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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

BRYAN CORDELL JOHNSON,

Defendant and Appellant.

C068885

(Super. Ct. No. 09F06047)

Convicted of first degree murder, defendant Bryan Cordell Johnson argues on appeal that the trial court erred in admitting evidence of prior sexual assaults he committed and in instructing the jury that the People did not have to prove motive. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In light of the arguments on appeal, the underlying facts may be briefly stated. In November 2007, the body of Sofia Marquez was found in a wooded area on a small hill near a freeway onramp to Highway 99 in Sacramento. She was wearing a camisole top with a tank top over it, both of which had been pushed up underneath her armpits. She had no clothes on below her waist, including shoes and socks. Her body had been covered with branches broken off nearby trees. She had pinpoint hemorrhages in her

eyes, which is indicative of asphyxiation or strangulation. The forensic pathologist who conducted the autopsy concluded she died from manual strangulation with hands or arms. The pathologist found no physical evidence of a sexual assault. Later, however, a criminalist found a single sperm head on a swab from the introital area (the entrance to the vagina).

During the victim's autopsy, scrapings were taken from under her fingernails. In August 2009, it was determined that the material from under the victim's nails contained defendant's DNA. Defendant was charged with first degree murder.

Before trial, the People moved to admit evidence that on several occasions defendant had choked his wife when she refused to have sex with him. (We will sometimes refer to this as the other crimes evidence.) The People contended the evidence of these "prior uncharged sexual offenses" was admissible under subdivision (b) of Evidence Code¹ section 1101 "to prove common plan and scheme, [and the] intent to strangle a resisting victim when seeking sex." The People also contended the evidence was admissible under section 1108 "to prove the Defendant's propensity to commit sexual offenses and to utilize strangulation when faced with a resisting victim."

At the hearing on the People's motion, defense counsel argued that "there was absolutely no evidence of an attempted sexual assault" in the present case and "[t]herefore, [section] 1108 does not apply at all and [the evidence] should not come in." The prosecutor responded that there was evidence of attempted rape in where the victim's body was located, the way it was positioned, the way the strangulation marks occurred, the position of her shirt, and her missing pants and shoes. Defense counsel asserted that the evidence of only a single sperm head in the victim's vaginal area "suggest[ed] that sexual contact occurred earlier, and, therefore, what the Court is left with is basically no

¹ All further section references are to the Evidence Code.

evidence of any sexual contact whatsoever.” Defense counsel added that absent any evidence of a sexual crime other than the other crimes evidence it “wouldn’t be appropriate” to admit the other crimes evidence.

The trial court concluded that the evidence defendant had attempted to strangle his wife when she refused his sexual advances was admissible under section 1101, subdivision (b) because it was relevant to motive and intent because the victim “whom the Defendant denies knowing, was found nude from the waist down and her top was pulled up, revealing her breasts. The Defendant’s DNA was found under her fingernails, and she was strangled.” The court found that the location and position of the victim’s body was “circumstantial evidence that the crime was of a sexual nature.” The court also concluded that “the evidence of the prior conduct [wa]s not inflammatory or prejudicial compared to the allegation in this case” and “[t]he presentation of the evidence involves a single witness and will not result in an undue consumption of time.”

The court also concluded the other crimes evidence was admissible under section 1108 because “[t]he fact[s] alleged in this case and the facts alleged in the prior instance constitute sexual offenses.” In reaching this conclusion, the court concluded that “the proffered evidence [is] highly relevant to . . . sexual propensity” and “is not inflammatory and is far less serious than the alleged offense charged.”

The jury found defendant guilty of first degree murder, and the trial court sentenced him to 25 years to life in prison.

DISCUSSION

I

Admissibility Of Other Crimes Evidence

On appeal, defendant contends there was insufficient evidence to establish a proper foundation for admission of the other crimes evidence, whether the evidence was admitted under section 1101, subdivision (b), or under section 1108. Under section 1101, defendant contends that to prove his “sexual motive and intent, the[re] would have to be,

as a preliminary matter, sufficient evidence that the charged crime was indeed sexually based or motivated in order to confer a focused significance on the uncharged crime.” In other words, defendant contends that there had to be sufficient proof that the victim was killed in the course of an attempted rape -- irrespective of the other crimes evidence -- before the other crimes evidence could be properly admitted on the issue of motive or intent. In defendant’s view, the evidence of the victim’s “partial nudity and the single sperm head found on the introital swab was insufficient to establish this foundation.”

