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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFREDO ASCENCIO,

Defendant and Appellant.

B239701

(Los Angeles County
Super. Ct. No. PA054662)

APPEAL from a judgment of the Superior Court of Los Angeles County. David B. Gelfound, Judge. Affirmed.

Judith Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott Taryle and Kimberly J. Baker-Guillemet, Deputy Attorneys General, for Plaintiff and Respondent.

An information, filed March 18, 2011, charged Alfredo Ascencio with two counts of committing a lewd act on a child under the age of 14 (Pen. Code, § 288, subd. (a))¹, along with multiple-victim special allegations under section 667.61, subdivisions (b) and (e)(4), and section 1203.066, subdivision (a)(7). A jury found Ascencio guilty on one of the counts, but not guilty on the other count. It found the multiple-victim special allegations not true. The trial court sentenced Ascencio to state prison for eight years, the upper term for a conviction under section 288, subdivision (a). Ascencio appealed, arguing evidentiary and sentencing errors. We affirm the judgment.

DISCUSSION

1. *The Other-crimes Evidence Did Not Prejudice Ascencio's Case*

Ascencio contends that the trial court committed prejudicial error by permitting questioning of one of his character witnesses about his prior conviction for possession of narcotics for sale in violation of Health and Safety Code section 11351. Although the court precluded reference to the conviction as a basis to impeach Ascencio's testimony in his defense, it allowed questioning of the character witness whether knowledge of the conviction would change her opinion that Ascencio acted appropriately with children. According to the court, "Although [the prior conviction] may not come in, if [Ascencio] chooses to testify due to the fact that [the prior conviction] is remote, once the defendant's character is brought into question I do believe the People can ask would it change your opinion if you knew the defendant had a prior [narcotics] charge and that is as far as it would go." After this ruling, defense counsel asked Sandra Chicas, one of Ascencio's character witnesses, "Would your opinion change if you were to hear that Mr. Ascencio had been convicted of a possession for sale of narcotics over 25 years ago." Chicas replied, "It would probably be [a] surprise, but I think I met him when he actually changed his life. I didn't meet him the way he was before, so I just know him the way he was when he was going to church."

¹ Statutory references are to the Penal Code unless otherwise noted.

Contrary to Ascencio’s contention, even if permitting inquiry regarding the prior conviction constituted error, any such error did not prejudice Ascencio’s case, as it is not reasonably probable that he would have obtained a more favorable result had the court precluded inquiry. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)² The jury’s verdict, finding Ascencio not guilty on the second count under section 288, subdivision (a), demonstrates that it carefully considered the evidence and did not use inquiry regarding his prior conviction to determine guilt in this case. Moreover, on the count under section 288, subdivision (a), for which the jury found Ascencio guilty, the evidence was undisputed that (1) Ascencio and the seven-year-old victim were alone in an area near the laundry room in the apartment complex where Ascencio and the victim lived; (2) the victim ran from the area crying and then told her sister that Ascencio had touched her vagina; (3) Ascencio made contradictory statements regarding the incident to the victim’s father shortly after the victim told her sister that Ascencio had touched her vagina; and (4) after learning that accusations had been made against him and that the police wanted to talk to him, Ascencio fled his apartment, leaving his wife and children behind, and was not apprehended by police until October 2010, almost five years after the incident with the victim. The trial court also instructed the jury that “[e]vidence of the defendant’s character for interacting appropriately with children can by itself create a reasonable doubt,” thereby putting the evidence that Ascencio had acted appropriately with children in proper context for the jury. As a result, based on the jury’s verdict as a whole, the strength of the evidence on the count for which the jury found Ascencio guilty and the

² Although Ascencio argues that permitting inquiry regarding his prior conviction amounted to federal constitutional error, requiring a harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24), California cases use the state harmless-error standard in *People v. Watson, supra*, 46 Cal.2d at p. 836 to evaluate prejudice from the erroneous admission of other-crimes evidence. (*People v. Malone* (1988) 47 Cal.3d 1, 22; *People v. Wagner* (1975) 13 Cal.3d 612, 620; *People v. Felix* (1999) 70 Cal.App.4th 426, 432-433.)

instruction regarding character evidence, any error in permitting inquiry regarding Ascencio's prior conviction did not prejudice his case.³

2. *The Trial Court Did Not Err By Imposing a State Prison Term*

In the event his conviction stands, Ascencio asks us to remand the matter for resentencing, arguing that the court imposed a state prison term on the mistaken belief that Ascencio was presumptively ineligible for probation. No basis exists to remand for resentencing.

