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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,
Plaintiff and Respondent,
v.
KEVIN M. ANTHONY,
Defendant and Appellant.

A132162

(Sonoma County Super. Ct.
No. SCR-587081)

On an early morning in October 2005, defendant Kevin M. Anthony entered the Santa Rosa residence of Jane Doe—then 87 years old. Armed with a knife, defendant robbed Jane Doe of some cash and credit cards, caused her to break a wrist when he pushed her from the kitchen into the garage, shut the door to keep her dog out, and proceeded to rape her.

In 2007, defendant was sentenced to prison for another rape he committed against Mary Doe.¹ At that time, samples were taken of his DNA. (See Pen. Code, § 296.)² In 2010, a “cold hit” connected defendant’s DNA with DNA a nurse had collected from Jane Doe during the medical examination conducted after her rape in 2005. Defendant was thereafter charged with a number of crimes against Jane Doe, and in April 2011 a

¹ In the case involving Mary Doe, defendant entered a plea of no contest to one count of forcible rape and admitted three enhancement allegations under Penal Code section 667.61, subdivisions (d) and (e), after which the trial court imposed an indeterminate sentence of 25 years to life. In September 2007, this court affirmed that conviction and sentence. (*People v. Anthony* (Sept. 10, 2007, A116720) [nonpub. opn.])

² Further statutory references are to the Penal Code unless otherwise specified.

jury found him guilty of forcible rape and other offenses. The jury also found true several enhancement allegations, including one in connection with the charge of forcible rape that defendant kidnapped Jane Doe within the meaning of section 667.61, subdivisions (a) and (e).

On appeal, defendant claims the evidence was insufficient for the jury to find true beyond a reasonable doubt the kidnapping enhancement under section 677.61, subdivisions (a) and (e). He also contends the trial court erred when it ruled that “propensity” evidence relating to the sexual offenses he committed against Mary Doe—was admissible under Evidence Code section 1108.

As discussed below, we find no merit in defendant’s claims and affirm the judgment.

BACKGROUND

The amended information filed in March 2011 set out six felony counts, each allegedly committed on October 20, 2005. Count 1 charged defendant with the forcible rape of Jane Doe, born April 1918. (§ 261, subd. (a)(2); see § 264, subd. (a).) Counts 2 and 3 charged him with two acts of forcible oral copulation. (§ 288a, subd. (c)(2)(A); see § 288a, subd. (c)(3).) Count 4 stated a charge of forcible sexual penetration with a foreign object. (§ 289, subd. (a)(1)(A); see § 289, subd. (k).) Count 5 charged defendant with the commission of first degree burglary of an inhabited dwelling. (§§ 459, 462, subd. (a); see §§ 460, subd. (a), 461, subd. (a).) Lastly, count 6 alleged defendant had inflicted pain and suffering on Jane Doe, an elder adult over 70 years of age, under circumstances likely to produce great bodily harm, and Jane Doe had, as a result, suffered great bodily injury. (§ 368, subd. (b)(1), (2)(B).)

With respect to each of the sex crimes charged in counts 1 through 4, the amended information included a number of enhancement allegations. The first and principal enhancement allegation alleged several circumstances under section 667.61, subdivision (e), so as to justify the enhanced sentence authorized under either subdivision (a) or (b) of section 667.61. That is: defendant in the commission of these sex crimes kidnapped Jane Doe under circumstances consistent with subdivision (d)(2) of section 667.61 (§ 667.61,

subd. (e)(1)); defendant committed the charged sex crimes in the course of committing a first degree residential burglary, under circumstances consistent with subdivision (d)(4) of section 667.61³ (§ 667.61, subd. (e)(2)); and, defendant personally used a deadly weapon in the commission of the charged sex crimes in violation of section 12022.3 (§ 667.61, subd. (e)(3)).⁴

The remaining enhancement allegations stated defendant had been armed with and used a deadly weapon—a knife—in committing the underlying sex crimes (§ 12022.3, subs. (a) & (b)), and defendant also inflicted great bodily injury on Jane Doe—over 70 years of age—in committing the underlying felonies/sex crimes (§§ 12022.7, subd. (c), 12022.8).

The amended information alleged, finally, that defendant was subject to one prior “strike.” That is, he had been convicted in February 2007 of the separate, forcible rape of Mary Doe.

