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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
C
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD COLWELL,

Defendant and Appellant.

B262521

(Los Angeles County
Super. Ct. No. NA093758)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

Richard Colwell was convicted of committing a lewd act upon his stepdaughter D.M., a child under the age of 14 (Pen. Code,¹ § 288, subd. (a).) On appeal, he argues that the trial court should have limited or sanitized evidence of domestic violence and that the court abused its discretion when it denied his motion to strike his prior conviction and imposed the upper term sentence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Colwell and D.M.'s mother S.C. ("Mother") married in 2004 and divorced after a 2007 incident of domestic violence that led to Mother's hospitalization. In 2012, D.M., then approximately 12 years old, disclosed to Mother that her stepfather Colwell had raped her in 2007 when she was six years old, shortly before the incident of domestic violence that ended the marriage. Colwell was charged with sexual intercourse with a child under the age of 10 years (§ 288.7, subd. (a)) and with lewd conduct with a child under the age of 14 years. It was also alleged that Colwell had suffered a prior serious or violent felony conviction within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and a prior serious felony conviction (§ 667, subd. (a)(1)).

At trial, the court denied Colwell's motion in limine to exclude or sanitize evidence of domestic violence. Eight photographs of Mother's injuries were shown to the jury over Colwell's objection.

D.M. testified that one night, when she was about six years old and Mother was away from home working a night shift, Colwell carried her into his bed. While playing pornography on the television, he attempted to place his penis inside her vagina multiple times both with and without a lubricant, ultimately masturbating until he ejaculated on her stomach. Colwell then washed D.M. off in the shower and put her in his bed, telling her, "Don't tell your mother or something will happen." D.M. understood Colwell to mean that the something that would happen would be bad.

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

D.M. testified that when Mother learned the next day from D.M.'s younger brother that D.M. had been in bed with Colwell, she asked D.M. whether Colwell had touched her. D.M. denied that any touching had occurred "because I didn't want anything to happen after what he said." D.M. then testified to the domestic violence that occurred just days later between Colwell and Mother, and she testified that the violence made her even more afraid of Colwell. Although she spoke to the police at that time about the domestic violence against her mother, D.M. did not disclose the sexual abuse because she was afraid that Colwell "would do something" to her. Even when she told Mother years later what had happened, D.M. still feared that Colwell would find her and retaliate.

The jury was unable to reach a verdict on the sexual intercourse count but convicted Colwell of lewd conduct. The court denied Colwell's motion to strike his prior strike offense, selected the upper term of eight years, and imposed a total sentence of 21 years in state prison. Colwell appeals.

DISCUSSION

I. Evidence of Domestic Violence

Colwell filed a motion in limine seeking to exclude evidence of the incident of domestic violence by Colwell against Mother that occurred a few days after the charged offenses on the ground that it was more prejudicial than probative. (Evid. Code, § 352.) In the alternative, Colwell requested that the evidence be sanitized and that the jury be advised only that D.M. was afraid to report the crime because she had seen him in a fight with another person; that he had been very angry; and that she was afraid of angering him. When arguing the motion before the court, Colwell's attorney advised the court that he was asking only that the evidence be sanitized. The prosecutor argued that the evidence was more probative than prejudicial; that it tended to demonstrate Colwell's motive (Colwell turned to his young stepdaughter for sexual contact because his relationship with Mother was ending); and that it explained D.M.'s failure to report the incident to Mother at the time (fear based on seeing Colwell be violent toward Mother). The court denied the motion in limine, reasoning, "The probative value is extremely

strong. It can only be established through actual physical evidence of the photograph of the injuries. Otherwise, the jurors cannot properly assess the full force of that conduct and its effect on the alleged victim. It is not substantially outweighed by the danger of undue prejudice.”

At trial, D.M. testified about the domestic violence incident and seeing Mother with a bloody, swollen face. D.M. testified that after the violence, she was “even more scared” than she had been before. Although she never saw Colwell again, she believed that something would happen if she told her mother what he had done, and feared that he would find her. Mother then testified in detail to Colwell’s jealousy and sexual insecurity, the disintegration of their marital and sexual relationship, his need to play pornographic videotapes in order to perform sexually, and the 2007 incident in which he argued with her about her relationship with her cousin and then attacked her, causing her to lose consciousness. She related awakening with injuries to the side of her face, mouth, lip, arm, and thigh. Mother testified that Colwell dropped her off at the hospital and never returned. Mother never reunited with Colwell, and ultimately divorced him.

