Filed 3/22/18 P. v. Galante CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

CHRISTOPHER ANTHONY GALANTE,

Defendant and Appellant.

2d Crim. No. B281205
(Super. Ct. No. 2013025740)
(Ventura County)

Christopher Anthony Galante appeals his conviction, by jury, of one count of committing a lewd act on a child who is under 14 years old (Pen. Code, § 288, subd. (a))[1], and two counts of committing a lewd act on a minor who is over 14. (§ 288, subd. (c)(1).) The victim of each lewd act is D.L., a niece of appellant's wife who lived with appellant, his wife and their children during most of her high school years. The jury further found, on count 1,

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

that appellant had substantial sexual conduct with a child under the age of 14. (§ 1203.066, subd. (a)(8).) With respect to all offenses, the jury found that D.L. was under 18 when the offenses occurred and that the prosecution commenced before her 28th birthday. (§ 801.1, subd. (a).) The trial court sentenced appellant to an aggregate term of nine years and four months in state prison. We affirm.

Procedural History

Appellant was originally charged with one count of committing a lewd act on a child under 14 years old (§ 288, subd. (a); count 1), two counts of committing a lewd act on a minor who had turned 14 (§ 288, subd. (c)(1); counts 2 and 3), and one count of sodomy on a minor. (§ 286, subd. (b)(1); count 4.) At the conclusion of appellant's first trial, the jury convicted him on count 3 and deadlocked on the other counts. The trial court declared a mistrial. On retrial, the jury found appellant guilty on counts 1 and 2. Count 4 was dismissed on the People's motion.

Facts

D.L. was born in November 1990. Her mother, H.D., is the older sister of S.G. S.G. is married to appellant.

When D.L. was about nine years old, she went to visit S.G. and appellant at their home in Provo, Utah. While he was alone with D.L., appellant showed her a pornographic movie and masturbated in front of her.

Sometime after this first incident occurred, appellant and S.G. moved from Provo to Camarillo, where S.G.'s parents (D.L.'s maternal grandparents) lived. D.L. recalled an incident in which she and her family were staying at her grandparents' house for either the Thanksgiving or Christmas holiday. One morning, she was alone with appellant. He led her from an upstairs bedroom

into a downstairs living room, had her sit on a red chair and then performed oral copulation on her. Appellant stopped when they heard someone moving around on the second floor above them. D.L. could not remember how old she was when this incident occurred, although she was sure it happened after her fifth grade year and before she started high school. The lewd act alleged in count 1 of the information refers to this incident.

On another occasion, appellant took D.L., her younger brother and two of her male cousins to a drive-in movie. They watched the movie from the bed of appellant's pickup truck. Appellant arranged the children so that he was sitting next to D.L. After putting blankets over their laps, appellant put his hand inside her pants and fondled her vagina. This incident also occurred before D.L. started high school. On cross-examination at the second trial, D.L. described another incident in which appellant masturbated in front of her while she was on a jungle gym.

In March 2005, when D.L. was 14 years old, she moved to Camarillo to live with appellant, S.G. and their two children, while attending Adolfo Camarillo High School. One morning, after she had been living with the Galante family for a few months, appellant woke D.L. up and took her into his bedroom where they had vaginal intercourse. Appellant's young daughter came to the bedroom door and asked appellant to make pancakes. Appellant stopped the intercourse and told D.L. to hide before going to make breakfast for his children. This was the first time that appellant had intercourse with D.L. This first incident of intercourse is the lewd act alleged in count 2 of the information.

D.L. lived with appellant and his family throughout her freshman, sophomore and junior years of high school. During

this time, he had intercourse with her several times a week, every week. Appellant would drive D.L. to school in the mornings. Often, while they were on their way to school, appellant would park his truck in a secluded location and have intercourse with D.L. Appellant also engaged in the same conduct during evenings, when he told his wife that he and D.L. were going to the gym. The first incident in which appellant had intercourse with D.L. while they were in his vehicle is alleged as count 3 of the information. He was convicted of this offense at his first trial.

In 2006, appellant took D.L. to Anaheim, to see a band they both liked. He got a hotel room for the night and had sex with D.L. both before and after the concert. Later that same year, appellant took D.L. to another concert in Anaheim. They also stayed in a hotel on that trip and again appellant had sex with D.L. in the hotel room. He also attempted to have anal sex with her, but stopped when she complained of pain. This incident of sodomy was alleged as count 4 of the information.

D.L. moved back in with her parents for her senior year in high school. During that year, she had little contact with appellant. On one occasion, however, appellant drove to Corona, where D.L. lived with her family. He told D.L.'s parents he wanted to take her to lunch. Instead, appellant took D.L. to a hotel and had sex with her. At that time, D.L. was 16 or 17 years old.