Defendant pleaded not guilty to these charges, and denied the accompanying enhancement allegations.

At the conclusion of defendant’s trial, on April 6, 2011, the jury found defendant guilty of all counts, and found true all of the enhancement allegations. On April 11, the court in its discretion struck the allegation of defendant’s prior “strike” conviction.

The trial court concluded its sentencing hearing on May 18, 2011. As to the conviction for forcible rape under count 1, the court imposed the enhanced prison sentence of 25 years to life authorized under section 667.61, subdivision (a). For the convictions for forcible oral copulation and forcible sexual penetration under counts 2, 3, and 4, it imposed consecutive, determinate prison terms of eight years each. With respect

³ Section 667.61, subdivision (d)(4), provides that the “defendant committed the present offense during the commission of [first degree residential burglary] with intent to commit [one of the sex offenses] specified in [section 667.61, subdivision (c)].”

⁴ The alleged circumstances “within the meaning” of section 667.61, subdivisions (a), (b), and (c), also included allegations defendant had personally inflicted great bodily injury on the victim in the commission of the charged sex crimes in violation of sections 12022.7 and 12022.8. We note this circumstance is set out in subdivision (d), not subdivision (e), of section 667.61. (See § 667.61, subd. (d)(6).)

to the convictions for residential burglary and elder abuse under counts 5 and 6, the court imposed, but stayed, consecutive prison terms of 18 months and four years, respectively. Regarding the enhancements alleged and proved in connection with the sex crimes for which defendant was convicted under counts 1 through 4, the court stayed imposition of sentence on the enhancements proved under section 12022.3, subdivision (b), and section 12022.7, subdivision (c). On the remaining enhancements, the court imposed consecutive terms totaling 60 years. Thus, defendant's sentence was 25 years to life, plus a determinate term totaling 84 years. This sentence was to run consecutively to the prison term defendant was currently serving, which had been imposed in February 2007.

Defendant's appeal followed. (See § 1237.)

DISCUSSION

A. The Kidnapping Enhancement Allegation Under Penal Code Section 667.61

Section 667.61 requires the imposition of an indeterminate sentence of 25 years to life when a defendant is convicted of a sex crime specified in subdivision (c), under “two or more” of the circumstances specified in subdivision (e). (§ 667.61, subd. (a).) The sex crimes specified in subdivision (c) of that section include each of the sex crimes—forcible rape, forcible oral copulation, and forcible sexual penetration—that were charged against defendant in this case. (§ 667.61, subd. (c)(1), (5), (7).) The circumstances set out in subdivision (e) of section 667.61 include the circumstance that “the defendant kidnapped the victim of the present offense in violation of Section 207 [or] 209” (§ 667.61, subd. (e)(1).)

With respect to each of the sex crimes charged in counts 1 through 4, the prosecution alleged, and the jury found true, “two or more” of the circumstances set out in section 667.61, subdivision (e), including the kidnapping circumstances specified under subdivision (e)(1).⁵ Subsequently, the trial court applied the circumstances the jury

⁵ The additional alleged circumstances under section 667.61, subdivisions (d) and (e), as also noted above, were that defendant committed the offenses during a burglary, while armed with a knife, and inflicted great bodily injury in violation of sections 12022.7 and 12022.8. (§ 667.61, subds. (d)(6) & (e)(2), (3).) The jury found these circumstances true as well.

had found true under section 667.61, subdivision (e), and imposed—as to count 1 only—the indeterminate sentence of 25 years to life pursuant to section 667.61, subdivision (a).⁶ In doing so, the court specified the two circumstances found to be true under section 667.61, subdivision (e), on which it relied to impose the sentence—the circumstance of “kidnapping with intent to commit a specific sex offense” (§ 667.61, subd. (e)(1)), and the circumstance that “defendant committed the present offense during the commission of a burglary” (§ 667.61, subd. (e)(2)). (See § 667.61, subd. (f).)⁷

The jury found true the allegation that defendant had kidnapped Jane Doe in violation of section “207 or 209.” (See § 667.61, subd. (e)(1).) The court, however, described the kidnapping that the jury had found true to be one that defendant had accomplished “with intent to commit a specific sex offense.” This indicates that the circumstance on which the court relied in imposing its sentence was the kidnapping circumstance described particularly under section 209, subdivision (b)—that is, as an act in which “[a]ny person . . . carries away any individual to commit robbery, rape” or another of several specified sex crimes. (§ 209, subd. (b)(1).) We may reasonably infer that the jury’s finding was itself consistent with the court’s characterization of that finding, not only from the instructions it was given, but also from the prosecution’s

⁶ As to defendant’s convictions for the remaining sex crimes charged in counts 2, 3, and 4, the trial court imposed the determinate, consecutive sentences authorized under section 667.6, subdivision (c).