Eight photographs of Mother’s injuries were shown to the jury. Colwell again objected to the photographs, most specifically to the final four, each of which depicted injuries to Mother’s mouth and lips. Colwell argued that the photographs were irrelevant and more prejudicial than probative, and that the final four were particularly unnecessary because they depicted the same injury from different angles. The court admitted the photographs into evidence, stating, “It’s admissible on the issue of motive and less so as to why the young girl didn’t report the matter during that several-year period. It’s some explanation for that. Of course, she didn’t report it even before this beating. I understand that. The close[-]ups are necessary because if you look at [Exhibit] 3, the injuries there aren’t readily apparent. She doesn’t look like she’s in a good place, but the injuries aren’t there. Unless you look at the close[-]up, they are not all that apparent. So they are probative, and the close[-]ups are necessary. The probative value is not substantially outweighed by any undue prejudice. They are not inflammatory. They are not pleasant, but they are not gruesome photographs.”

Colwell contends on appeal that the trial court erred in permitting this evidence to be introduced without being sanitized. We review the trial court's ruling under Evidence Code section 352 for an abuse of discretion (*People v. Valdez* (2004) 32 Cal.4th 73, 108), and find no abuse of discretion here. The evidence was probative with respect to D.M.'s credibility. D.M. had waited five years to reveal the sexual abuse, and there was no physical evidence of the incident. Accordingly, her credibility was a central issue in the case. The testimony about, and photographic evidence of, the domestic violence that occurred within days of Colwell's sexual abuse of D.M. gave context to and explained D.M.'s fear of Colwell, and in conjunction with his threat that something bad would happen if she disclosed the abuse tended to explain why it took years for D.M. to tell Mother what had happened. (See, e.g., *People v. Garcia* (2001) 89 Cal.App.4th 1321, 1335-1336 [domestic violence evidence highly probative on issues of motive, consent, fear and delay in reporting].) In terms of prejudicial effect, the jury was instructed on the limited purpose of the evidence, and the evidence was not particularly inflammatory, no more so than the charged offense of the rape of a six-year-old child.

Colwell argues that the evidence of domestic violence was not needed to establish either the time frame of the sexual assault or why D.M. did not reveal the incident immediately. He challenges the probative value of the evidence, arguing that D.M.'s testimony about her fear of Colwell that prevented her from revealing the claimed abuse contemporaneously was "equivocal at best and was far outweighed by the prejudicial damage done." He contends that D.M. had made up her mind not to disclose the incident before the domestic violence occurred, and he observes that she did not testify that "the specific fact of the domestic violence . . . actually caused her to suppress reporting any sexual assault." Colwell maintains that D.M.'s testimony that she was "even more scared" after the attack on Mother "could have referred to a fear that appellant would attack her mother again, not that he would hurt" her. He notes that D.M. did not state that he was afraid Colwell would do to her what he had done to Mother. Moreover, given that S.C. moved away from Colwell after the violence and D.M. was not exposed to him again, Colwell argues that under these circumstances D.M. "could not continue to fear

that appellant would hurt her if she told.” Finally, Colwell argues that even if the evidence had probative value, that value was outweighed by its prejudicial impact. He characterizes the photographs of Mother as multiple and graphic, and argues that it likely resulted in the jury being emotionally biased against the defendant, as well as confusing the issues and unduly consuming time.