Appellant stopped having sex with D.L. in 2011, after she started dating the man she later married. In June 2011, D.L. told her mother about appellant's conduct. When police contacted D.L. in June 2011, she decided that she did not want to press

charges because she was embarrassed and did not want to cause family turmoil.

In 2013, after she graduated from college, D.L. changed her mind about pressing charges against appellant. With the help of police, D.L. made a pretext call to appellant. During their conversation, appellant admitted to having sex with D.L. when she was "so young," explaining that he "fell in love" with her and thought they "were, you know, like a couple." When D.L. asked appellant why he masturbated in front of her and orally copulated her, he replied, "I don't know the answer that would be--satisfactory." Appellant insisted that he believed they had been in love with each other. He did not deny committing any of the sex acts D.L. described.

By way of defense, appellant admitted that he had a years' long sexual relationship with D.L. He insisted, however, that they did not have any sexual contact until she was 16 years old. Appellant testified that D.L. never came to stay with them while he and his wife lived in Provo, Utah, so that incident in which she described appellant masturbating to a pornographic video could not have occurred. His wife, S.G., corroborated that testimony. Similarly, appellant and his wife denied that he was ever alone with D.L. in her grandparents' Camarillo house, so the oral copulation she described could not have occurred. D.L. testified that appellant and S.G. were also spending the night at that house; they testified they never slept there because their own house was only a few miles away. Appellant also denied that he took D.L., or any of the other children, to a drive-in movie, so the fondling she described did not happen. D.L.'s brother corroborated her testimony, but two of her cousins testified they had never been to a drive in movie with appellant and D.L.

Contentions

Appellant contends the trial court violated his right to due process and abused its discretion in several of its evidentiary rulings. First, the trial court admitted evidence of uncharged sexual offenses committed by appellant against D.L. These included: appellant masturbating in front of the then nine-year old D.L.; the weekly intercourse he had with D.L., in his pickup truck while she was in high school; and the sex he had with D.L. in the hotel room before and after they attended the concerts in Anaheim. Appellant objected to the evidence concerning masturbation on the ground that it was unduly prejudicial and demonstrated only his bad character and propensity to commit sex offenses. (Evid. Code, §§ 352, 1101, 1108.) His only objection the evidence concerning his weekly offenses against D.L. or his conduct in the Anaheim hotel room, however, was that it should be excluded under Evidence Code section 352. Second, appellant contends the trial court improperly excluded evidence about why D.L. moved in with appellant and his wife, rather than remaining in her parents' home. Third, the trial court improperly excluded evidence of D.L.'s sexual relations with another person that would have impeached her credibility with regard to the oral copulation incident. Finally, appellant contends the trial court erred when it instructed the jury in terms of CALCRIM No. 1193 because that instruction allows the jury to consider expert testimony on Child Sexual Abuse Accommodation Syndrome (CSAAS) as evidence that the complaining witness is telling the truth.

Discussion

Evidence of Uncharged Sex Offenses. Appellant contends the trial court erred in admitting evidence of his other,

uncharged sex offenses against D.L. because that evidence was unduly prejudicial, irrelevant for any proper purpose and served only to demonstrate his bad character or propensity to commit sex offenses. (Evid. Code, §§ 352, 1101, 1108.) We are not persuaded.

At both trials, appellant's counsel objected to evidence concerning the masturbation incident on the ground that the evidence was inadmissible under Evidence Code sections 1101 and 1108. Appellant did not object on these grounds, at either trial, to the remaining evidence of uncharged sex offenses. His only objection was that evidence of the other uncharged offenses should be excluded under Evidence Code section 352. Failure to raise the Evidence Code sections 1101 and 1108 objections in the trial court results in forfeiture of those claims on appeal. (*People v. Morris* (1991) 53 Cal.3d 152, 187-188, disapproved on other grounds, *People v. Stansbury* (1995) 9 Cal.4th824, 830.) Even if the objections had not been forfeited, we would reject them because, for the reasons explained below, we conclude the trial court did not abuse its discretion when it admitted evidence of appellant's uncharged offenses.

Evidence of uncharged offenses is not admissible to prove conduct on a specific occasion, but may be admitted to establish some other relevant fact such as knowledge, intent, motive, plan or absence of mistake. (Evid. Code, § 1101, subd. (b).) The uncharged misconduct must bear "some degree of similarity" to the charged crime, "but the degree of similarity depends on the purpose for which the evidence was presented." (*People v. Jones* (2011) 51 Cal.4th 346, 371.)