⁷ We observe the trial court indicated on the record an alternate basis for its imposition of sentence, as to count 1, pursuant to section 667.61, subdivision (a). The sentence of 25 years to life is required under subdivision (a) not only when “two or more” of the circumstances set out in subdivision (e) are found true, but also when “one or more” of the circumstances specified in subdivision (d) are found true. (§ 667.61, subd. (a).) The court noted the jury had additionally found true a circumstance alleged pursuant to section 667.61, subdivision (d)(4)—that is, the court stated, “defendant committed the present offense during the commission of a burglary of the first degree as defined in subdivision (a) of section 460 with intent to commit an offense specified in subdivision (c) [of section 667.61, which includes] rape in violation of [] section 261[, subdivision (a)(2)].”

closing argument, which focused on the kidnapping definition set out in section 209, subdivision (b).⁸

The act of kidnapping defined in section 209, subdivision (b)(1)—committed in furtherance of robbery or a specified sex crime—applies “only . . . if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense.” (§ 209, subd. (b)(2).) Defendant, emphasizing this statutory qualification, contends, in essence, that the evidence presented was insufficient to support the jury’s finding that he kidnapped Jane Doe within the meaning of section 209, subdivision (b). He cites several decisions, particularly *People v. Daniels* (1969) 71 Cal.2d 1119, for the proposition that, “when in the course of a *robbery*[,] a defendant does no more than move his victim around inside the premises in which he finds [the victim]—whether it be a residence, as here, or a place of business or other enclosure—his conduct generally will not be deemed to constitute the offense proscribed by section 209.” (*Id.* at p. 1140, italics added.) Defendant reasons that here, too, his movement of Jane Doe was entirely within her residence, no more than a few feet from her kitchen to the attached garage. He urges the movement was not substantial, but merely incidental to the sex offenses, and it did not increase the risk of harm.

We review this contention to determine, after viewing the evidence in the light most favorable to the prosecution, whether *any* rational trier of fact could have found the essential elements of the crime (or enhancement circumstances) beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319.)

Jane Doe testified she had just gotten up at 6:00 a.m., and opened her garage door to let out her pet dog. Leaving the garage door open, she went back into the kitchen to

⁸ The instructions on the kidnapping issue—aside from those concerning simple kidnapping under section 207—were limited to the kidnapping definition set out in section 209, subdivision (b). (See Judicial Council of California Criminal Jury Instructions (2011) CALCRIM No. 1203.)

make coffee. Defendant entered the kitchen with a knife in one hand, put his other over Jane Doe's mouth and told her not to scream. He asked her if there was anyone else in the house, and she said, "No," only herself and her dog, although she later told defendant she was expecting her son to come by shortly, at 7:30 a.m. The dog, by this time, was back in the kitchen, barking, and Jane Doe asked defendant not to hurt her dog. Defendant took some cash and credit cards from her purse. He then pushed Jane Doe from the kitchen into the garage, down a few stairs, causing her to break her wrist. He closed the door between the kitchen and garage to keep the dog out. It was at that point that defendant forced Jane Doe onto the floor of the garage and began to commit the charged sexual offenses.

As we have noted, the charge of kidnapping under section 209, subdivision (b), has two prongs. The first prong is shown when a person "carries away any individual to commit robbery [or] rape" or another specified sex offense. (§ 209, subd. (b)(1).) With regard to this prong, the jury considers the scope and nature of the movement, including the actual distance the victim is moved. There is, however, no minimum distance a defendant must move the victim in order to satisfy the first prong. (*People v. Vines* (2011) 51 Cal.4th 830, 870.)

