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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALAN SCOTT RANDEL,

Defendant and Appellant.

A132185

**(Sonoma County
Super. Ct. No. SCR564177)**

Alan Scott Randel appeals from a judgment of conviction and sentence after a jury found that he had committed multiple sex offenses against his minor stepdaughter. He contends the trial court erred by imposing the upper term of sentence based in part on the court's finding that he had committed perjury at trial. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

An amended information charged Randel as follows: in counts 1 through 3, forcible rape (Pen. Code, § 261, subd. (a)(2)); in count 4, forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)); in count 5, dissuading a witness by means of force or threat of force (Pen. Code, § 136.1, subd. (c)(1)); and in count 6, felony child endangerment (Pen. Code, § 273a, subd. (a)).

The matter proceeded to a trial by jury.

A. Prosecution Case

Randel was the stepfather of victim Jane Doe, who was about 13 years old when Randel married Doe's mother. Randel, Doe, Doe's mother, and Doe's older brother lived together in an apartment in Santa Rosa for about 18 months, until Doe's mother, and then

Doe's brother, moved out in the beginning of 2006. By then, Doe was around 14 years old. Randel assured Doe that he would take care of her and put her through college, so Doe agreed to continue living with him.

Randel was strict with Doe. He did not allow her to talk to boys. He often punished her by taking away her phone or iPod or forbidding her to visit her friends. Doe testified: "A couple times he locked me in my bedroom and I wasn't allowed to go out and get anything to drink or eat and [had] to stay in for a day." Once Randel made Doe stay in her room without allowing her to use the bathroom. He also forbade her from shutting her bedroom door and bathroom door; if she tried to shut the bathroom door, he would open it and yell at her.

Randel was physically and emotionally abusive as well. He punched Doe in the face a couple of times, slapped her in the face, pushed her to the floor, and punched her in the arms, resulting in bruises. One of the blows to her face caused her braces to slice her gums. He warned Doe that if she ever told anybody, he would kill her or hurt her family or she "wouldn't have any place to live or any place to go."

When Doe was 15 years old, she and Randel moved into a house. There, Doe slept in her own bed only once. On that night, she awoke to find Randel groping her vagina and breasts, outside her clothes. When she asked him to stop touching her and to get out of her room, he became angry. After that, Randel insisted that Doe sleep in his bed; Doe acquiesced because she felt she had no choice.

A couple of months before her sixteenth birthday, Randel forced Doe to have sexual intercourse for the first time. Doe was sitting on the bed, watching television, when Randel entered and told her to sit next to him. When she refused, he sat next to her and started to rub her thigh. She slapped his hand away and told him not to touch her, and they argued. He then began rubbing her vagina outside her clothes, and she told him to stop. Doe attempted to get up, but Randel pulled her back; she tried to leave, but Randel blocked the door, pushed her onto the bed, held her down, and took off her pants. Randel started to put his penis in Doe's vagina; she was crying and attempted to get up, but she was unable to. Randel then raped her, using "a lot of force" to prevent her from

escaping. Afterward, Doe “just laid there, crying, for a while,” and Randel “got up and left.”

From then on, Randel continued to have sex with Doe, for awhile “a couple times a week.” She never consented or wanted to have sex with him. To the contrary, Doe testified, she always told Randel that she did not want to have sex with him, but “[h]e would always get mad and hit me, or he would yell back at me.” Doe even tried to push Randel off of her, punch him, slap him, and throw things at him, but “[i]t just made [Randel] mad and more angry.” Eventually, Doe stopped resisting. She testified: “I was afraid of getting hit or slapped. I didn’t want to get hurt anymore.”

Doe also tried to call the police once but, she testified, Randel “threw the phone and told me, ‘I wouldn’t call the police,’ because if I did, he would kill me.” Randel threatened Doe that if she told anybody, he would hurt her mother and brother and she would be homeless with nowhere to go.

Randel told Doe that he wanted to marry her and “have kids” with her, bought her diamond jewelry, etched their names in the concrete in front of the house, and claimed “it’s not rape because we’re in love.” Doe acknowledged that she did tell Randel that she loved him, because he was her stepfather and because she thought he would otherwise get mad. But she thought he was “crazy” when he said, “we’re in love,” because she told him “all the time” that she was *not* in love with him.

Randel nonetheless continued to assault Doe sexually until June 13, 2009. On that day, he orally copulated her for the first time. When Doe told him “no,” Randel forced his penis into her vagina.

A few days later, Doe told a friend that Randel was sexually assaulting her. At trial, the friend confirmed that Doe had cried and said that Randel had been molesting her for a year and a half.

