.1298-1299.) The court concluded that "if the facts of the offense could constitute a sexual offense, the defendant's conviction of an offense that is not a sexual offense would not bar testimony about the prior act." (*Id*. at p. 1294.)

Guerra claims the trial court may not look "behind the charge of conviction to its conduct." He contends it was bound by the plea agreement resulting in a misdemeanor battery conviction. But this is essentially the same position that was rejected in *People v. Lopez*.

Guerra has not shown that the trial court erred by applying *People v. Lopez* and finding that Kira Doe's evidence, if believed, showed assault with intent to commit rape. Her testimony supported the elements of that offense (*People v. Lopez*, *supra*, 156 Cal.App.4th at p. 1297; *People v. Soto* (1977) 74 Cal.App.3d 267, 278; *People v. Green* (1960) 180 Cal.App.2d 537, 542-543; § 220; CALCRIM No. 890), and its admission "did not lessen the prosecution's burden to prove his guilt beyond a reasonable doubt." (*People v. Falsetta* (1999) 21 Cal.4th 903, 920.) The court's jury instruction (CALCRIM No. 1191) gave proper guidance to jurors on the use and limitations of this evidence to prevent prejudice. (*Falsetta*, at p. 920.) The potential for prejudice was decreased because Kira Doe's testimony "was no stronger and no more inflammatory than the testimony concerning the charged offenses." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.) Its probative value was high.

Even had there been instructional error, the result would not change. For instructional error we use the *People v. Watson* (1956) 46 Cal.2d 818, 836-837, standard to determine if there is a "reasonable probability that the outcome of defendant's trial

could have been different had the trial court properly instructed the jury . . . ." (*People v. Flood* (1998) 18 Cal.4th 470, 490.) But that is not the case here. "[T]he vaginal swabs taken during the SART exam from Melissa Doe's vaginal cavity were tested and . . . the DNA sperm" was Guerra's. This refuted Guerra's claim that Jorge C. had sexual intercourse with the victim. It also showed Guerra's consciousness of guilt. He repeatedly and falsely told police that he never had sexual intercourse with Melissa Doe.

Guerra did not take advantage of the opportunity Officer Hackett gave him to show how his sexual intercourse with the victim was consensual. Melissa Doe's injuries were consistent with "blunt force trauma." Nurse Farwell testified the history Melissa Doe provided was consistent with the SART findings. Jurors could find Jorge C.'s testimony was conflicting and Dr. Fennell's was largely abstract or hypothetical. Fennell did not interview the victim. Melissa Doe's testimony shows she did not consent and she was raped. The jury found her to be credible and the defense case unpersuasive.

The Constitutionality of the Admission of Propensity Evidence

Guerra contends the "admission of propensity evidence under [Evidence Code] section 1108 deprived him of his right to a fair trial and violated his rights of due process and equal protection." (Capitalization omitted.)

But the California Supreme Court has repeatedly rejected these claims. (*People v. Loy*, *supra*, 52 Cal.4th at pp. 60-61; *People v. Falsetta*, *supra*, 21 Cal.4th at pp. 910-922.) Guerra relies on the decisions of some federal courts. But we are "not bound by the decisions of the lower federal courts." (*People v. Bradley* (1969) 1 Cal.3d 80, 86.) Moreover, the Ninth Circuit has

upheld the constitutionality of a federal rule similar to the one applicable in this case. (*U.S. v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1024-1027.) It said, "We conclude that there is nothing fundamentally unfair about the allowance of propensity evidence under Rule 414." (*Id.* at p. 1026.) "[C]ourts have routinely allowed propensity evidence in sex-offense cases." (*Id.* at p. 1025.) We have reviewed Guerra's remaining contentions and we conclude he has not shown grounds for reversal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

John A. Trice, Judge

Superior Court County of San Luis Obispo

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