Defense counsel did not object to imposition of a state prison term. (See *People v. Scott* (1994) 9 Cal.4th 331, 353.) Indeed, defense counsel argued that the low state prison term for a section 288, subdivision (a), violation was appropriate in this case.

Moreover, any objection to imposition of a state prison term would have been futile. In sentencing Ascencio, the trial court noted that it had reviewed the probation report, recommending a prison term, the People's sentencing memorandum, requesting the upper term for a section 288, subdivision (a), violation, and a Static-99 report on Ascencio, which concluded he had a "zero" risk factor for reoffending. It also heard argument from the prosecutor and defense counsel. The court then concluded "that the high term [is] the appropriate disposition in this matter. The court does find that [the victim] was vulnerable. The defendant in this matter used a position of trust. I also find that the manner in which the crime was carried out indicates planning and sophistication. He used a ruse to play a game with this young gal, or this young girl. He trapped her in a particular area, rubbed on her vagina and then forced her head toward his erect penis. I do find that defendant posed a danger to others and others' safety and also that his convictions are of increasing seriousness. Probation is denied." The court's comments in

³ Defense counsel also asked another character witness, Ascencio's brother, if knowledge that Ascencio had a prior conviction for possession of narcotics for sale would change the brother's opinion that Ascencio acted appropriately with the brother's children. The prosecutor followed up with a question about the prior conviction on cross-examination. Ascencio does not argue error with respect to the examination of this witness. Nevertheless, the same harmless-error analysis would apply.

sentencing indicate that it did not find probation appropriate for Ascencio and that aggravating factors warranted imposition of the upper state prison term. (See Cal. Rules of Court, rules 4.414 & 4.421.) That finding was well within the court’s sentencing discretion. (*People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1157 [“sentencing court enjoys broad discretion in determining whether to grant or deny probation”; “defendant who is denied probation bears a heavy burden to show the trial court has abused its discretion”].)

Contrary to Ascencio’s contention, the trial court’s comment that “it’s presumptive that the defendant is not eligible for probation” does not demonstrate sentencing error. The court’s comment, taken in context, merely suggests that the court did not find probation appropriate in this case. (See *People v. Mehserle, supra*, 206 Cal.App.4th at p. 1158 [sentencing court’s comments in denying probation must be read in context].) Immediately after making the comment, the court stated, “However, in this matter probation will be denied.” In addition, after reviewing the facts of the crime and Ascencio’s conduct, the court reiterated that “[p]robation is denied.” The court thus was aware that probation was an option but found that it was not warranted. Although as cited by Ascencio, a defendant convicted of a section 288 violation may be granted probation when the court finds “that rehabilitation of the defendant is feasible and that the defendant is amenable to undergoing treatment” and “that there is no threat of physical harm to the victim if probation is granted” (§ 1203.066, subd. (d)(1)(B) & (E)), the court here made no such findings, apparently because it found Ascencio ineligible for probation under the general criteria affecting probation (see Cal. Rules of Court, rule 4.414) and, therefore, had no need to specifically address section 1203.066, subdivision (d)(1)’s requirements. Further, Ascencio does not argue, nor does the record support a contention, that the evidence supported only the conclusion

that each of the relevant special probation requirements in section 1203.066, subdivision (d)(1), was met.⁴

DISPOSITION

The judgment is affirmed.

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ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.

⁴ Ascencio also argues the trial court erred by sentencing him without first obtaining a report on his mental condition under section 288.1. Such a report, however, is required only in a case in which the trial court is inclined to grant probation. (*People v. Thompson* (1989) 214 Cal.App.3d 1547, 1549.) As the court here was not inclined to grant probation, it was not required to obtain a section 288.1 report before sentencing Ascencio.