Detective Hector DeLeon of the Santa Rosa Police Department investigated Doe’s complaint against Randel. Doe agreed to make a pretext phone call to Randel, which DeLeon recorded. In the phone conversation, Randel promised Doe that he would stop having sex with her. He apologized and said that he felt bad. When Doe asserted that it

“started when I was fifteen, almost sixteen,” Randel replied: “I expected too much from you.” When Doe claimed, “I told you every time I don’t want to” and “[w]hat you did to me is not okay,” Randel did not dispute the point, but asked whether Doe was with anyone. Doe said “raping me is not okay,” and Randel told her not to “say that.” He agreed not to lick her vagina. He also acknowledged that he should not have hit Doe and that he had a bad temper.

Randel was arrested. In an interview with Detective DeLeon, Randel initially denied hitting Doe or having any sexual contact with her. Later, he admitted that he had sex with her at least five times, and that Doe might be correct that it began in January 2008. He also admitted that they orally copulated each other and that Doe copulated him two or three times. Randel claimed that he and Doe were a couple and were “in love,” and he expressed disbelief that Doe said the sex was not consensual.

Psychologist Anthony Urquiza, as an expert in child sexual abuse accommodation syndrome (CSAAS), testified that the components of CSAAS include the abused child’s secrecy about the abuse, feelings of helplessness, disassociation, and delayed disclosure. A number of factors present in this case, he opined, were consistent with abuse or could produce one or more of the characteristic CSAAS behaviors.

B. Defense Case

Randel testified that he and Doe were in love and they “told each other every day that [they] loved each other” – five times a day. They would hug and kiss on the couch, and eventually their relationship became sexual: he touched her vagina; she touched his penis; they orally copulated each other; they had intercourse “[m]any times”; they had an “intimate sexual relationship” that “was loving, very loving”; Doe was “comfortable with” Randel orally copulating her; and “Doe actually enjoyed having a sexual relationship. Randel claimed that Doe would want to have sex, but he would refuse because he did not want to get her pregnant. Once when he suggested they “make love,” Doe said she did not have a ring, so he took her to pick out a ring and later bought it for her. He denied beating, threatening, shoving, or forcibly raping Doe.

During cross-examination, the prosecutor queried Randel about lies he told to Detective DeLeon during their interview. Randel acknowledged, “Yeah throughout the whole interview, I suppose I lied.” Attempting to explain himself, he said: “All I can say for myself is I was uncomfortable.” He claimed he had “never been in that position.” He added: “I was totally at sea. I didn’t know how to answer the questions without putting myself in jeopardy or Ms. Doe.” He asserted that he “wanted to tell the truth, but it wasn’t going to be heard.” Many times DeLeon asked Randel to tell the truth, but he “didn’t feel comfortable with it.”

Other defense witnesses included a neighbor, who testified that Doe said she had a “boyfriend at work” and a “house boyfriend,” and then quickly said, “no, no, no, I meant at work.” Randel’s stepmother testified that she saw Doe sit down next to Randel and “cozy” up to him. Randel’s father testified that he saw Doe rub Randel’s hair, put her finger in his ear, place her arms around Randel, and slide her hand into his back pocket. Randel’s mother testified that she saw Doe run her hands up Randel’s neck and “tickle” it, “shush” him by placing her fingers on his lips, and slide under Randel’s arm in a restaurant.

C. Jury Verdict

The jury found Randel guilty on counts 1 through 4. On count 5, the jury convicted him on the lesser offense of dissuading a witness (Pen. Code, § 136.1, subd. (b)(1)), and on count 6, the jury convicted him on the lesser offense of misdemeanor child abuse (Pen. Code, § 273a, subd. (b)).

D. Sentence

The probation department’s presentence report suggested that the court should consider, among other factors, that Randel perjured himself at trial by testifying he had been in a consensual dating and sexual relationship with Doe and she fabricated the rapes. (See Cal. Rules of Court, rule 4.421(a)(6) [aggravating factors include “illegally interfer[ing] with the judicial process”].) Randel’s sentencing memorandum argued that Randel genuinely believed that his relationship with Doe was consensual, and that his mistaken belief should be treated as a mitigating factor.

The court sentenced Randel to state prison for the total term of 25 years, comprised of the following: the three-year upper term on count five (dissuading a witness); a consecutive upper term of eight years on count one (forcible rape); consecutive six year midterms on each of count two and count three (forcible rape); and a consecutive two years (one-third the midterm) on count four (oral copulation). In addition, the court imposed a one-year concurrent term on count six (child abuse).

