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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DEROLLY FORBS,

Defendant and Appellant.

F061487

(Super. Ct. No. SF015415A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Cliff Gardner, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Alice Su, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Derolly Forbs was charged with forcible rape (Pen. Code,¹ § 261, subd. (a)(2); count 1), forcible oral copulation (§ 288a, subd. (c)(2); count 2), possession of a firearm by a felon (§ 12021, subd. (a)(1); count 3), and assault with a deadly weapon (§ 245, subd. (a)(1); count 4). Appellant's first trial ended with the jury acquitting him on the oral copulation count. However, the jury was unable to reach a verdict and the trial court declared a mistrial as to the remaining counts.

On retrial, appellant was convicted of forcible rape (count 1), possession of a firearm by a felon (count 2), and misdemeanor assault (§ 240), the lesser included offense of assault with a deadly weapon (count 3). The jury also found true that appellant had a prior conviction of forcible rape, and the trial court found true enhancement allegations based on the prior conviction. The court sentenced appellant to prison for an aggregate term of 61 years to life.

Appellant's main contention on appeal is that the trial court erred during the second trial by admitting his testimony from the first trial. Appellant's prior testimony included denials that he had sex with the victim. DNA testing completed after the first trial contradicted this testimony. Appellant argues his waiver of the privilege against compulsory self-incrimination in the first trial became invalid because the circumstances on which the waiver was based—i.e., the lack of DNA testing—changed and, therefore, the court should have excluded his testimony from the first trial from the second trial in which inculpatory DNA evidence was introduced. Appellant also contends that Evidence Code section 1108 and CALCRIM No. 1191 are unconstitutional. We affirm the judgment and order a nonsubstantive correction to the abstract of judgment and minute order of sentencing.

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

BACKGROUND²

The First Trial

During motions in limine, the prosecutor responded to the defense's motion to produce any lab results associated with the case by stating, "I'm not aware of any. I will call the lab and find out if they ever did a preliminary screening on the sexual assault kit, but I'm not aware that they did." The court then granted the defense motion to exclude any and all results of DNA testing or laboratory findings based on the prosecutor's representation that "There is no DNA that we've done."

At trial, Marie C., appellant's adult stepdaughter and the alleged victim in the case, testified that appellant had sex with her when she did not want him to. The same day she went to the hospital and underwent a sexual assault exam during which "[t]hey swabbed everything" including "the inside" like "[a] PAP smear."

The arresting officer testified that appellant voluntarily provided him with a DNA sample from his mouth.

Appellant testified that he did not have sex with Marie. He had erectile dysfunction and was unable to have an erection or ejaculate at the time of the alleged incident.

Appellant admitted he was convicted of rape in 1995 based on an incident in which he had sex with his "kids' mother" after she said she did not want him to touch her.

The Second Trial

During the second trial, the prosecution presented evidence that vaginal swabs obtained from Marie during the sexual assault exam contained sperm cell fractions, and that appellant's DNA sample matched the genetic traits of the sperm cell fractions.

² Since appellant does not challenge the sufficiency of the evidence to support any of his convictions and we have not found any error requiring a prejudice analysis, we will only summarize the facts pertinent to appellant's claim that the trial court erred in admitting his testimony from the first trial.

A redacted transcript of appellant's testimony from the first trial was read into evidence.

Appellant elected not testify in the second trial.

DISCUSSION

I. Admission of Testimony from Appellant's First Trial

Appellant contends the trial court erred in admitting his testimony from the first trial. Appellant's argument may best be expressed in the words of his own brief:

“[Appellant] waived his privilege against self-incrimination based on the circumstances known at the time of the first trial; the state rested virtually its entire case on [Marie's] testimony, and presented no physical evidence to corroborate [Marie's] claims. Under these circumstances, [appellant] waived his privilege against self-incrimination and testified that he did not have intercourse—consensual or otherwise—with [Marie]. But when the state decided to test and introduce DNA proving that [appellant] had at least consensual sex with [Marie], the entire factual basis for [appellant's] decision to testify in the first place—that there was no DNA evidence against him—was destroyed. ...[B]ecause [appellant] knowingly and voluntarily waived his constitutional right based upon an assumed set of circumstances, but the circumstances later changed and rendered invalid the assumptions on which his initial waiver was made, the initial waiver was rendered invalid, and his subsequent testimony was inadmissible.”

