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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. PEUYOKO VICTOR PEREZ, Defendant and Appellant.	2d Crim. No. B283977 (Super. Ct. No. 2012030601) (Ventura County)

Peuyoko Victor Perez appeals from the judgment, entered after the trial court found him guilty of rape of an incompetent person (count 1; Pen. Code, § 261, subd. (a)(1))[1], oral copulation of an incompetent person (count 2; § 288a, subd. (g)), sexual battery (count 3; § 243.4, subd. (d)), and anal and genital penetration by a foreign object (count 4; § 289, subd. (b)). Appellant was sentenced to 13 years state prison and ordered to pay various fines and fees, including $10,000 restitution to the

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

victim. We reverse the victim restitution order and remand for further proceedings to determine the victim's economic losses. (§ 1202.4, subd. (f).) In all other respects, the judgment is affirmed.

Facts

Appellant raped and sexually assaulted C.B., an intellectually disabled, 59-year old cousin. C.B. had an IQ of 58 and the social skills of a four-year-old. In August 2012, appellant visited C.B. and her cousins/caregivers to use their Jacuzzi. Appellant entered C.B.'s bedroom wearing a towel and told her to close the door and take her clothes off. Appellant threatened to put his hand over her mouth and ordered C.B. to lie on the bed. C.B. testified that appellant "started putting his penis in [my] . . . pee-pee," i.e., her vagina.

Appellant licked C.B.'s breasts and vagina, and ordered C.B. to get up and bend over the bed. Appellant put his penis in C.B.'s anus and asked if it felt good. C.B. replied, "'No. . . . It doesn't. . . . It really hurts.'"

After appellant left, C.B. cried and told her caregivers that appellant was "rough" with her but did not go into details. The next morning, C.B. said that appellant touched her breast and had sex with her. Appellant called C.B.'s caregiver to apologize and said he was "'probably going to get picked up by the cops.'" After the caregiver called the police, C.B. was examined by a sexual assault response team (SART) nurse who reported injuries to C.B.'s labia consistent with rape. Appellant's sperm cells and DNA were found on C.B.'s underwear.

Prior Sexual Misconduct

Pursuant to Evidence Code sections 1101, subdivision (b) and section 1108, Tracy G. testified that appellant sexually

assaulted her at his massage salon in 2006. Appellant had Tracy G. disrobe and turn over on her back, and put his tongue in her vagina. Tracy G. protested and tried to sit up but appellant told her to lay back down. Appellant apologized and said he was having marital problems. After Tracy G. reported the incident, appellant admitted the sexual assault in a police cool call. He plead guilty to misdemeanor sexual battery, and was ordered to register as a sex offender. (§ 290.)

Childhood Molestation of C.B.

Appellant argues that the trial court erred in excluding evidence that C.B. was molested 50 years ago and in not continuing the trial so that appellant could investigate.[2] A week before trial, the prosecution stated that S.K., C.B.'s sister, disclosed that her deceased uncle (appellant's grandfather) sexually molested S.K. and C.B. 50 years earlier when C.B. was six years old. The prosecution moved to exclude the evidence on the ground that it was inadmissible under the Rape Shield Law (Evid. Code, § 782). The prosecution stated that there was no direct evidence that the molestation actually occurred. Appellant argued that the molestation might be relevant to C.B.'s credibility and requested a continuance to investigate.

Denying the motion, the trial court ruled that the case had been on-going for several years and both sides had the right to have the matter tried now due to C.B.'s age and developmental disability. "[B]ecause of the death of the uncharged perpetrator in 1999, there's no way that any of those

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[2] Before sentencing, appellant filed a motion for a new trial on the same grounds which were denied. The trial court ruled "if the [prior molestation] evidence was inadmissible, then the request for a continuance . . . was properly denied."

molestations . . . would be relevant or admissible to explain the 2012 observations at the [SART exam] or, of course, the DNA that was later evaluated and identified."

No abuse of discretion occurred. Under the Rape Shield Law (Evid. Code, § 782), the past sexual conduct of the complaining witness is inadmissible to prove consent but may be admissible in some cases to challenge the credibility of witness. (*People v. Fontana* (2010) 49 Cal.4th 351, 362.) Evidence Code section 782 vests the trial court with broad discretion to weigh the defendant's proffered evidence before submission to the jury and to resolve the conflicting interests of the complaining witness. (*People v. Rioz* (1984) 161 Cal.App.3d 905, 916.)

Appellant made no offer of proof that the prior molestation was relevant or that there was good cause to continue the trial. (Evid. Code, § 782, subd. (a)(1); Pen. Code, § 1050, subd. (e).) And there was no showing that C.B. confused appellant's sexual assault with the prior molestation. C.B. reported the sexual assault to her caretakers and the police, and her testimony was corroborated by the forensic evidence and appellant's phone call the day after the rape.