Evidence Code section 1108 provides that, in a prosecution for a sex offense, evidence of the defendant's prior sex offenses is

admissible to establish his or her propensity to commit those crimes, so long as the evidence is not inadmissible under Evidence Code section 352. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286.) An uncharged sex offense may be admissible under Evidence Code section 1108 even if it is not sufficiently similar to the charged crimes to be admissible under Evidence Code section 1101. (*People v. Loy* (2011) 52 Cal.4th 46, 63.) There is "a strong presumption in favor of admitting sexual assault evidence under Evidence Code section 1108 to show propensity to commit charged crimes. [Citation.]" (*People v. Merriman* (2014) 60 Cal.4th 1, 62.)

The trial court has discretion to admit evidence of uncharged sex offenses unless the probative value of that evidence 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.'" (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1116.) We will disturb the trial court's determination on the admissibility of such evidence only if it exercised its discretion "'"in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]'" (*People v. Lewis*, *supra*, 46 Cal.4th at p. 1286.) Among the factors the trial court should consider in deciding whether to admit evidence of uncharged offenses under Evidence Code section 1108 are: "(1) whether the propensity evidence has probative value, e.g., whether the uncharged conduct is similar enough to the charged behavior to tend to show the defendant did in fact commit the charged offense; (2) whether the propensity evidence is stronger and more inflammatory than evidence of the defendant's charged acts; (3) whether the

uncharged conduct is remote or stale; (4) whether the propensity evidence is likely to confuse or distract the jurors from their main inquiry, e.g., whether the jury might be tempted to punish the defendant for his uncharged, unpunished conduct; and (5) whether admission of the propensity evidence will require an undue consumption of time. [Citation.]" (*People v. Nguyen*, *supra*, 184 Cal.App.4th at p. 1117.)

The trial court here did not abuse its discretion when it admitted evidence of the masturbation incident. Appellant conceded at the first trial that the evidence did not result in undue consumption of time, and conceded in his opening brief on appeal that the incident was not more egregious or inflammatory than the charged offenses. The evidence also had little tendency to confuse the jurors, because the charged offenses involved intercourse rather than masturbation or oral copulation. In addition, the trial court's instructions to the jury, given with the consent of defense counsel, clearly described the charged offenses, mitigating any potential confusion.

Most importantly, the masturbation evidence had high probative value because it placed the charged offenses in context and helped to explain why D.L. did not object or disclose when appellant began having intercourse with her a few years later. D.L. testified she did not tell her parents about appellant's conduct because "it had kind of become a normalized thing that he was going to do sexual things with me." She further explained that, by the time appellant had sexual intercourse with her, "he had already touched me and I had already seen his penis, and it was something that I didn't know otherwise."

Finally, the masturbation incident was not too remote because the charged offenses began when D.L. was only 12 or 13

years old, and appellant orally copulated her. The gap is also much smaller than those found in other cases where offenses occurring 20 or 30 years before the charged offense were held admissible. (See, e.g., *People v. Robertson* (2012) 208 Cal.App.4th 965, 992 [34 years between uncharged and charged offenses]; *People v. Branch* (2001) 91 Cal.App.4th 274, 284 [30 years]; *People v. Pierce* (2002) 104 Cal.App.4th 893, 900 [23 years].)

In addition to evidence of the masturbation incident, the trial court properly admitted evidence that appellant orally copulated D.L. and had sexual intercourse with her on many occasions in addition to the one occasion charged in count two of the information. This evidence was admissible for the reasons we have just described. There is a strong degree of similarity between the charged and uncharged offenses. If the jury disbelieved D.L.'s testimony about the oral copulation or the first instance of sexual intercourse, it would also disbelieve her testimony about the uncharged offenses. As a result, it is unlikely the jury would convict appellant based on the uncharged offenses, rather than the charged crime.

Ineffective Assistance of Counsel. Appellant contends his trial counsel was ineffective for failing to object to the evidence of his uncharged sexual offenses against D.L. For the reasons we have stated, an objection to the uncharged offenses based on Evidence Code sections 1101 and 1108 would properly have been overruled. Counsel is not ineffective for failing to raise a futile objection. (*People v. Frye* (1998) 18 Cal.4th 894, 985, disapproved on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 420-421.)

