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

THE PEOPLE,

Plaintiff and Respondent,

v.

PHILLIP ANTHONY TRUJILLO,

Defendant and Appellant.

F062655

(Super. Ct. No. VCF222730)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

John Hardesty, 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, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Phillip Anthony Trujillo of two counts of forcible lewd acts on a child under the age of 14 years and three counts of lewd acts on a child under the age of 14 years. Trujillo contends (1) the evidence was insufficient to support the convictions on counts 2 through 5; (2) the trial court abused its discretion in admitting evidence of uncharged sexual offenses, which violated his constitutional rights; (3) the prosecutor committed prejudicial misconduct in closing argument; and (4) cumulative error. We reject Trujillo's contentions and will affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Alexis experienced a breakdown when she was 15 years old. She called a suicide hotline and told the counselor she had been molested when she was younger. A detective was dispatched to Alexis's home to investigate. Trujillo was identified as the person who had molested Alexis. Upon investigation, the detective learned that Trujillo had molested other children, including Brad and Chad.

On November 8, 2010, Trujillo was charged with two counts of a forcible lewd act on Brad, a child under the age of 14 years at the time the acts were committed, and three counts of lewd acts on Alexis, a child under the age of 14 years at the time of the commission of the acts. It also was alleged as to all five counts that Trujillo had substantial sexual contact with the child victims and that there were multiple victims.

Brad testified that when he was five or six years old, Trujillo told him to lie down on the couch. Brad complied and Trujillo inserted his penis into Brad's anus. Brad recalled two incidents when he was seven or eight years old. In one incident, Brad and Trujillo were in a room together when Trujillo pulled down his pants and made Brad orally copulate him. In another incident, Brad and Trujillo were in a camper and Trujillo again forced Brad to orally copulate him.

When Brad was 12, Trujillo grabbed Brad, pulled down his pants (Trujillo's) and inserted his penis into Brad's anus. Trujillo sodomized Brad several other times in a

trailer. Trujillo also inserted his penis into Brad's mouth over five times. All of this was when Brad was 12.

At trial, Alexis testified that Trujillo was friends with her uncle. When she was approximately seven years old, Alexis was on her uncle's couch and Trujillo reached under her clothing and touched her vagina. This happened multiple times. When Alexis was approximately 11 years old, Trujillo came up behind her, gave her a hug, and tried to touch her, saying, "it would be just like old times." Alexis stepped on his foot and locked herself in the bathroom.

Amber and Chad testified about uncharged sexual offenses committed by Trujillo. Amber testified that when she was five, she lived next door to Trujillo; Trujillo was about 14 years old. Amber went to Trujillo's house to visit his sister; Trujillo led her to a camper in the backyard. While in the camper, Trujillo pulled down her underpants and put his mouth on Amber's vagina.

Trujillo admitted to the investigating detective that he had placed his mouth and tongue on Amber's vagina. Trujillo claimed, however, that five-year-old Amber initiated the sexual touching.

Chad testified that when he was about nine years old, Trujillo took him to the side of the house and made him orally copulate Trujillo. Chad recalled "vomiting really bad."

A jury convicted Trujillo on all five counts and found the allegations to be true. The trial court sentenced Trujillo to an indeterminate term of 75 years to life.

DISCUSSION

Trujillo raises three main contentions in this appeal: (1) insufficiency of the evidence to support the convictions on counts 2 through 5; (2) abuse of discretion in admitting evidence of uncharged sexual offenses, along with an improper instruction to the jury, CALCRIM No. 1191, which constituted a violation of due process; and (3) prejudicial prosecutorial misconduct based upon comments in closing argument. He also argues cumulative error warrants reversal.

I. Sufficiency of the Evidence

In reviewing a challenge to the sufficiency of the evidence, appellate courts do not determine the facts. We examine the record as a whole in the light most favorable to the judgment and presume the existence of every fact the trier of fact reasonably could deduce from the evidence in support of the judgment. (*People v. Lee* (2011) 51 Cal.4th 620, 632; *People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Unless the testimony of a single witness is physically impossible or inherently improbable, it is sufficient for a conviction. (Evid. Code, § 411; *People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Count 1 pertained to Trujillo's sodomizing Brad, and count 2 pertained to Trujillo forcing Brad to orally copulate him. At trial Brad testified that Trujillo forced his penis into his (Brad's) mouth. Brad then was asked to recall the number of times he had been forced by Trujillo to perform oral copulation on him; Brad testified it was over five times.