These arguments are not persuasive. The evidence was relevant and probative because it tended to explain D.M.’s failure to report the incident at the time. (Evid Code, §§ 210, 352.) The victim was six years old at the time of the offense, and Colwell threatened that something bad would happen if she told Mother what he had done. Her failure to disclose the abuse immediately does not mean that she would have continued to conceal it from Mother absent the domestic violence, nor does it suggest that the incident of domestic violence that followed within a few days did not impress further upon D.M. that Colwell was dangerous and that his threat of retribution could come to pass, whether by means of injury to herself or to Mother, if she disclosed what he had done to her. D.M. may not have specifically testified that the domestic violence actually caused her to suppress reporting any sexual assault, but the evidence certainly permitted the inference that Colwell’s attack on Mother reinforced his threat in the eyes of this six-year-old child. As to whether D.M. reasonably could remain in fear of Colwell after contact with him ceased, this pertains to D.M.’s credibility, not the admissibility of the evidence. Finally, we have reviewed the eight photographs shown to the jury. Four depict the multiple injuries to Mother’s external and internal mouth area; two show her face from different angles; and the remaining two display the bruises she sustained to her arm and thigh. We do not find them graphic, unduly prejudicial, or likely to bias the jury against Colwell. Colwell has not established any abuse of discretion in the trial court’s admission of the evidence or its decision not to sanitize it.

II. Imposition of Upper Term Sentence

The trial court imposed the upper term sentence of eight years in prison, observing that the offense involved a high degree of callousness; the victim was particularly

vulnerable and had been entrusted to his care; Colwell threatened her; Colwell's prior convictions were of increasing significance; and "the occurrence here, although one incident in this period of time, is of the most egregious kind."

Colwell argues that the court abused its discretion in imposing the upper term sentence. First, he argues that the aggravating circumstance in California Rules of Court, rule 4.421, subdivision (a)(1), that the crime involved "great violence, great bodily harm, threat of great bodily harm, or other acts involving a high degree of cruelty, viciousness, or callousness," is inapplicable here because he did not restrain, hit, injure D.M., or do anything to make it worse than an "ordinary" molestation. Colwell acknowledges that he "may have told" D.M. not to tell Mother what he had done to her because "something will happen," but he argues that the aggravating factor does not apply because he did not actually say he would hurt her or anyone else; it was D.M. who interpreted his words as a threat that he would hurt her. The trial court found that the offense involved a high degree of callousness, which is supported by the evidence that Colwell encouraged Mother to take a night shift, leaving D.M. in his care, and that he not only sexually abused this small child but also threatened her with harm if she disclosed what he had done, leaving her with lasting trauma and feelings of low self-worth.

Next, Colwell contends that D.M. was no more vulnerable than any other minor left in the care of a stepparent, and he also observes that the trial court cannot base a finding of vulnerability on a victim's age alone. While it is generally true that when the victim's age is an element of the offense, the court may not rely on the victim's age as a basis for a finding of vulnerability (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 195), age may be viewed as making a child particularly vulnerable when the child is extremely young within the age range for an offense and dependency or fear is involved. (*People v. Ginese* (1981) 121 Cal.App.3d 468, 477.) In such cases the dependency or fear offers a basis for the vulnerability finding. (*Ibid.*) The court noted D.M.'s young age, that she was in Colwell's care, and that Colwell threatened her. The record supports the trial court's finding that D.M. was particularly vulnerable as a very young person entrusted to her stepfather's care while her mother was away. (*People v. Garcia* (1983) 147

Cal.App.3d 1103, 1106 [child is vulnerable when attacked by a person entrusted with his or her supervision or control]; *People v. Garcia* (1985) 166 Cal.App.3d 1056, 1070 [child victim of sexual molestation was particularly vulnerable in light of extreme youth and close relationship to the defendant].)

Also supported by the record is the conclusion that Colwell's prior convictions were of increasing seriousness. Colwell argues that "Except for the 1998 battery for which he was placed on probation, all of defendant's priors were misdemeanors." The evidence showed that Colwell's four offenses prior to 1998 were misdemeanors involving such conduct as driving with a suspended license and disorderly conduct. In 1998 he was convicted of felony assault with a deadly weapon (§ 245, subd. (a)(1)) with a great bodily injury allegation under section 12022.7, and his next offense was a 2007 misdemeanor conviction for battery of a spouse or cohabitant (§ 243, subd. (e)(1)). Then came the instant charges of sexual abuse of a child. This record supports the trial court's conclusion that Colwell's convictions escalated in seriousness over time, as they began to include felony convictions and increasingly involved attacks on people.