Exclusion of Impeachment Evidence. D.L. testified at the preliminary hearing that her parents sent her to live with appellant's family because she had a "boyfriend that was verbally and emotionally abusive, and my friends were doing drugs and just not living the way that my parents would want me to be." In an effort to attack her credibility, defense counsel sought to introduce the testimony of A.P., who would have testified that he was the ex-boyfriend at issue and that he was not verbally or emotionally abusive toward D.L. The trial court excluded the evidence at both trials on the ground that it was inadmissible under Evidence Code sections 352 and, at the second trial, Evidence Code section 787.[2] Appellant contends the trial court abused its discretion and denied him the right to present a defense and to cross-examine and confront witnesses. We disagree.

The trial court did not abuse its broad discretion when it concluded that the limited probative value of A.P.'s proffered testimony would have been substantially outweighed by the probability of wasted time and the danger that it would confuse the issues or mislead the jury. (Evid. Code, § 352; *People v. Clark* (2016) 63 Cal.4th 522, 586.) In her preliminary hearing testimony, D.L. did not name the "verbally and emotionally abusive boyfriend" she moved to avoid. A.P. may not have been that person. He may also have viewed their relationship, and his own conduct, differently than did D.L. or her parents. His self-

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[2] Evidence Code section 787 provides, "Subject to Section 788 [regarding evidence of a prior felony conviction], evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness."

serving denial that he abused D.L. would shed little light on the relevant question of appellant's abusive behavior. At best, A.P.'s testimony would have impeached D.L. on a collateral issue because her reasons (or her parents' reasons) for moving to Camarillo have nothing to do with any of the charged offenses. Whatever the reason, D.L. was living in appellant's house and appellant repeatedly took advantage of that circumstance to sexually assault her. The trial court correctly recognized that the proffered testimony would have been a "complete sideshow" that was likely to confuse the issues and mislead the jury.

We reject appellant's contention that excluding A.P.'s testimony violated his rights to present a defense and to cross-examine and confront witnesses. These constitutional claims were forfeited because appellant did not raise them in the trial court. (*People v. Tully* (2012) 54 Cal.4th 952, 979-980.) The claims also fail on the merits because the defendant in a criminal trial does not have "an unfettered right to offer testimony that is . . . inadmissible under standard rules of evidence." (*Taylor v. Illinois* (1988) 484 U.S. 400, 410; see also *People v. Ardoin* (2011) 196 Cal.App.4th 102, 119.) Excluding evidence offered to impeach a witness on a collateral matter does not deprive the defendant of the right to confront witnesses. (*People v. Jennings* (1991) 53 Cal.3d 334, 372.)

Evidence of D.L.'s Prior Sexual Conduct. In the sealed portions of their briefs, the parties address appellant's contention that the trial court erred when it excluded evidence that another person had sexual contact with D.L. under circumstances similar to those she attributed to appellant. The trial court held an in camera hearing to evaluate appellant's offer of proof concerning

this incident. It then excluded the evidence under Evidence Code sections 352 and 782.

As a general rule, a victim of sexual assault may not be questioned about specific instances of his or her prior sexual activity. (Evid. Code, § 1103, subd. (c); *People v. Woodward* (2004) 116 Cal.App.4th 821, 831.) Evidence Code section 782 provides a limited exception to the general rule, and a strict procedure for admitting evidence of prior sexual conduct when it is "offered to attack the credibility of the complaining witness . . . ." (Evid. Code, § 782, subd. (a); *People v. Bautista* (2008) 163 Cal.App.4th 762, 781-782.) The defendant must make a written motion that includes an affidavit, filed under seal, containing an offer of proof "of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness." (Evid. Code, § 782, subd. (a)(1).) If, after reviewing the sealed affidavit and holding an in camera hearing, the court finds the proffered evidence is relevant to the credibility of the complaining witness "and is not inadmissible pursuant to [Evidence Code] 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." (*Id.*, subd. (a)(4).)

Here, appellant followed the statutory procedure and the trial court held an in camera hearing on the request. Appellant contended the evidence was relevant to impeach D.L.'s credibility because it would show that she might be confused about the identity of her abuser or she might be transferring blame for the incident from that person to appellant. In addition, appellant claimed D.L. told the investigating officer that she had no sexual contact with anyone other than appellant prior to her marriage.

The testimony at issue would have contradicted that statement, impeaching D.L.'s credibility.

Respondent argued D.L. was old enough at the time of the incident to recognize and remember her abuser and that there was no reason to believe she was transferring blame from one person to another. It also disputed appellant's characterization of her statement to the investigating officer. Respondent noted that, near the end of her interview, D.L. disclosed that another person had also abused her.