Under the second prong, "the movement of the victim [must be] beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense." (§ 209, subd. (b)(2).) This refers to whether the movement subjects the victim to a substantial increase in risk of harm above and beyond that inherent in the underlying crime, and includes consideration of such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes. (*People v. Vines, supra*, 51 Cal.4th at p. 870.) The risk of harm may be increased even if the dangers do not actually materialize. (*Ibid.*) The jury, as we have noted, was properly instructed as to these considerations. (See fn. 8, *ante.*)

Initially, we decline to apply the notion defendant has drawn from decisions involving kidnapping in the furtherance of a robbery, to the effect that movement of a

victim from one part of a building to another is categorically insufficient for purposes of section 209, subdivision (b), when carried out in furtherance of committing a sex crime. (See *People v. Shadden* (2001) 93 Cal.App.4th 164, 169–170.)

In our view, the foregoing evidence was sufficient for the jury to find that both prongs of section 209, subdivision (b), were satisfied. Given that defendant did not commence his attack on Jane Doe until he completed his forced movement into the garage, the jury could reasonably find, beyond a reasonable doubt, that the movement was more than “merely incidental” to the commission of those offenses. Moreover, the jury could similarly have found, beyond a reasonable doubt, that the movement substantially increased the risk of harm to Jane Doe, because it prevented her, for example, from escaping to another room of the house where she could lock the defendant out and summon help. It also decreased the likelihood of detection should anyone else, such as Jane Doe’s son, arrive suddenly at the house, and correspondingly increased the defendant’s opportunity to commit the series of sexual offenses that he in fact committed while in the garage. Finally, we note that the nature, or manner, of defendant’s forcible movement of Jane Doe increased the risk of danger of physical injury to her, and did, in fact, result in her fracturing her wrist.

Viewing the evidence in the light most favorable to the prosecution, we conclude the evidence was sufficient for a rational trier of fact to find, beyond a reasonable doubt, that defendant’s movement of Jane Doe constituted a kidnapping in violation of section 209, subdivision (b). (*People v. Johnson, supra*, 26 Cal.3d at p. 576.)

B. *The “Propensity” Evidence Admitted Under Evidence Code Section 1108*

Among the prosecution’s pretrial motions was one seeking to admit “propensity” evidence under Evidence Code sections 1108 and 1101—specifically, the facts underlying defendant’s conviction, in February 2007, of forcible rape against Mary Doe. Defendant opposed the motion on the ground that its prejudicial effect far outweighed its probative value under Evidence Code § 352. At its hearing on the matter, on March 8, 2011, the trial court granted the motion. It determined that the facts underlying the sex crime against Mary Doe were not more inflammatory than those at issue involving Jane

Doe. Moreover, the facts underlying both crimes showed a number of similarities, and the two incidents were not remote, but had occurred within a month of each other. The court further found the facts probative not only to show a common modus operandi, but also regarding the credibility of Jane Doe, who was to testify at trial and was currently 92 years old. It concluded the probative value of the proposed evidence outweighed its prejudicial effect, and ruled the proposed testimony by Mary Doe admissible.

Defendant argues that the probative value of Mary Doe's testimony was substantially outweighed by its "exceedingly prejudicial" effect on the jury. He contends, in addition, that the prosecution's remark during closing argument—that "if he's raped before he'll rape again"—exacerbated this prejudicial effect. The trial court's error in allowing the propensity evidence, in defendant's view, cannot be considered harmless under all the circumstances.

Propensity "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is [generally] inadmissible" (Evid. Code, § 1101, subd. (a).) There are, however, specified exceptions. (*Ibid.*) One of these exceptions provides that "[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 . . . is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1108, subd. (a); see Evid. Code, § 1108, subd. (d)(1)(A) ["sexual offense" includes forcible rape, oral copulation, and sexual penetration as proscribed under §§ 261, 288a, & 289].)

Evidence Code section 352 provides discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumptions of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) In determining whether to admit evidence of "another sexual offense" under Evidence Code section 1108, subdivision (a), "trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the

likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.' ” (*People v. Loy* (2011) 52 Cal.4th 46, 61, quoting *People v. Falsetta* (1999) 21 Cal.4th 903, 917.) We review the trial court's ruling for abuse of discretion. (*People v. Story* (2009) 45 Cal.4th 1282, 1295.)

