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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DELANO CAGNOLATTI,

Defendant and Appellant.

D059751

(Super. Ct. No. RIF142762)

APPEAL from a judgment of the Superior Court of Riverside County, Harry A. Staley, Judge. Affirmed in part and reversed in part.

A jury convicted defendant Delano Cagnolatti of eight counts of aggravated sexual assault on a child under the age of 14 (Pen. Code, § 269, subd. (a)),¹ two counts of providing or transporting a child under the age of 16 for a lewd act (§ 266j), and one count of being a sex offender and not registering an address change (§ 290.013, count 11). The information charged a count of not registering under section 290.013 (count

¹ All further statutory references are to the Penal Code unless otherwise specified.

12). However, during trial, the court granted a prosecution motion to dismiss count 12. In a bifurcated proceeding, the court found true the allegations that Cagnolatti had suffered numerous prior strike convictions (§§ 667, subds. (c) & (e)(2)(A); 1170.12, subd. (c)(2)), one of which was a conviction for forcible oral copulation within the meaning of section 667.71. The court sentenced Cagnolatti to a total indeterminate prison term of 485 years to life.

On appeal, Cagnolatti argues the court abused its discretion by denying his motion to sever trial on counts 11 and 12 from the remaining counts. He also challenges the sentence imposed on count 11.

I

FACTS

A. Prosecution Evidence

The Molestations

The victims, Does 1 and 2, are Cagnolatti's nieces through his marriage to their great aunt, P. Cagnolatti. Doe 1 was born in April 1997, and Doe 2 was born in May 1996.

Cagnolatti first molested Doe 1 around 2005. He touched her "private parts" with his hand and also put his "private part" in her vagina, which hurt her and made her cry. The first time it happened was in his truck,² and he also molested her at a house. He also tried to force her to touch his penis with her hand but she pulled away. He told Doe 1

² Cagnolatti was a truck driver. His truck had a sleeping compartment, which contained a bed, behind the cab of the truck.

that he had a gun and would kill her and her family if she told anyone. He also told her that, if she told anyone, he would get in trouble and she was afraid she would not be allowed to see him anymore.

Cagnolatti first molested Doe 2 when she was eight years old and continued to molest her until she was 11 years old. The sexual acts included rape and oral copulation, and occurred more than 10 times when she was nine years old and more than 10 times when she was 10 years old. Although Doe 2 first testified she did not recall any threats, she later testified he threatened to kill her if she told anyone. On one occasion, he slapped her when she refused to orally copulate him.

Cagnolatti took Does 1 and 2 on a number of trips with him in his truck. The first time he took the girls on a trip nothing untoward occurred. However, on later trips to places including Bakersfield and Fresno, Cagnolatti molested Does 1 and 2. During some of those trips, Cagnolatti also brought other men to Doe 2, and these other men molested her. The other men gave money to Cagnolatti.

The Investigation

In March 2008 Doe 2 first learned Cagnolatti had molested Doe 1. Doe 2 then told Doe 1 Cagnolatti had done the same to her. They told their grandmother, and she called the Sheriff's Department. She also investigated Cagnolatti's name on the Internet and learned he was a registered sex offender.

San Bernardino County Deputy Sheriff Sodaro took the initial report on March 12, 2008. The sisters told Deputy Sodaro about the molestations and about Cagnolatti's

threats if they told anyone. One week later, investigators went to the house at which Cagnolatti was registered.³ They found it empty and for sale. Over the next several weeks the investigators returned to the address frequently but never found anyone there. Cagnolatti did not change his registration address between August 2007 and June 2008.

On May 14, 2008, authorities found Cagnolatti in Texas. When they stopped him, he identified himself as Cleve Benson and gave the arresting officers items of identification for Cleve Benson. However, the officers had his photograph, believed him to be Delano Cagnolatti, and arrested him.

B. Defense Evidence

Cagnolatti's wife, the great aunt of Does 1 and 2, testified she and Cagnolatti lived at the Moreno Valley address (at which he had registered) until June 2008. The house went into foreclosure and they were unsuccessful at trying to work with the bank to prevent foreclosure. Cagnolatti was in Texas trying to get trucking work starting around February 2008 but he was still living at the Moreno Valley address during February and March 2008. Cagnolatti told his wife that Doe 1 stole from him. Brian P., Does 1 and 2's uncle, had custody of the girls at various times from 2003 or 2004 to 2006, and also had custody of Doe 1 for two months in 2010. During the latter period of custody, Doe 1 constantly stole things and lied to him. He finally called the Sheriff to take her away.

³ Cagnolatti registered as a sex offender and gave an address in Moreno Valley. His registration included the acknowledgement that he had to register a new address within five days and, if he moved out of state, he had to register in the new state within 10 working days.