Defendant offers a similar argument regarding section 1108. According to him, “[t]he charged crime cannot be transmuted into a sexual offense merely because the prosecution advances a theory that makes it a sexual offense once evidence of a collateral sexual offense i[s] introduced.” To support this argument, he relies on the same case that is the centerpiece to his argument under section 1101, subdivision (b) -- *People v. Guerrero* (1976) 16 Cal.3d 719. As we will explain, however, *Guerrero* is distinguishable from this case in two very important respects, and the difference between the two cases supports the trial court’s admission here of the other crimes evidence under section 1108.

In *Guerrero*, the defendant was charged with the murder of a young woman who was found dead after having been seen with him in his car a few hours earlier. (*People v. Guerrero, supra*, 16 Cal.3d at pp. 722-723.) When she was found, the victim “was fully clothed; while her blouse was above her brassiere, that garment was in place. There was no evidence of sexual molestation; an investigation revealed no trace of sperm or vaginal trauma.” (*Ibid.*) There was conflicting testimony at defendant’s trial as to whether “the victim could have died as a result of jumping or falling from the car” or whether “only blows to the head by a blunt instrument could have caused [her] death.” (*Id.* at p. 723.) The trial court decided that evidence that the defendant had raped another girl “six weeks before the alleged murder, could be introduced on the issues of identity and intent.” (*Id.* at p. 722.)

On review, the Supreme Court held that the evidence of the uncharged rape should not have been admitted to show (among other things) that the defendant killed the victim in the course of an attempted rape because in the murder case “there [wa]s no evidence whatsoever of sexual intercourse or attempted sexual intercourse which the [earlier] rape might explain.” (*People v. Guerrero, supra*, 16 Cal.3d at p. 727.) Absent other evidence that the victim was killed in the course of an attempted rape, the court explained, “the argument of the People” for admission of the other crimes evidence was “circular.” (*Id.* at p. 728.) Under the People’s theory, “(1) sexual activity must have taken place in the [latest] offense because [the] defendant’s rape of [the earlier victim] demonstrate[d] his aggressive sexual tendencies; (2) therefore, evidence of the [earlier] rape may be introduced to show the intent with which [the] defendant tried to engage in sex with [the current victim].” (*Ibid.*) The court explained that this reasoning was faulty because “[t]he first premise, of course, seeks to prove [the] defendant’s conduct in this case by means of evidence of his criminal disposition. Such proof is expressly prohibited by Evidence Code section 1101, subdivision (a).” (*Guerrero*, at p. 728.)

Here, defendant contends the evidence of the uncharged sex offenses against his wife was admitted based on “the identical circularity that *Guerrero* prohibits.” There are two important distinctions between this case and *Guerrero*, however, and those distinctions make all the difference. First, the flaw the Supreme Court found in the People’s reasoning in *Guerrero* was based on the fact that, at that time, the evidence of the prior rape was inadmissible under Evidence Code section 1101, subdivision (a) to prove the defendant’s propensity to commit such offenses. With the enactment of section 1108, that prohibition against the use of character evidence was lifted. As our Supreme Court has explained, section 1108 was specifically “intended . . . to relax the evidentiary restraints [Evidence Code] section 1101, subdivision (a), imposed.” (*People v. Falsetta* (1999) 21 Cal.4th 903, 911.) “[S]ection 1108 permits ‘the admission, in a sex

offense case, of the defendant's other sex crimes for the purpose of showing a propensity to commit such crimes.' ” (*People v. Medina* (2003) 114 Cal.App.4th 897, 902.)