In imposing the upper term on counts one and five, the court noted several factors that led to its decision, including Randel's perjury at trial: "Because the defendant obviously committed perjury during the course of his testimony and admitted same during the course of that testimony[;]the defendant has engaged in violent conduct which indicates he's a serious danger to society; the defendant's prior convictions as an adult are numerous; the defendant was on a conditional sentence when the crimes were committed; and the defendant's prior performance on conditional sentence and probation were unsatisfactory and, as such, the three-year [upper] term was imposed [on count five]. [¶] The same reasoning is going to be applied to the other matters in which the aggravated term will be imposed."

This appeal followed.

II. DISCUSSION

Of the several reasons the trial court gave for imposing the upper term on counts one and five, Randel hones in on the court's finding that he "obviously committed perjury during the course of his testimony and admitted same during the course of that testimony." Randel argues that the court improperly imposed the upper terms based on this perjury finding, and that the matter must be remanded for new sentencing.

A court may consider a defendant's perjury in meting out a sentence. "A trial court's conclusion that a defendant has committed perjury may be considered as one fact to be considered in fixing punishment as it bears on the defendant's character and prospects for rehabilitation." (*People v. Redmond* (1981) 29 Cal.3d 904, 913.) "The commission of perjury is of obvious relevance in this regard, because it reflects on a defendant's criminal history, on [the defendant's] willingness to accept the commands of

the law and the authority of the court, and on [the defendant's] character in general.” (*United States v. Dunnigan* (1993) 507 U.S. 87, 94 (*Dunnigan*); see also Cal. Rules of Court, rule 4.421(a)(6).)

If the court imposes an aggravated sentence based on the defendant's perjury, however, the court must make findings on the record encompassing the elements of perjury: “a willful statement, under oath, of any material matter which the witness knows to be false.” (*People v. Howard* (1993) 17 Cal.App.4th 999, 1004 (*Howard*).) These findings are constitutionally required to protect against a violation of the defendant's constitutional right to testify, which does not include a right to commit perjury. (*Ibid.*) The concern, essentially, is that a sentence may be aggravated if the defendant actually committed perjury by being untruthful, but not if the defendant merely gave inaccurate testimony due to confusion, mistake, faulty memory or some other reason besides a willful attempt to impede justice. (*Ibid.*; see *Dunnigan, supra*, 507 U.S. at pp. 95-96.)

In the present case, respondent concedes, the trial court failed to make express findings encompassing all the elements of a perjury violation. For purposes of our analysis, therefore, we will assume that the court erred in this respect.

Any such error, however, was harmless. In *Howard*, the trial court had not made express findings encompassing all the elements of perjury, but the error was deemed harmless beyond a reasonable doubt because the defendant's inaccurate testimony was clearly not given “ ‘due to confusion, mistake or faulty memory.’ ” (*Howard, supra*, 17 Cal.App.4th at p. 1005.) The same can be said of Randel's testimony.

Randel and Doe presented entirely inconsistent, mutually incompatible accounts of their relationship and, more importantly, specific events. Randel represented to Detective DeLeon – and the jury – that he and Doe were in love, Doe enjoyed having sex with him, and he never beat or threatened her. Doe, on the other hand, testified that she told Randel she was *not* in love with him, she told Randel she did *not* want to have sex with him, she *never* consented to any sexual act but instead tried to resist by pushing, punching, slapping, throwing things, and saying “no,” and Randel beat her physically and threatened her life and her family. Thus, the differences between their respective

testimonies cannot be chalked up to the supposition that two people can perceive or recall nebulous events differently; rather, Randel and Doe took steadfastly contrary positions as to whether many particular acts and statements occurred or not. As in *Howard*, “[s]omeone was lying,” not just confused or mistaken. (*Howard, supra*, 17 Cal.App.4th at p. 1005 [adequate assurance that there was no violation of constitutional right to testify where the victim claimed defendant forced her to perform act of oral copulation, while the defendant claimed that the victim offered and willingly performed the act].)

Furthermore, the willful falsity of Randel’s statements in the interrogation and in court is made plain by the fact that his account to the police and at trial did not just contradict Doe’s account; it also contradicted his own statements during the pretext phone call. While he told the police and the jury that he never slapped or punched Doe, in the phone call he essentially admitted that he had done just that, acknowledging his bad temper and agreeing that he should not have hit her. While he told the police and the jury that the sex he had with his 15-year-old stepdaughter Doe was consensual, in the phone call he did not dispute Doe’s assertion that she told him every time that she did not want to have sex; instead, he merely asked Doe if someone was with her (within hearing distance) as she spoke on the phone. In fact, in the phone call he apologized to Doe, said he felt bad about having sex with her, and promised to stop. The inference is that his statements to the police and in court were conscious and deliberate falsehoods.