Citing *People v. Daggett* (1990) 225 Cal.App.3d 751, appellant argues that the prior molestation may show that C.B. was subjected to similar sex acts by her uncle, which would rebut the argument that C.B. exhibited sexual knowledge that could only have derived from appellant's assault. Unlike *People v. Daggett*, C.B. did not exhibit sophisticated sexual knowledge and there was no offer of proof that the 50-year old molestation could expose contradictions in C.B.'s testimony. The trial court reasonably concluded that questions about the prior molestation would only embarrass C.B. and confuse the jury.

Prior Sexual Misconduct

Appellant contends that trial court erred in admitting evidence that appellant sexually assaulted Tracy G. in 2006. The trial court found that the evidence was probative and admissible to show appellant's character and propensity to crimes on this nature. The assault of Tracy G. was similar, involved the non-consensual sexual touching of a grown woman, was not remote in time, and involved a follow up phone call in which appellant admitted the sexual assault. The day after C.B. was raped, appellant called C.B.'s caregiver to apologize, asked for forgiveness, and said he wanted to make sure that C.B. was okay. The 2006 incident was sufficiently similar in nature, was admissible to prove the absence of mistake or accident, and was no more prejudicial than the charged crime. (*People v. Cage* (2015) 62 Cal.4th 256, 273.)

We reject the argument that the trial court erred in receiving evidence about the 2006 sexual assault or that it rendered appellant's trial fundamentally unfair. (*People v. Kipp* (1998) 18 Cal.4th 349, 371; *People v. Falsetta* (1999) 21 Cal.4th 903, 913.) When the defendant is accused of a sex offense, "Evidence Code section 1108 permits the court to admit evidence of the defendant's commission of other sex offenses, thus allowing the jury to learn of the defendant's possible disposition to commit sex crimes. [Citation.] . . . The evidence is presumed admissible and is to be excluded only if its prejudicial effect substantially outweighs its probative value in showing the defendant's disposition to commit the charged sex offense or other relevant matters. [Citation.]" (*People v. Cordova* (2015) 62 Cal.4th 104, 132.)

The sexual assault of Tracy G. was relevant to show that appellant sexually assaulted grown women after he isolated the woman and put her in a vulnerable situation. It bolstered C.B.'s credibility that appellant instructed her to close the bedroom door and lie down before raping and orally copulating her. The trial court stated that the Tracy G. evidence would not "interfere with my ability to fairly decide and evaluate the facts presented in this case."

Substantial Evidence - Rape

Appellant also argues that the evidence does not support the rape conviction because the prosecution failed to prove the victim's vagina was penetrated. As in every sufficiency-of-the-evidence case, we "consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432.)

C.B.'s testimony was corroborated by the SART exam finding that C.B. suffered bruising and trauma to her labia, which was consistent with insertion of a penis into the vaginal vault. Appellant complains that the SART exam photos are of poor quality, but that goes to the weight of the evidence. The crime of rape is completed by any sexual penetration, however slight. (§ 263.) "'[P]enetration of the external genital organs is sufficient to constitute sexual penetration and to complete the crime of rape even if the rapist does not thereafter succeed in penetrating into the vagina.' [Citation.]" (*People v. Quintana* (2001) 89 Cal.App.4th 1362, 1366.)

Appellant argues that C.B. gave conflicting statements to the police, stating that appellant put his "'pee-pee down there'" and then saying that appellant licked her breasts and vagina. That was a matter for the trier of fact to decide. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Appellant requests that we reweigh the evidence. "This, of course, we cannot do." (*People v. Kemp* (1961) 55 Cal.2d 458, 471.) Unless the testimony is physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. (*People v. Young*, *supra*, at p. 1181.)

Upper Term Sentence

Appellant argues that the trial court erred in imposing an eight-year upper term on count 1 for rape of an incompetent person.[3] The trial court found that appellant violated a position of trust with C.B. who was "a child in every way other than her chronological years on earth." It found that C.B. was vulnerable with no one to protect her, and that appellant was a registered sex offender. Only a single aggravating factor is required to impose an upper term sentence. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.)

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[3] Selecting count 1 as the principal term, the trial court imposed an eight-year upper term, plus two years (one third the midterm) on count 2 for forcible oral copulation, plus one year (one-third the midterm) on count 3 for sexual battery and two years (one-third the midterm) on count 4 for anal and genital penetration by a foreign object, for a total aggregate term of 13 years state prison.