The convictions on counts 3, 4, and 5 were for lewd acts against Alexis. Alexis testified that when she was approximately seven years old, while she was lying on the couch, Trujillo "stuck his hand up and started touching" her "private parts." When she referred to her private parts, she meant her vagina. She testified that Trujillo touched her vagina "[s]everal different times," "[a]round like four" times or "a couple times." She also acknowledged that when interviewed previously by a detective, she told the detective it happened five or six times.

Trujillo argues that the testimony described was insufficient because it did not provide him with sufficient particularity to allow him to defend himself, thus violating his due process rights. He recognizes in his opening brief that this argument failed in the California Supreme Court in *People v. Jones* (1990) 51 Cal.3d 294, which found "generic testimony" regarding child molestation "is sufficiently substantial from an evidentiary standpoint. [Citations.]" (*Id.* at pp. 313-314.) The victim must be able to describe (1) the kind of act or acts committed with sufficient specificity to assure unlawful conduct has occurred and to differentiate between types of conduct, (2) the number of acts with

sufficient certainty to support the number of counts, and (3) the general time period to assure the acts were committed within the applicable statute of limitations. (*Id.* at p. 316.)

Here, the testimony of Brad and Alexis contained the three components described in *Jones*. Thus, Brad's testimony regarding the forced oral copulation of Trujillo was sufficient to support the count 2 conviction, and Alexis's testimony regarding the multiple times Trujillo touched her vagina under her clothing supported the convictions on counts 3, 4, and 5, despite some confusion on her part as to the number of times the touching occurred. It is for the jury to resolve conflicts in testimony or issues of credibility and it is of no consequence a jury might have reached a contrary conclusion by believing other evidence, or drawing other reasonable inferences. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

Trujillo, however, also argues that this court should not credit the decision in *Jones* because it undermines the requirement for juror unanimity. This contention fails as *Jones* applies here and is binding upon this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

II. Uncharged Sexual Offenses

Trujillo claims that admission of uncharged sexual offenses was an abuse of discretion and that instructing the jury with CALCRIM No. 1191 was a violation of his due process rights. We conclude that he has forfeited any challenge to the admissibility of this evidence.

Admissibility

Prior to trial, the People moved to admit testimonial evidence of prior uncharged sexual offenses pursuant to Evidence Code sections 1108 and 1101. (All further statutory references are to the Evidence Code unless otherwise stated). Specifically, the People sought to admit evidence of four uncharged offenses: (1) oral copulation of Amber;

(2) forcing Chad to orally copulate Trujillo; (3) oral copulation of Brad and sodomizing Brad; and (4) attempted molestation of Alexis.

The trial court conducted a section 352 hearing and concluded the probative value would not be outweighed by the danger of undue prejudice. During the hearing, Trujillo's counsel stated, "I'll object and submit it." The basis of the objection never was specified.

Although defense counsel objected to admission of the uncharged misconduct evidence, he did not state the basis of the objection during the section 352 hearing. When the testimony was presented during the trial, defense counsel raised no objection whatsoever when the witnesses were questioned about prior uncharged sexual misconduct committed by Trujillo. The only objections made pertained to matters other than Trujillo's prior sexual misconduct. As an example, an objection was made on the basis of vagueness to a question asking a witness to describe "growing up in the Trujillo household."

Any objection to the admissibility or relevancy of the prior uncharged sexual acts under section 352, 1101, or 1108 is forfeited because Trujillo failed to preserve any objection at trial. "A tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the trial evidence itself. [Citations.]" (*People v. Holloway* (2004) 33 Cal.4th 96, 133.)

It is a well-established principle of jurisprudence that only points that were raised and ruled on in the trial court are cognizable on appeal. (§ 353; *People v. Clark* (1993) 5 Cal.4th 950, 988, fn. 13.) To preserve an evidentiary issue for appellate review, timely objection must have been interposed on the same ground during trial. (*People v. Hill* (1992) 3 Cal.4th 959, 989.) Since the evidentiary claim presented in this appeal was not

raised and ruled on during trial, the point was not preserved for appellate review. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1014-1015.)

Likewise, the challenge to admissibility of the evidence on constitutional due process grounds is forfeited. “An appellate contention that the erroneous admission or exclusion of evidence violated a constitutional right is not preserved in the absence of an objection on that ground below. [Citations.]” (*People v. Daniels* (2009) 176 Cal.App.4th 304, 320, fn. 10.) No objection on the basis of a violation of constitutional rights ever was raised.

We also note the California Supreme Court expressly has rejected this contention on the merits. In *People v. Falsetta* (1999) 21 Cal.4th 903, 915-922, the court held that evidence of uncharged sexual offenses admitted pursuant to section 1108 does not violate a defendant’s rights to due process.