This contention lacks merit.³

“[Generally,] a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him.” (*Harrison v. United States* (1968) 392 U.S. 219, 222, fn. omitted.)

³ We assume without deciding the issue was not forfeited because, as respondent argues, “a specific objection on the grounds now specified do[es] not appear in the record.”

Appellant acknowledges that he knowingly and voluntarily waived his privilege against self-incrimination, in the first instance, based on the strength of the prosecution's evidence against him. According to appellant, he elected to testify at his first trial based on the assumption the prosecution would be unable to corroborate the victim's testimony with physical evidence due to the lack of DNA testing. Thus, he essentially made a tactical decision to take the stand and testify that he did not, and could not, have sex with the victim, hoping the jury would believe and acquit him. Instead, the jury hung on the rape count and appellant was retried. In the interim between the first and second trials, DNA testing was completed, the results of which contradicted appellant's prior testimony.

Contrary to appellant's assertion, these circumstances did not invalidate his waiver of the right against self-incrimination in the first trial. The possibility his first trial might end in a mistrial and that DNA testing might be conducted in the event of a retrial were foreseeable circumstances at the time of the waiver. The record indicates that appellant and his counsel were aware that testable samples had been collected from appellant and the victim during the police investigation, and that the state simply had not gotten around to testing them. There is no indication appellant elected to testify based on a mistaken belief that DNA testing could *never* be done on the samples. And even though the court excluded evidence of DNA test results in the first trial based on the prosecutor's representation that DNA testing had not been conducted, appellant does not claim that he understood this to mean DNA test results would be excluded in future proceedings. Appellant points to no evidence supporting his claim that his waiver of the right against self-incrimination in the first trial was invalid because it was based on "[m]istake, ignorance or any other factor overcoming the exercise of free judgment" (*People v. Cruz* (1974) 12 Cal.3d 562, 566).

We have reviewed the cases cited by appellant to support his argument on appeal. None address situations analogous to the one here.⁴ For example, appellant cites a line of decisions holding it was error for the court to fail to obtain a new express waiver of the right to a jury trial after the prosecutor filed an amended pleading charging a new offense or adding a prior conviction or penalty enhancement. (*People v. Walker* (1959) 170 Cal.App.2d 159, 162, 165-166 [amended information charged sale of heroin rather than mere possession]; *People v. Luick* (1972) 24 Cal.App.3d 555, 557-559 [amended information added five priors]; *People v. Hopkins* (1974) 39 Cal.App.3d 107, 118-119 [amended information subjected defendant to additional 10-year minimum sentence]; see also *People v. Ray* (1965) 238 Cal.App.2d 734, 735 [when defendant pleads guilty in municipal court and then priors are added in superior court, defendant has not waived the right to jury trial on the priors].)

The other cases appellant cites are likewise inapposite. (*Harrison v. United States*, *supra*, 392 U.S. at pp. 222-224 [under fruit of poisonous tree doctrine, if defendant “impelled” to testify at one trial by admission of illegally obtained confession, his testimony is inadmissible at a second trial]; *In re Crumpton* (1973) 9 Cal.3d 463, 464-465 [defendant who pleaded guilty to kidnapping for purposes of robbery entitled to habeas relief to withdraw plea where plea based on mistaken legal understanding of kidnapping statute and undisputed preliminary hearing testimony established defendant could not have been convicted of kidnapping had he stood trial]; *Ferrel v. Superior Court* (1978) 20 Cal.3d 888, 892, fn. 5 [dicta observing that “when a valid limitation on or suspension of pro. per. privileges occurs, a defendant should be afforded the opportunity to

⁴ Nor do they stand for the sweeping proposition for which appellant cites them; namely, that, “when a defendant knowingly and voluntarily waives a constitutional right based upon an assumed set of circumstances, but the circumstances later change and render invalid the assumptions on which the initial waiver was made, courts have long held the initial waiver is invalid.”

reconsider whether he wants to proceed in pro. per. or have counsel appointed to represent him”].)