Moreover, Randel’s admission that he lied during the police interview because he was uncomfortable with telling the truth and afraid of putting himself in jeopardy was the icing on the cake. Randel conceded during cross-examination that he had lied “throughout the whole interview” with Detective DeLeon because, among other things, he did not want to put himself “in jeopardy,” and he chose not to tell the truth because he did not feel “comfortable” doing so. From this testimony it is reasonable to conclude that Randel was willing to lie to protect himself, and that his statements to the detective and at trial were not mistakes, misperceptions, or good faith assertions, but deliberate falsehoods geared to mislead others so he could escape liability.

Indeed, whether or not the court expressly made findings on each element of perjury, substantial evidence supported a finding on all of those elements: a willful statement, under oath, of a material matter, which the witness knows to be false. (*Howard, supra*, 17 Cal.App.4th at p. 1004; Pen. Code, § 118.) The court observed that cross-examination revealed Randel’s willingness to lie if he was under pressure or did not want to tell the truth, and that his “contentions about there was this unusual relationship and it went on for the period of time and it was with the consent of the victim” were not believable. This pertains to Randel’s statements, under oath (at trial), pertaining to material matters. And for the reasons stated *ante*, a reasonable inference from the evidence is that Randel made the false statements willfully, knowing they were untrue when he made them, rather than out of any confusion, mistake, or faulty memory. The record, therefore, “provides adequate assurance that there was no violation of the constitutional right to testify—i.e., that the court’s reliance on perjury as an aggravating factor was properly based on untruthfulness. The court’s omission was harmless beyond a reasonable doubt.” (*Howard, supra*, 17 Cal.App.4th at p. 1005.)

Randel argues that the court drew an unreasonable inference in finding that he admitted “that [he] would only tell a lie if he was under pressure or didn’t want to tell the truth” and confirmed the “lack of his credibility unless it suited him.” Randel notes that he explained at trial that he was “at sea” during the interrogation, had not been in such a situation before, and was worried that his answers would put him or Doe in jeopardy. This, Randel argues, does not suggest he was dishonest when he testified at trial or predisposed to lie under oath. But that is exactly what it suggests. Randel essentially conceded that he made a conscious decision not to tell the truth because he thought it could turn out bad for him, suggesting dishonesty and a willingness to lie. The reasonable inference is that he would lie, even if under oath at trial, to try to escape a guilty verdict.

In his reply brief, Randel argues that the record suggests he really believed, out of confusion or delusion, that his sexual relationship with Doe was consensual. In essence, he urges that the evidence could be viewed such that his statements on this point were not

willfully false. Plainly, however, there was ample evidence supporting the trial court's finding that he *was* lying, rather than being confused or deluded, after consideration of all the evidence as well as Randel's demeanor on the stand. Moreover, aside from Randel's perception of his relationship with Doe, he testified that certain acts and events simply did not occur, and there was no evidence that those denials stemmed from confusion or delusion as opposed to a conscious decision to deny the truth.

In sum, Randel fails to establish reversible error in the court's perjury finding, and its reliance on that finding to impose the upper term, even though the court did not make express findings with respect to each of the perjury elements.¹

Furthermore, regardless of the propriety of the court's reliance on Randel's perjury, any error in this regard would be harmless for another reason: the court relied on several other permissible aggravating factors in imposing the upper term. (Cf. *People v. Black* (2007) 41 Cal.4th 799, 813.) A "single factor in aggravation will support imposition of an upper term." (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433; see also *People v. Osband* (1996) 13 Cal.4th 622, 730.) And, the parties agree, when a court has given both proper and improper reasons for a sentence choice, the sentence will not be set aside unless "it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492.)

¹ Randel also argues more broadly: "Permitting the sentencing court to treat an acknowledgement [by the defendant at trial] of that lack of candor [in his interrogation by police] as the pivotal factor in imposing an aggravating term would be tantamount to permitting the imposition of an aggravated [term] whenever a defendant testifies after having lied in the course of interrogation." But Randel's concern is misplaced. First, Randel did not receive the aggravated term because he lied to the police in the course of interrogation, but because he lied at trial. Second, the conclusion that Randel lied at trial was not derived solely from the fact that he lied in the course of interrogation and then stuck with those false statements at trial; it was also supported by his contradictory statements in the pretext phone call and his admission that he was basically willing to lie when it suited him. Third, as we discuss *post*, Randel's perjury in this case was *not* the "pivotal factor" in imposing the aggravating term.