Colwell argues that "the prosecutor's claim that appellant 'threatened the victim' under [California Rules of Court,] rule 4.421(a)([6]) is also inapplicable" because that factor concerns dissuading a witness from testifying, but whether the prosecutor made an argument at sentencing has no bearing on whether the court abused its discretion in imposing the upper term sentence. He also asserts that the court could not use Colwell's status as D.M.'s stepfather as a basis for finding that D.M. was vulnerable and that he had violated a position of trust, but it is not clear from the record that the court did so. The court did not make specific findings that both the aggravating factors of California Rules of Court, rule 4.421(a)(1) and (11) applied, but merely said that D.M. "was a young person in his care, was particularly vulnerable." To the extent, if any, that the court improperly relied on the fact that Colwell was D.M.'s stepfather to support more than one aggravating factor, any error was harmless, as the record supported the court's findings of multiple factors in aggravation and there is no indication that the court would have

imposed a different sentence in the absence of this arguably improper sentencing factor. (*People v. Williams* (1991) 228 Cal.App.3d 146, 153.)

Finally, Colwell makes arguments about mitigation and about the appropriate balancing of aggravating and mitigating factors. He argues that in mitigation the court “failed to acknowledge the multiple letters submitted in support of appellant as an honest, trustworthy individual.” Colwell identifies no authority in support of his apparent contention that the court was required to note on the record that it had received correspondence on Colwell’s behalf, and we are aware of none. Moreover, Colwell fails to establish that the court “ignored a valid mitigating circumstance” when it did not discuss these letters. Finally, Colwell concedes that “a single valid circumstance in aggravation was applicable” but that it was “countered by a particularly high quality mitigating circumstance of absolutely no criminal record,” but the record demonstrates (and Colwell admits elsewhere in his briefing) that he had a criminal record prior to the instant offense. Colwell’s inexplicable assertion that he had led a “prior blameless life” before the present crime is belied by the record. Colwell has not demonstrated any error.

III. Denial of *Romero* Motion

Colwell asserts that the trial court abused its discretion when it denied his motion to strike his prior conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 for the purposes of applying the Three Strikes law. In deciding whether to strike a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, the court “must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).)

Colwell argues that his prior strike should have been stricken because the current offense involved no violence and the victim was not particularly vulnerable; the court

failed to carefully consider the nature and circumstances of the current offense, which he contends is minor in the scope of crimes encompassed by the Three Strikes law; and his prior convictions were neither numerous nor increasing in seriousness. He compares and contrasts his criminal history and personal circumstances with those of the defendants in *Williams, supra*, 17 Cal.4th 148 and *People v. Bishop* (1997) 56 Cal.App.4th 1245, arguing that he is not the “violent, hardcore criminal for which the Three Strikes [l]aw was designed” and that he should be considered outside the spirit of that law.

We review rulings on motions to strike prior convictions for an abuse of discretion (*Williams, supra*, 17 Cal.4th at p. 162), and find none here. We have reviewed the transcript of the hearing on the *Romero* motion and conclude that, contrary to Colwell’s assertion, the trial court discharged its duty to consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, Colwell should have been deemed outside the scheme’s spirit. (*Id.* at p. 161.) The trial court discussed these considerations when ruling, first noting that the strike prior was not very remote in time given that Colwell molested D.M. in close temporal proximity to the conclusion of his probation supervision for his prior felony offense. The remainder of the court’s comments concerned both the decision to deny the *Romero* motion and to impose the high term: the offense involved a high degree of callousness; D.M. was particularly vulnerable and was in Colwell’s care; he threatened her; his prior convictions were of increasing significance; and the offense, though the only one in its time period, was “most egregious.” The current offense may not have involved the use of violence to commit the crime, but as we have already discussed above, the evidence supported the trial court’s conclusion that the offense involved a high degree of callousness and a particularly vulnerable victim. Similarly, as discussed above, Colwell’s record permitted a conclusion that his convictions were numerous and had increased in seriousness, as he had moved from his earlier misdemeanor property and conduct crimes to offenses involving violence against people, two of which constituted felonies. Although the Three Strikes law encompasses many heinous offenses, we are not prepared to agree with

Colwell that sexually abusing a six-year-old child is “at the mild end of the spectrum” of such crimes. Colwell has not shown, and we cannot say, that the court abused its discretion in finding that he did not fall outside the spirit of the Three Strikes law.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

BLUMENFELD, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.