The trial court concluded the proffered testimony should be excluded under Evidence Code section 782 because it had no tendency in reason to undermine D.L.'s credibility. Appellant contends this was an abuse of discretion. (*People v. Rioz* (1984) 161 Cal.App.3d 905, 916 ["[T]he express provisions of Evidence Code section 782 vest broad discretion in the trial court to weigh the defendant's proffered evidence, prior to its submission to the jury, and to resolve the conflicting interests of the complaining witness and the defendant."].) There was no abuse.

People v. Daggett (1990) 225 Cal.App.3d 751, on which appellant relies, does not support admitting the evidence at issue here. The court in *Daggett* concluded that a young child's testimony accurately describing sex acts may have an "aura of veracity" because knowledge of those acts "may be unexpected in a child who had not been subjected to them. [¶] In such a case it is relevant for the defendant to show that the complaining witness had been subjected to similar acts by others in order to cast doubt upon the conclusion that the child must have learned of these acts through the defendant." (*Id.* at p. 757.) D.L., however, was not a very young child when she was sexually assaulted. She was about 9 years old when appellant

masturbated in front of her, 12 or 13 when the oral copulation occurred and 14 when appellant first had sexual intercourse with her. Her knowledge of these acts, which she described as an adult, is not unexpected and does not, by itself, lend relevance to evidence that she may have had sexual contact with someone other than appellant. There was no evidence from which a jury could infer that D.L. was confused about the identity of her abuser or that she transferred blame for her abuse from the abuser to appellant. Admitting evidence of other sexual conduct would have consumed considerable time and diverted the jury's attention from the charged offenses. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1097.) The trial court did not abuse its discretion when it excluded this evidence.

Instructional Error. Appellant contends the trial court erred when it instructed the jury in terms of CALCRIM No. 1193 concerning expert testimony regarding CSAAS. He contends the instruction improperly permits the jury to use the expert testimony as evidence that the complaining witness is telling the truth. As a consequence, he contends, CALCRIM No. 1193 reduces the prosecution's burden of proof, violating his right to due process. Appellant forfeited the claim of instructional error by failing to object to the instruction in the trial court. (*People v. Lucas* (2014) 60 Cal.4th 153, 291, fn. 51, disapproved on other grounds, *People v. Romero* (2015) 62 Cal.4th 1, 53, fn. 19.) However, we review the claim on its merits because appellant contends the instruction also affected his substantial rights. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) No prejudicial error occurred.

"[I]n all cases in which an expert is called to testify regarding CSAAS . . . the jury must sua sponte be instructed that

(1) such evidence is admissible solely for the purpose of showing the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested; and (2) the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true." (*People v. Housley* (1992) 6 Cal.App.4th 947, 959.) CALCRIM No. 1193 satisfies these requirements because it instructs the jury that the testimony of CSAAS experts "is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not [D.L.'s] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony."

Appellant contends CALCRIM No. 1193 is erroneous because it permits the jury to use expert CSAAS testimony to evaluate D.L.'s believability but fails to explain that the testimony is not substantive evidence of appellant's guilt. Appellant further contends the instruction reduces the prosecution's burden of proof by allowing the jury to use expert testimony to bolster D.L.'s credibility.

In reviewing the claim of instructional error, we are required to consider "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." (*People v. Richardson* (2008) 43 Cal.4th 959, 1028, internal quotation marks omitted.) We review the challenged instruction in the context of the entire charge, and "not from a consideration of parts of an instruction or from a particular instruction. [Citation.]" (*People v. Solomon* (2010) 49 Cal.4th 792, 822, internal quotation marks omitted.)

When considered in context with the instructions as a whole, we conclude there is no reasonable likelihood the jury applied CALCRIM No. 1193 to reduce the prosecution's burden of proof. The instruction expressly informs the jury that expert CSAAS testimony "is not evidence" of appellant's guilt. It also informs the jury that CSAAS testimony may only be used to decide whether D.L.'s behavior was consistent with that of a person who has been molested and to evaluate her credibility. The instruction did not permit the jury to find D.L. credible based solely on the opinion of the expert witnesses, neither of whom expressed an opinion on her credibility. The jury was also properly instructed on the burden of proof, the reasonable doubt standard, and the factors it should consider in evaluating a witness's credibility. It was further instructed to disregard any opinion it found "unbelievable, unreasonable, or unsupported by the evidence." (CALCRIM No. 332.) We presume the jury understood and applied all of these instructions. (*People v. Richardson*, *supra*, 43 Cal.4th at p. 1028.) Read as a whole, the instructions did not lower the prosecution's burden of proof or allow the jury to use CSAAS testimony for an improper purpose. There was no error.

Conclusion

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J. TANGEMAN, J.

Michael Lief, Judge

Superior Court County of Ventura

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