Jury Instruction

Trujillo’s claim of error concerning instructing the jury with CALCRIM No. 1191¹ also fails. This instruction tells the jury how to consider evidence of uncharged

¹ CALCRIM No. 1191 reads: “The People presented evidence that the defendant committed the crime[s] of _____ <insert description of offense[s]> that (was/were) not charged in this case. (This/These crimes[s] (is/are) 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[s]. 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[s], 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] _____ <insert charged sex offense[s]>, as charged here. If you conclude that the defendant committed the uncharged offense[s], 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 _____ <insert charged sex offense[s]>. The People must still prove (the/each) (charge/ [and] allegation) beyond

sexual offenses, including that the truth of the offenses must be proven by a preponderance of the evidence. Trujillo's contention is not unique. Various versions of this instruction, and the burden of proof, have been challenged many times. But, as he acknowledges in his opening brief, this contention has been rejected by the California Supreme Court in *People v. Reliford* (2003) 29 Cal.4th 1007, 1013. We are bound by this decision.

III. Prosecutorial Misconduct Claim

Trujillo contends that the prosecutor committed misconduct during closing argument. We conclude the comments complained of were harmless.

During his initial closing argument, the prosecutor stated:

“Those little kids, three of them now are adults, one of them is still a minor, the two victims that are named you know there's going to be scars on their lives permanently from that. I'm not here today to ask you to fix what's been done because frankly we all know that we can't go back and change what's happened. We can't fix those people. We can't fix the things that have been done to them. But for the sake of humanity and doing what's right and righteousness and goodness and justice -- ”

At that point, defense counsel objected and the trial court sustained the objection stating, “it is appealing to the passions of the jury.”

In his rebuttal argument, the prosecutor stated, “Now I had a quote I was gonna show you the other day. And the quote is simply this, ‘Is there anything worse than destroying the innocence of a child.’” Defense counsel objected, but, before the trial court could rule, the prosecutor stated, “I want you to think about that.” The trial court overruled the objection stating it was “argument.”

a reasonable doubt. [¶] [Do not consider this evidence for any other purpose [except for the limited purpose of _____ <insert other permitted purpose, e.g., determining the defendant's credibility>].]

““““A prosecutor’s ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant [requested] an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” [Citation.]’ [Citations.]” (*People v. Carter* (2005) 36 Cal.4th 1215, 1263-1264.)

Trujillo contends the comments of the prosecutor were inappropriate appeals to the sympathy or passions of the jury and were prejudicial. The first objection by defense counsel was sustained, but no curative admonition was requested. “To preserve a [prosecutorial] misconduct claim for appellate review, a defendant must make a timely objection and ask the trial court to admonish the jury to disregard the remark (or conduct) unless such an admonition would not have cured the harm. [Citation.]” (*People v. Booker* (2011) 51 Cal.4th 141, 184.) Trujillo did not request a curative admonition and has failed to demonstrate that the jury would have disregarded a curative admonition. (*People v. Green* (1980) 27 Cal.3d 1, 27.)

The second objection was overruled as simply constituting argument. Presumably, the jurors understood that the prosecutor and defense counsel were advocates, not neutral, disinterested parties. (*People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8.) In any event, the passing comment was not prejudicial, nor did it deprive Trujillo of a fundamentally fair trial. (*People v. Bell* (1989) 49 Cal.3d 502, 542.)

Even if we were to view the prosecutor's remarks as inappropriate, there is no indication the jury construed or applied the remarks contrary to the trial court's instructions. A jury is presumed to follow a court's instruction in the absence of any indication that it was unwilling or unable to do so. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 196.) The jurors were instructed that comments from counsel were not evidence and that they were to decide the case based upon the evidence, not bias, sympathy, prejudice, or public opinion. Here, there is no evidence in the record, and Trujillo has cited none, indicating the jury was unwilling or unable to follow instructions.

Accordingly, we reject Trujillo's claim of prejudicial prosecutorial misconduct. (*People v. Foster* (2010) 50 Cal.4th 1301, 1354 [Supreme Court rejected the defendant's assertion that he did not forfeit claim of prosecutorial misconduct by his failure to object and seek curative admonition where the defendant did not explain why a curative admonition would not have cured any harm].)

IV. Cumulative Error

Trujillo argues that the cumulative effect of the errors was so prejudicial as to deny him due process and a fair trial. As explained above, there was sufficient evidence to support the convictions on counts 2 through 5, the evidentiary objections are not cognizable on appeal, and any claim of prosecutorial misconduct was not preserved. Consequently, there is no cumulative error. Trujillo "was entitled to a fair trial but not a perfect one. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) The record reflects he received a fair trial and his contention of cumulative error is rejected.

DISPOSITION

The judgment is affirmed.

CORNELL, J.

WE CONCUR:

WISEMAN, Acting P.J.

GOMES, J.