Thus, it was permissible here -- as it was not in *Guerrero* -- to offer the evidence that defendant had on several occasions choked his wife when she refused to have sex with him to show that defendant had a propensity to commit that sort of assault on women. Granted, if there was no other evidence suggestive of a sexual element to the current crime, the other crimes evidence could not properly have been admitted to establish that sexual element. (See *People v. James* (2000) 81 Cal.App.4th 1343, 1354 [“Other crimes evidence can support an inference of propensity, but propensity alone cannot support a conclusive inference that the defendant committed the charged offense”].) But that observation only brings us to the second significant distinction between this case and *Guerrero*: here, unlike in *Guerrero*, there *was* evidence other than the other crimes evidence that the current crime involved an attempted rape. While the victim in *Guerrero* was found with only her blouse out of place, and presumably was found in a place where she could have simply jumped or fallen from the defendant's car, the victim here had no clothes on below her waist; her top was pushed up, exposing her breasts; and she was found in a place where the perpetrator covered her body with tree branches to conceal her. Taken together, this evidence supports the reasonable conclusion that some sort of sexual activity, or attempted sexual activity, occurred in conjunction with the victim's death. There was no such evidence in *Guerrero*.

Based on the evidence that the victim may have been strangled in the course of, or for resisting, an attempted sexual assault, and on the permissible use of the prior crimes

evidence under section 1108 to show defendant's propensity to engage in such assaults, there was no error in the trial court's admission of the other crimes evidence.²

II

Motive Instruction

The trial court instructed the jury on motive as follows: "The People are not required to prove that the defendant had a motive to commit the crime charged. In reaching your verdict you may, however, consider whether the defendant had a motive. Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty."

Defendant contends the trial court erred in giving this instruction because, in defendant's view, the attempted rape of the victim was both the asserted motive for the murder and an element of the charge of felony murder. Under these circumstances, defendant argues, instructing the jury that the prosecution did not have to prove motive was "erroneous, confusing, and substantially likely to be understood and applied in an unconstitutional manner." We disagree.

On the charge of felony murder, the trial court instructed the jury that "[t]o prove that the defendant is guilty of first degree murder under this theory, the People must prove that, one, the defendant attempted to commit rape; two, the defendant intended to commit rape; and, three, while attempting to commit rape the defendant caused the death of another person." Under this instruction, the People had to prove that defendant intentionally attempted to rape the victim and killed her while he did so. According to defendant, however, the prosecutor argued to the jury that the attempted rape was "a

² Because we conclude the other crimes evidence was admissible under section 1108, we need not decide whether it also was admissible under section 1101, subdivision (b).

motive in this case,” and thus the jury could have been misled by the jury instruction on motive to believe that the People did *not* have to prove the attempted rape.

We find no reasonable possibility that the jury understood the instructions, and the prosecutor’s argument, in this manner. In arguing motive to the jury in connection with the charge of first degree murder on the theory that the killing was willful, deliberate and premeditated, the prosecutor argued as follows: “We’re not required to show a motive, but, certainly, if there is a motive, you can consider that. And if you think about this, if a woman is resisting being sexually assaulted, wanting to get away, screaming for help and the man is wanting to have sex with that woman and she’s resisting, as occurred with [defendant’s wife], the defendant would be upset and mad about that, as he was with [his wife]. And he puts his hands on her throat attempting to silence her, attempt to get what he wants, and he continues to squeeze, knowing it could kill her. That is a motive in this case.”

Our Supreme Court has explained that “motive is the ‘reason a person chooses to commit a crime.’ ” (*People v. Cash* (2002) 28 Cal.4th 703, 738.) Thus, the prosecutor’s argument suggested that defendant might have intentionally killed the victim because he was trying to silence or subdue her or because he was angry that she was resisting his sexual advances. From the motive instruction, the jury would have understood that to prove an intentional killing, the People did not have to prove that one or more of these reasons, or any other, was the reason defendant killed the victim. We do not believe, however, that the jury also might have intuited from the motive instruction that for purposes of the felony murder charge the People did not have to prove that defendant intentionally attempted to rape the victim. The felony murder instruction was clear on this point, and we see no reasonable possibility that the jury would have somehow been misled on this point by the unrelated motive instruction and the prosecutor’s arguments about defendant’s possible motives for an intentional killing. Accordingly, we reject defendant’s claim of instructional error.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.