Appellant contends that C.B.'s vulnerability is not an aggravating factor because mental incompetency is an element of the offense. (See Cal. Rules of Court, rule 4.420(d) [element of the crime may not be used to impose a particular term]; *People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1291-1292.) The argument is without merit. "'"Vulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act." [Citation.]' [Citation.]" (*People v. DeHoyos* (2013) 57 Cal.4th 79, 154.) It encompasses more than just C.B.'s intellectual disability. Appellant was a friend of the family, frequently visited the home, and abused a position of trust by assaulting C.B. when she was alone in her bedroom. (See, e.g., *People v. Quintanilla* (2009) 170 Cal.App.4th 406, 413 [victim's vulnerability and defendant's abuse of trust were aggravating factors in imposing upper term for forcible lewd acts on a child under 14].) Appellant did not object at sentencing and forfeited any claim that the trial court misweighed or double-counter sentencing factor. (*People v. Scott* (1994) 9 Cal.4th 331, 353.)

On the merits, there was no sentencing error. Appellant grew up with C.B., knew that she had a profound intellectual disability, and knew that C.B.'s caregivers were elderly and would probably not hear anything. Appellant ordered C.B. to close the bedroom door, remove her underwear, and not cry out call for help. The probation report listed as aggravating factors, the fact that appellant took advantage of a position of trust and confidence (Cal. Rules of Court, rule 4.421(a)(11)), engaged in violent conduct, and posed a serious danger to society (Cal. Rules of Court, rule 4.421(a)(1) & (b)(1)). Appellant showed no remorse and characterized himself as the victim. The

probation report stated "[h]ad his crime not been discovered, not only would C.B. have been continued to be abused, but it is likely [appellant] would have sought out additional victims considering his prior history." The probation report recommended that appellant be incarcerated "for the longest term permitted by law in order to protect the community and C.B." Appellant makes no showing that an eight year sentence for rape of an incompetent person is excessive or arbitrary or capricious. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

Consecutive Sentences

Appellant argues that the trial court erred in imposing consecutive sentences on count 2 (oral copulation of an incompetent person) and count 3 (sexual battery) because the crimes occurred so closely in time and place as to indicate a single period of aberrant behavior. (Cal. Rules of Court, rule 4.425(a)(3).) Consecutive sentences are proper where "the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior." (§ 667.6, subd. (d); see *People v. Garza* (2003) 107 Cal.App.4th 1081, 1092.) It "does not require a change in location or an obvious break in the perpetrator's behavior." (*People v. Jones* (2001) 25 Cal.4th 98, 104.) "'Neither the duration of time between the crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions.'" (*People v. Corona* (1988) 206 Cal.App.3d 13, 18, fn. 2.)

Appellant instructed C.B. to lie on the bed and got on top of her and raped her. Appellant then licked her breasts and vagina before bending C.B. over the bed and putting his penis in

her anus. The trial court reasonably found that appellant had a chance to reflect on his actions before continuing the sexual assault. (See, e.g., *People v. Irvin* (1996) 43 Cal.App.4th 1063, 1071.) A sentencing court may find that the sex crimes occurred on separate occasions even if the crimes occurred in the same physical location and there is no obvious break in defendant's behavior. (*People v. Garza*, *supra*, 107 Cal.App.4th at p. 1092.) Section 667.6, subdivision (d) authorizes consecutive sentences where the defendant "had a reasonable opportunity to reflect upon his . . . actions and nevertheless resumed [his] sexually assaultive behavior." As the statute tells us, the duration of time between the acts and the retention of the *opportunity to attack* again are not themselves determinative. (*People v. Plaza* (1995) 41 Cal.App.4th 377, 385.)

Restitution

The trial court ordered appellant to pay $10,000 restitution to C.B. and retained jurisdiction to determine and make further restitution orders.[4] Appellant argues and the Attorney General agrees, that no evidence was received that C.B. suffered economic losses. The prosecution's sentencing memorandum stated that C.B.'s conservator was asking for $50,000 restitution, but no documentation was provided as required by section 1202.4, subdivision (d). Defense counsel

[4] The trial court imposed a $300 restitution fine (§ 1202.4), a $300 parole revocation fine (§ 1202.45), and a $1,800 fine pursuant to section 290.3. Appellant was also ordered to pay $10,000 victim restitution (§ 1202.4) and $600 for the cost of the SART exam (§ 1203.1h).

confirmed that she had not been provided anything specific and asked that the trial court "reserve any restitution issue."

We are compelled to reverse and remand to recalculate the restitution amount. Because economic losses for damaged property, medical expenses, mental health counseling, and lost wages or profits will vary from case to case, the prosecution is required to make a prima facie showing that C.B. suffered economic losses as a result of appellant's criminal acts. (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1543.)

Disposition

We reverse the $10,000 victim restitution order and remand for further proceedings to determine C.B.'s economic losses. (§ 1202.4, subd. (f).) The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Patricia M. Murphy, Judge

Superior Court County of Ventura

Susan S. Bauguess, 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, Stacy S. Schwartz, Deputy Attorney General, for Plaintiff and Respondent.