The prosecution, in its motion to admit Mary Doe's testimony under Evidence Code section 1108, summarized the proposed evidence as follows. At approximately 6:00 a.m. on November 17, 2005, Mary Doe—then 15 years old—was awakened when a man entered the bedroom she occupied with her younger sister. He put his hand over her mouth, put a knife to her throat and asked if anyone else was in the house. She nodded “yes,” and defendant told her he would not hurt her if she kept quiet. He pulled her off the bed and forced her out of the room and downstairs to the living room. There he put a blanket over her face, forcibly orally copulated her, and forced her to do the same to him. He digitally penetrated Mary Doe's vagina, and vaginally raped her, telling her to keep her legs up. He licked her left breast. The man forced her into the kitchen after hearing someone upstairs coughing. He vaginally raped Mary Doe again, once on the kitchen counter and once from behind after bending her over a kitchen chair. Mary Doe saw it was about 6:45 a.m. when defendant got scared and left. Mary Doe subsequently identified defendant as the man who attacked her.⁹ The prosecution concluded with a statement that defendant had pleaded guilty to the forcible rape of Mary Doe, and in connection with this offense had admitted using a deadly weapon and attempting to dissuade Mary Doe from reporting the crime. Defendant was convicted accordingly, and on February 1, 2007, was sentenced to a prison sentence of 25 years to life. (See fn. 1, *ante*.)

⁹ We note Mary Doe's subsequent testimony substantially conformed to this offer of proof, and concluded with her again identifying defendant as her attacker.

We have summarized the factors to be considered by the trial court in conducting the weighing process of Evidence Code section 352 to determine whether to admit evidence of “another sexual offense” pursuant to Evidence Code section 1108. In our view, the trial court, in this instance, properly considered and dismissed concerns regarding “possible remoteness,” “the degree of certainty” that it was committed, or the potential burden on defendant to defend against the incident involving Mary Doe. (*People v. Loy, supra*, 52 Cal.4th at p. 61.) The evidence showed the two offenses occurred within a month of one another in 2005, and that defendant, when confronted with the evidence of the incident involving Mary Doe, negotiated a plea resulting in his conviction and sentence for forcible rape.

We also conclude it was reasonable for the trial court to conclude the evidence of the offense involving Mary Doe was highly probative, due to the marked “similarity” with the charged offenses. (*People v. Loy, supra*, 52 Cal.4th at p. 61.) Both offenses were committed in the victim’s residence in the early morning. In both instances, the defendant moved the victim from one part of the house to another in order to facilitate the commission of the offenses. Further, the details of defendant’s attack on Jane Doe were similar in several respects to the details of his attack on Mary Doe. The testimony of Jane Doe indicated that defendant had similarly initiated his contact with her by putting one hand over her mouth, telling her to keep quiet, while holding a knife in the other hand. He similarly asked Jane Doe if anyone else was in the house. Jane Doe testified that defendant—again similar to the incident involving Mary Doe—both digitally penetrated her vagina and vaginally raped her, and then told her to turn over and get on her hands and knees, after which he vaginally raped her from behind. A nurse who examined Jane Doe after the incident further testified that Jane Doe had reported to her that defendant first pulled Jane Doe’s nightgown over her head, similar to the way in which defendant first put a blanket over Mary Doe’s head. Jane Doe also reported to the nurse details similar to those reported by Mary Doe—which Jane Doe no longer recalled at the time of trial—indicating defendant had forcibly orally copulated her, and had forced her to orally copulate him, and had engaged in “some licking of her breasts.”

Finally, we conclude the trial court reasonably determined that the “likely prejudicial impact” of the evidence of defendant’s sexual offense against Mary Doe—who was 15 years old at the time—was no greater than that inherent in the charged offenses against Jane Doe—who was 87 years old at the time and suffered a fractured wrist as a result of defendant’s attack. (*People v. Loy, supra*, 52 Cal.4th at p. 61.)

We conclude the trial court did not abuse its discretion in ruling the evidence of the sexual offense against Mary Doe admissible under Evidence Code section 1108.

DISPOSITION

The judgment is affirmed.

Marchiano, P.J.

We concur:

Margulies, J.

Dondero, J.