A CPS investigator interviewed Does 1 and 2 in 2004 and neither mentioned any inappropriate touchings by Cagnolatti. The parties stipulated a social worker would testify she interviewed the girls in 2005 and both denied Cagnolatti inappropriately touched them. However, when she again interviewed them in 2008, they told her of the inappropriate conduct.

II

ANALYSIS

Prior to trial, Cagnolatti moved to sever trial of counts 1 through 10 from the failure-to-register counts 11 and 12. He argued (1) they were improperly joined and (2) even if properly joined, the charges should be tried separately because of the prejudicial effect trial of the failure-to-register counts would have on the remaining counts.⁴ The prosecutor argued, and the court found, Cagnolatti's conduct of leaving the state without registering the move was admissible because relevant to show consciousness of guilt of the remaining counts.

A. General Principles

Section 954 provides in relevant part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or

⁴ Cagnolatti also argued that, if the charges were not severed, it could undermine a previous in limine ruling in which the court ruled the prosecution could not introduce a prior victim's testimony about Cagnolatti's conduct that led to the prior conviction because the court found the prosecution had transgressed its discovery obligations regarding that testimony.

offenses, under separate counts" The law favors consolidation of charges. (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.) "Joinder of criminal charges for trial benefits the public by reducing delay in the disposition of criminal charges, and it benefits the state by conserving judicial resources and public funds." (*People v. Hill* (1995) 34 Cal.App.4th 727, 735.) Whether offenses are joinable under section 954 is a question of law we review de novo. (*People v. Cunningham* (2001) 25 Cal.4th 926, 984.)

However, "[t]he determination that the offenses are "joinable" under section 954 is only the first stage of analysis because section 954 explicitly gives the trial court discretion to sever offenses or counts "in the interest of justice and for good cause shown." ' ' (*People v. Lucky* (1988) 45 Cal.3d 259, 276-277.) A defendant must make a showing of good cause to obtain severance (*People v. Maury* (2003) 30 Cal.4th 342, 392), and it is the defendant's burden to demonstrate substantial prejudice would arise were the charges not separately tried. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315.) Although the determination of prejudice is necessarily dependent on the facts of each case, several guiding factors have emerged: " 'Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the

charges carries the death penalty or joinder of them turns the matter into a capital case.' " (*Ibid.*; accord, *People v. Marshall* (1997) 15 Cal.4th 1, 27-28.)

B. The Counts Were Properly Joined

We conclude that, although the counts were not of the same class, the counts were properly joined under section 954 because there was sufficient linkage in their commission. The courts have broadly construed the phrase "connected together in their commission" as used in section 954: "[O]ffenses which are committed at different times and places against different victims are nevertheless 'connected together in their commission' when they are . . . linked by a 'common element of substantial importance.'" " (*People v. Lucky, supra*, 45 Cal.3d at p. 276; accord, *People v. Mendoza* (2000) 24 Cal.4th 130, 160.) If the offenses are so connected, joinder is permissible even though the offenses do not relate to the same transaction and may have been committed at different times and places against different victims. (*Aydelott v. Superior Court* (1970) 7 Cal.App.3d 718, 722.)

Our Supreme Court illustrated the application of this standard in *People v. Alvarez* (1996) 14 Cal.4th 155, 188. In *Alvarez*, the court held the trial court's joinder of rape and vehicle theft counts survived de novo scrutiny where "the rape occurred very close in time and place to the theft of the vehicle, and the theft of the vehicle may have been motivated by a desire to avoid apprehension for the rape." (*Ibid.*) More significantly, in *People v. Valdez* (2004) 32 Cal.4th 73, 119, our Supreme Court subsequently held that a murder charge and an escape charge shared a common element of substantial importance

even though the murder occurred two years before the escape charge. The court concluded the escape, which occurred as the defendant was being returned to "lock-up" following his murder charge arraignment, was nevertheless connected and therefore properly joined because "[t]he apparent motive for the escape was to avoid prosecution for the murder." (*Ibid.*) The court in *People v. De La Plane* (1979) 88 Cal.App.3d 223, 251 (disapproved on other grounds by *People v. Green* (1980) 27 Cal.3d 1, 39, fn. 25) likewise held it was proper to join one count (a robbery charge) with another crime (murder) that occurred 10 months later than the first count, reasoning the offenses were arguably connected to the extent that the murder victim was originally charged as a codefendant on the robbery charge, and the victim's cooperation with the prosecution provided a motive for the murder.