Here, it is not reasonably probable that the court would have imposed a lesser sentence if it had known that the perjury factor was improper. In addition to the perjury finding, the court found that (1) Randel “has engaged in violent conduct which indicates he’s a serious danger to society;” (2) Randel’s “prior convictions as an adult are numerous;” (3) Randel “was on a conditional sentence when the crimes were committed;” and (4) Randel’s “prior performance on conditional sentence and probation were unsatisfactory.” Randel does not dispute any of these four aggravating factors or that substantial evidence supports them; nor does he dispute that any of these four factors would suffice to support the imposition of the upper term.

Instead, Randel argues that it is reasonably probable the court would have imposed a lesser sentence without the perjury finding because “the court acknowledged that its finding that appellant perjured himself was the *decisive factor* in selecting the upper terms on counts one and five.” (Italics added.) The court, however, acknowledged no such thing.

Randel bases his argument on the following statement by the court: “I think *one of the possibly most significant parts* of this case from a sentencing perspective, Mr. Woods [defense counsel], is the position that your client has put you in when he committed perjury on the stand in front of the Court because I, quite candidly, have never been in a situation in which what I would respectfully classify as rather rigorous and pointed cross-examination revealed that your client would only tell a lie if he was under pressure or didn’t want to tell the truth. [¶] And when he said that on the stand, he lost all credibility in the eyes of the Court. [¶] So these contentions about there was this unusual relationship and it went on for the period of time and it was with the consent of the victim, none of that do I believe.” (Italics added.) The court’s statement cannot be construed to mean that Randel’s perjury was the decisive factor in choosing the aggravated term, for two reasons.

First, the court merely stated that Randel’s perjury was “*one of the possibly most significant parts* of this case from a sentencing perspective.” (Italics added.) The court did *not* say that this factor was pivotal or decisive in its decision to impose the aggravated

term, let alone that the court would not have imposed the upper term had it not been for Randel's perjury. To the contrary, Randel's perjury was just "one" of the significant bases for the sentence.

Second, when the court made this statement, it was not explaining the court's reasons for imposing the upper term, but the court's reason for rejecting the defense notion that Randel's claim of consensual sex should be a mitigating factor. Immediately before the court's statement, defense counsel had asked the court to accept the defense view that there were factors in mitigation, which included the assertion that Randel genuinely believed the sex was consensual and had acted under a mistaken belief. Thus, when the court referred to "one of the most significant parts of the case for sentencing purposes," it seems to have meant that Randel's perjury, his declaration of willingness to perjure himself, and his resulting lack of credibility were significant to whether there was a mitigating factor: in other words, the court did not find Randel's claim of mistake to constitute a factor in mitigation, because the court did not believe Randel's claim of mistake. And, even if the court could not use perjury as an aggravating factor, it certainly could use Randel's trial testimony to find in its discretion that there were no mitigating factors, leaving the other four aggravating factors to support the imposition of the upper term. Nothing in the court's statements suggests that the upper term would not have been imposed, even if the court did not rely on Randel's perjury as an aggravating factor.

Randel's remaining arguments are flatly untenable. He asserts: "The court also indicated that it had reservations about the length of the sentence it was imposing, noting that appellant was receiving a harsher sentence than defendants the court had sentenced for first degree murder." This, however, is a complete misrepresentation of the record.

The court did *not* express reservations about the 25-year sentence it was imposing; it expressed its view that the 35-year sentence proposed by the probation department was excessive. In fact, the court expressed great confidence in the propriety and fairness of the 25-year sentence it was imposing: "And I indicated my reasons to impose the 25-year term, and the reasoning is based on a full review of the evidence by the Court, the interest

of justice would be served by the subject sentence. [¶] The fact that society would be protected. [¶] The fact that the victim would be protected in particular.”

As to the court’s reference to “first degree murder,” it had nothing to do with any concern that Randel’s sentence was more than what some murderer had received. Rather, the court said this: “*I probably labored over this sentencing more than any other sentence I have imposed even on the first degree murder cases over which I have presided because there’s so much discretion here before the Court. [¶] And I have spent several hours and probably on five or six significant occasions in trying to grapple with [this] particular case.*”

The record confirms no reasonable probability that the court would have imposed a lesser sentence if it believed that its perjury finding could not be used as an aggravating factor. Randel fails to establish reversible error.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.