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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

HAMEED HAMILTON,

Defendant and Appellant.

E051642

(Super.Ct.No. RIF118755)

OPINION

APPEAL from the Superior Court of Riverside County. J. Thompson Hanks, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood, and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION¹

In February 2003, defendant Hammed Hamilton raped an unconscious and intoxicated woman. Defendant's DNA was not identified until 2007. In June 2009, a jury convicted defendant of three criminal counts: two counts of rape in violation of section 261, subdivisions (a)(3) and (a)(4), and dissuasion of a witness by force. (§ 136.1, subd. (c)(1).)²

In August 2010, the court imposed sentence on counts 1 and 2 of two middle terms of six years, staying the sentence on count 1 pursuant to section 654. The court dismissed count 3 as time-barred. (§ 1385.)

At trial, defendant offered the defense that he and the victim had engaged in consensual sex. On appeal, defendant contends the court erred by allowing evidence of his activities as a pimp in violation of section 266h. He further objects to the testimony about the rape examination. Defendant also asserts a claim for ineffective assistance of counsel. We reject these contentions and affirm the judgment.

II

FACTUAL BACKGROUND

A. February 2003 Rape

The victim, S.B., was a gang member with a criminal record of shoplifting,

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

² In 2008, both codefendants pleaded guilty to violating section 136.1, subdivision (c)(1).

possession of a stolen vehicle, firearm possession, giving the police a false name, and grand theft auto. S.B. was a regular user of PCP (phencyclidine).

On the evening of February 20 and 21, 2003, S.B. was staying at a friend's apartment in Moreno Valley. S.B. had a conversation with codefendants Terry Clark ("YT") and Dion Winn ("Black") on the street in front of the apartment complex. Later she saw defendant ("Dollar") in the alley with Clark and Winn.

The three men were all sitting in defendant's car, parked by the apartment laundry room. Defendant and S.B. discussed smoking "sherm," a slang term for a marijuana cigarette laced with PCP. Sometime earlier S.B. had already smoked PCP and marijuana. Winn and S.B. smoked some sherm while sitting on the hood of defendant's car. S.B. began to argue with Winn and, after she insulted his mother, he hit her with a closed fist on her right cheek. She fell to the ground and lost consciousness.

On the ground, S.B. was struck by a fist or a foot on the back of her head, causing a loss of memory. S.B. had a confused recollection of being taken into the laundry room and treated roughly. She heard bumping noises and recalled being bent over a dryer. At some point, defendant helped her off the ground, saying, "'Why did you let that' . . . '[person] do that to you?'"

Afterwards, just before daylight, S.B. encountered two friends who asked what was wrong with her and took her to an apartment. When S.B. saw herself in a mirror, her clothing was in disarray. Her white sweatpants were pulled down and her red underpants were around one ankle. Her T-shirt was around her neck with only one arm through a sleeve and her bra showing. Her face was bruised and there was dirt in her pony tail.

S.B. was confused about what had happened. She talked on the phone to her sister, who recommended she not take a shower. The next day S.B.'s grandmother took her to the hospital for a rape examination.

S.B.'s friends corroborated her testimony that, when they saw her that evening, she was dusty, dirty, somewhat disheveled and distressed, and appeared to be using PCP. When her grandmother picked up S.B. to take her to the hospital, her white pants were dirty and torn in the back. S.B. had not consented to sex. S.B. told two people she had been raped.

When the police interviewed her at the hospital, she said she had been roughed up by Winn but she did not know if she had been raped. In a second interview, she described being hit, kicked, and dragged by Winn. She said defendant had sex with her while Winn held her down. She said she had been too high or sedated to recall all the details in the first interview.

During the rape exam, S.B. said she could not remember what happened after she was struck in the face. She was in pain but she could not say if her vagina or anus had been penetrated. She said she had been choked, strangled, and assaulted in an alley. S.B. had scrapes and bruises on her face, hand, and elbow. Dried secretions were on her legs above the knees. Based on swabs taken during the rape exam, the police were notified in 2007 of a DNA match with defendant.