Appellant has presented no basis for us to conclude that his waiver of the right against self-incrimination in the first trial was invalid or that the trial court erred in admitting his testimony in the second trial.

II. Constitutionality of Evidence Code section 1108 and CALCRIM No. 1191

The trial court admitted evidence of appellant’s prior rape offense under Evidence Code section 1108, which provides in pertinent part that “(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.”

The trial court also instructed the jury pursuant to CALCRIM No. 1191 as follows:

“The People presented evidence that the defendant committed the crime of rape by force or fear of Lancia G. that was not charged in this case. This crime is defined for you in these instructions. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offense.

“Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden of proof, you must disregard this evidence entirely.

“If you decide that the defendant committed the uncharged offense, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses and based on that decision also conclude that the defendant was likely to commit and did commit the crime of rape by force or fear as alleged in Count 1.

“Now, if you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Count 1. The People must still prove said allegation beyond a reasonable doubt. Do not consider this evidence for any other purpose except as you may be instructed.”

Appellant raises two related arguments for purposes of future review. First, he contends Evidence Code section 1108 violates his federal due process rights. However, our Supreme Court has repeatedly held Evidence Code section 1108 does not offend due process. (*People v. Loy* (2011) 52 Cal.4th 46, 60-61; *People v. Wilson* (2008) 44 Cal.4th 758, 797; *People v. Falsetta* (1999) 21 Cal.4th 903, 910-922; see *U.S. v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1024-1027 [upholding a similar federal rule].) Second, appellant contends instruction with CALCRIM No. 1191 violated his due process rights under the federal and state Constitutions. Appellant raised no objection to the instruction in the trial court. In any event, in *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016 (*Reliford*), our Supreme Court upheld the constitutionality of a substantially identical instruction, the 1999 version of CALJIC No. 2.50.01,⁵ rejecting arguments similar to those raised by appellant here. (See also *People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1103-1104 [rejecting due process challenge to CALCRIM No. 1191 under compulsion of *Reliford*]; *People v. Crompt* (2007) 153 Cal.App.4th 476, 479-480 [same].) We are bound by the foregoing Supreme Court authority. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

⁵ The 1999 version of CALJIC No. 2.50.01 as modified in *Reliford* stated: “‘Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense other than that charged in the case. [¶] “Sexual offense” means a crime under the laws of a state or of the United States that involves any of the following: [¶] ‘Contact, without consent, between the genitals or anus of the defendant and any part of another person’s body. [¶] ‘If you find that the defendant committed a prior sexual offense in 1991 involving [the victim], you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused. [¶] ‘However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense in 1991 involving [the victim], that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime. The weight and significance of the evidence, if any, are for you to decide. [¶] ‘You must not consider this evidence for any other purpose.’” (*People v. Reliford, supra*, 29 Cal.4th at pp. 1011-1012.)

III. Amendment of the Abstract of Judgment and Minute Order of Sentencing

In footnote 2 of his opening brief, appellant correctly observes that the abstract of judgment and minute order of sentencing contain errors concerning the numbering of counts that must be corrected. The abstract and minute order indicate that the trial court imposed a six-year term on count 3 (for the possession of a firearm by a felon), and a concurrent 90-day jail term on count 4 (for the misdemeanor assault), reflecting the numbering of the counts in the original information. In the amended information filed following appellant's acquittal on the oral copulation count in the first trial, count 3 was renumbered as count 2, and count 4 was numbered as count 3.

DISPOSITION

We remand the matter to the trial court with directions to amend the abstract of judgment and the minute order to reflect the correct numbering of counts for the offenses of possession of a firearm by a felon and misdemeanor assault. In all other respects, the judgment is affirmed.

HILL, P. J.

WE CONCUR:

KANE, J.

POOCHIGIAN, J.