On the basis of this authority, we conclude the charges involving Does 1 and 2 and the failure-to-register charges were properly joined under section 954. The failure-to-register offense shared a common element of substantial importance with the other charges because Cagnolatti apparently left the state at or around the same time the instant molestations came to the attention of authorities. As the trial court observed when denying the motion to sever, a trier of fact could infer a consciousness of guilt from Cagnolatti's conduct. Because a trier of fact could infer (to paraphrase *People v. Valdez*, *supra*, 32 Cal.4th at p. 119) that "[t]he apparent motive for [Cagnolatti's flight] was to avoid prosecution for [the sex crimes]" (*ibid.*), there was a common element of

substantial importance permitting joinder of the charges.⁵ (Accord, *People v. Alvarez, supra*, 14 Cal.4th at p. 188 [proper to join theft of vehicle charge to rape charge where theft may have been motivated by a desire to avoid apprehension for the rape, even though defendant contends possible linkage by motive was speculative because "[while] there was no direct evidence [of motive] [t]here was . . . sufficient circumstantial evidence to support what the superior court rightly considered a 'fair inference' ".])

C. Denial of the Motion to Sever Was Not an Abuse of Discretion

Our determination that joinder of the counts in the information satisfied the requirements of section 954 does not end our inquiry: "The determination that the offenses are "joinable" under section 954 is only the first stage of analysis because section 954 explicitly gives the trial court discretion to sever offenses or counts "in the interest of justice and for good cause shown." ' " (*People v. Lucky, supra*, 45 Cal.3d at pp. 276-277.) Cagnolatti had the burden of demonstrating substantial prejudice requiring the charges be separately tried. (*People v. Bradford, supra*, 15 Cal.4th at p. 1315.)

Although the determination of prejudice is necessarily dependent on the facts of each case, several guiding factors have emerged: " 'Refusal to sever may be an abuse of

⁵ Cagnolatti's sole authority contesting that the charges shared a common element of substantial importance is *People v. Madden* (1988) 206 Cal.App.3d Supp. 14, in which the appellate department of Los Angeles Superior Court concluded a charge of possession of a hypodermic syringe was improperly joined with a charge of failure-to-appear. The appellate department concluded, without citing any authority on point, that permitting consolidation under these facts was improper. (*Id.* at p. 18.) *Madden* has never been followed on this point by any subsequent case, and appears inconsistent with the rationale of numerous other cases, including *People v. De La Plane, supra*, 88 Cal.App.3d 223, *People v. Valdez, supra*, 32 Cal.4th 73, and *People v. Alvarez, supra*, 14 Cal.4th 155. We believe these authorities have effectively overruled, and we decline to follow, *Madden*.

discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.' "*Ibid.*)

Applying these factors here, Cagnolatti does not carry his burden of showing the court's ruling was an abuse of discretion. In determining whether a trial court abused its discretion by refusing to sever charges, reviewing courts first consider the cross-admissibility of the evidence in hypothetical separate trials. (*People v. Soper* (2009) 45 Cal.4th 759, 774.) "If the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges." (*Id.* at pp. 774-775.) Even were the evidence not cross-admissible, that circumstance would not by itself establish prejudice or an abuse of discretion. (*Id.* at p. 775; see also § 954.1.)

Here, the evidence would have been cross-admissible because Cagnolatti tried to secret himself around the time police learned of his molestations of the victims, and therefore the evidence that he left without registering his new address would have been admissible to show consciousness of guilt. Cagnolatti argues his departure for Texas (and his attempt to avoid being identified when authorities in Texas found him) would

have sufficed to show "flight," and therefore his failure to register was of minimal additional probative value while being highly prejudicial, and therefore he contends his failure to register would not have been cross-admissible because it would have been excluded under Evidence Code section 352. However, the inference of a consciousness of guilt from the fact Cagnolatti left California was arguably *strengthened* by the fact Cagnolatti knowingly risked *additional penal consequences* (e.g. conviction for violating section 290.013) by leaving without satisfying his obligation to register his address change. Because the fact Cagnolatti violated section 290.013 by leaving California was not purely duplicative of the evidence of the *fact* he left California, the former would have been cross-admissible in a separate trial of the counts involving Does 1 and 2.

Because the evidence would have been cross-admissible at a separate trial, any suggestion of prejudice was dispelled and the trial court's refusal to sever properly joined charges was justified. (*People v. Soper, supra*, 45 Cal.4th at pp. 773-775.)

D. The Sentence on Count 11 Must Be Modified

On appeal, Cagnolatti asserts the consecutive 75-year-to-life term imposed on count 11 was unauthorized because it was premised on the mistaken understanding that an enhancing allegation under section 667.71 was appended to count 11. The People concede no enhancing allegation under section 667.71 was appended to count 11 and therefore the sentence on count 11 was unauthorized. We agree the sentence was unauthorized, and we therefore vacate the sentence as to count 11 and remand for resentencing on count 11.

DISPOSITION

The judgment is reversed to the extent it imposed a consecutive 75-year-to-life term on count 11 and, on remand, the court shall resentence Cagnolatti as to count 11. In all other respects, the judgment is affirmed.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.