B. Witness Dissuasion on March 9, 2003

On March 9, 2003, S.B. was in an alley with some friends when defendant, Winn, and Clark drove by. S.B. threw a can of soda at the car and the three men followed her

into an apartment. Defendant told S.B, they had been looking for her because she had been saying she was raped. Defendant called S.B. a liar and warned her he would kill her, “put a cap in [her] ass,” and shoot her. Defendant made a gesture like a gun with his hand.

C. Defendant’s Testimony

Defendant’s nicknames were Dollar and Holiday. Defendant had a criminal history of receiving stolen property, loitering for prostitution, and robbery for taking a woman’s cell phone. He had worked intermittently as a pimp. He carried business cards for an escort service called “Holiday’s Treats.”

On the night of February 21, 2003, defendant had stopped to talk to Winn and Clark when S.B. joined them. S.B. and Winn argued and Winn pushed her down causing her to hit her head and dirty her pants. No one punched her or kicked her. S.B. walked away and then returned to defendant who was “talking sweet” to her. Defendant drove them to the far end of the alley and they began kissing. S.B. crawled into the back seat where they had consensual sex. Defendant asked S.B. if she had wanted to have sex with him and she purportedly answered, “For a long time, darlin’.” She voiced sounds of enjoyment and did not ask him to stop. Defendant did not use a prophylactic and he withdrew before ejaculating.

Afterwards, they dressed and talked. He drove her away and dropped her off. Defendant was never in the laundry room.

The next day, defendant heard that S.B. was claiming he, Winn, and Clark had raped her in the laundry room. When they saw her again on March 9, 2003, defendant

was concerned and angry. Other people were yelling but he did not talk to S.B. or threaten her.

III

EVIDENCE OF PRIOR PIMPING OFFENSES

Defendant acknowledged he had a criminal history. Defendant contends the trial court erred in admitting impeachment evidence of defendant's prior offenses involving pimping for prostitution. (§ 266h.)

People v. Castro (1985) 38 Cal.3d 301, 316-317, “set forth a two-prong analysis to determine the admissibility of prior convictions.[] The trial court must first determine whether the prior conviction involves moral turpitude. If moral turpitude is not involved, the prior conviction may not be admitted. If the prior conviction involves moral turpitude, the court must yet exercise its discretion whether to exclude the conviction under Evidence Code section 352.” (*People v. Jaimez* (1986) 184 Cal.App.3d 146, 149.)

Defendant concedes as a threshold issue that pimping is a crime of moral turpitude admissible to impeach his credibility. But defendant contends the prejudicial effect of such evidence requires its exclusion and the trial court abused its discretion. (*People v. Weaver* (2001) 26 Cal.4th 876, 933.) We disagree.

Abuse of discretion is a ruling ““outside the bounds of reason.”” (*People v. Waidla* (2000) 22 Cal.4th 690, 714.) The present case does not display an abuse of discretion. The respective credibility of both the victim and defendant was the most significant aspect of the case because they gave conflicting stories about whether their sexual encounter was consensual. The victim's criminal history was disclosed at trial.

Similarly, defendant's history of pimping was properly admitted as impeachment evidence. (See *People v. Jones* (1965) 232 Cal.App.2d 379, 392.)

One ground on which defendant objects to the admission of the impeachment evidence is that his history of pimping does not reflect adversely on his honesty or veracity in the same way as crimes like theft or perjury. (*People v. Beagle* (1972) 6 Cal.3d 441, 453.) Defendant also contends that the probative value of the evidence was minimal. (*People v. Wheeler* (1992) 4 Cal.4th 284, 296-297.) We disagree on both points. Pimping is evidence of the readiness to do evil and is repugnant to acceptable morality. (*People v. Jaimez, supra*, 184 Cal.App.3d at p. 180.) The evidence is relevant and sufficiently probative to impeach defendant's honesty.

Defendant also claims the pimping evidence would result in undue consumption of time, undue prejudice, confusion of issues, and misleading the jury. We disagree. The evidence about pimping involved a mere five pages of testimony in the reporter's transcript and was hardly confusing or misleading. Furthermore, we do not agree the pimping evidence created undue prejudice of bad character in view of the other evidence in this case. Defendant admitted having sex in the back seat of a car in an alley with a drug-addled victim. He also admitted to other past crimes. The addition of a history of pimping did not create additional prejudice. It is not reasonably probable defendant would have obtained a more favorable outcome if the evidence had been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 837-838.)

IV

PROSECUTORIAL ERROR

In a related argument, defendant argues the prosecutor's argument about defendant being a pimp was improper and it was ineffective assistance of counsel for defendant's trial attorney not to have objected.

In her argument to the jury, the prosecutor referred to defendant derisively as "Mr. I've-only-pimped-the-times-you've-caught-me." With regard to the charge of witness dissuasion, the prosecutor chided defendant about his lack of recollection, "We're not as dumb as the women that may choose to work for him." The prosecutor also spoke sarcastically about defendant's claim he did not use language threatening to "cap" S.B.: "Really? Are pimps not this rude?" Finally, she told the jury, "the law and common sense allow[] us to explore someone's background, conduct that they have done, to analyze that character or the believability . . . someone who is a pimp and won't admit to it on the stand or only admit to the – being a pimp for the three times that we caught him—please. . . . [¶] And because he's a pimp and exploits women, he should admit to that. . . . [¶] . . . [¶] . . . Are pimps nicer these days than they were when I worked vice? Don't insult our intelligence."

Based on these remarks, defendant protests the prosecutor's "intemperate behavior" violated defendant's constitutional right of due process. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) Furthermore, the prosecutor invited the jury to decide the case based on its judgment that defendant was of bad character, more likely to commit criminal acts. (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1074-1075.)

Additionally, the prosecutor invoked the power of her office to bolster the case against defendant. (*People v. Riggs* (2008) 44 Cal.4th 248, 302.)

The People concede the prosecutor may have been inappropriate in her argument but argue the defense attorney's performance was not deficient and there was no prejudice to defendant. The People maintain there were tactical reasons for not objecting. We agree it is plausible that defendant's trial counsel may not have wanted to emphasize defendant's history as a pimp. Instead, the defense attorney chose to respond directly to the prosecutor's comments by accusing her of trying to make the jury think defendant is a "worthless human being" who "doesn't deserve to be found not guilty." The defense counsel also may have thought the prosecutor's argument might backfire because of her bullying tone, focusing on defendant's character instead of the merits of the case. Because there were plausible reasons justifying counsel's actions, "[a]n appellate court should not . . . brand a defense attorney incompetent unless it can be truly confident all the relevant facts have been developed" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

Additionally, we conclude, as discussed above that defendant did not suffer prejudice as a result of the prosecutor's comments. Even without the pimping evidence, defendant admitted to having a criminal history which impaired his credibility. Furthermore, this was not a simple case of he-said-she-said. Several other people witnessed S.B.'s condition after her encounter with defendant. Her disheveled clothing, her emotional distress, and her physical injuries were inconsistent with a consensual sexual encounter. It is therefore not reasonably probable that, but for defendant's

lawyer's failure to object to the prosecutor's argument, the outcome of the trial would have been different. (*People v. Duncan* (1991) 53 Cal.3d 955, 966.)

V

CONFRONTATION CLAUSE

Over a defense objection, a nurse, Tracey Gomez, testified as an expert about the contents of the SART (Sexual Assault Response Team) report prepared by two nurses who examined S.B. after the assault. Defendant argues Gomez's testimony violated the Confrontation Clause, as held in *Crawford v. Washington* (2004) 541 U.S. 36, 51-52, unless the witness was unavailable and defendant had an opportunity for cross-examination.

The United States Supreme Court recently confirmed that "modern rules of evidence continue to permit experts to express opinions based on facts about which they lack personal knowledge." (*Williams v. Illinois* (U.S., June 18, 2012, 10-8505) 2012 WL 2202981.) An expert's testimony concerning a report prepared by a third party does not violate the Confrontation Clause when the report was not admitted into evidence. As an expert, Nurse Gomez could properly testify about the SART report which was not admitted into evidence.

VI

DISPOSITION

We reject defendant's claims of prejudicial error in the admission of evidence

and ineffective assistance of counsel.

We affirm the judgment.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.