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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER ALLEN BRAMMER,

Defendant and Appellant.

F062897

(Super. Ct. No. CRM004150)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. John D. Kiriwara, Judge.

Julie Schumer, 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, Michael A. Canzoneri and Barton Bowers, Deputy Attorneys General, for Plaintiff and Respondent.

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In 2000, Christopher Allen Brammer started molesting his 11-year-old stepgranddaughter. In 2002, he started molesting his 15-year-old stepdaughter. He impregnated each, had each get an abortion, had each engage in sex acts with the other,

and had sex with each hundreds of times. He stopped having sex with his stepdaughter when, at age 19, she chose to have a normal life with her boyfriend. He stopped having sex with his stepgranddaughter when, at age 19, she stopped going over to his house. A year later, when his stepgranddaughter went to his house wearing a wire, he admitted having sex with her and impregnating her.¹ A jury found him guilty of multiple sex crimes against both of his victims. We vacate his convictions on two counts charged in violation of a statutory proscription against multiple convictions and order the imposition of court security fees but in all other respects we affirm the judgment.

BACKGROUND

On May 13, 2011, a first amended information charged Brammer with one count of continuous sexual abuse of a child under the age of 14 (count 1; Pen. Code, § 288.5),² two counts of oral copulation of a child under the age of 14 and over 10 years younger (counts 2 & 5; § 288a, subd. (c)(1)), two counts of a lewd or lascivious act on a child under the age of 14 (counts 3 & 4; § 288, subd. (a)), four counts of a lewd or lascivious act on a child 14 or 15 years of age by a person at least 10 years older (counts 6-7 & 9-10; § 288, subd. (c)(1)), three counts of oral copulation of a child under the age of 18 by a person over the age of 21 (counts 8, 11, & 17; § 288a, subd. (b)(2)), and 13 counts of unlawful sexual intercourse with a child under the age of 16 by a person 21 years of age or older (counts 12-16 & 18-25; § 261.5, subd. (d)).

On May 20, 2011, after the court granted the prosecutor's motion to dismiss counts 12-13 and 19-25, a jury found Brammer guilty on counts 1-7, 9-10, and 14-18 and not guilty on counts 8 and 11. On July 18, 2011, the court sentenced him to an aggregate term of 36 years and four months in state prison.

¹ Additional facts, as relevant, are in the discussion (*post*).

² Later statutory references are to the Penal Code except where otherwise noted.

DISCUSSION

1. Evidence of Past Cocaine Use

Brammer argues that the court's admission of his statement admitting his past cocaine use was an abuse of discretion and a violation of his federal constitutional rights to due process and a fair trial. The Attorney General argues that he forfeited his right to appellate review of the federal constitutional issue and that he fails to show error or prejudice.³ We agree with the Attorney General.

Before trial, Brammer objected to the admission in evidence of his comment admitting his past cocaine use during his interview with a police detective. The grounds of his objection were that the evidence at issue was irrelevant and more prejudicial than probative. (See Evid. Code, §§ 350-352, 1101.) The prosecutor, while conceding that the evidence had "minimal relevance," argued that it had "minimal prejudice" and that the rule of completeness militated in favor of its admission in evidence. (See Evid. Code, § 356.) The court found that the prejudice did not substantially outweigh the probative value and ruled the evidence admissible. In a videotape of Brammer's interview, the jury saw him telling the detective that his stepgranddaughter threatened to plant cocaine on him, that he found a "big ol' bindle of nice coke" in his truck, and that he was "an old partier" who knew about "good cocaine" but that his wife, with whom he had a "great" relationship, got him off the partying.

The deferential abuse of discretion standard of review applies to a ruling on the admissibility of evidence, including a ruling that turns on the relative probativeness and prejudice of the evidence in question. (*People v. Hamilton* (2009) 45 Cal.4th 863, 930,

³ In the interest of judicial efficiency, to preclude a later claim that the lack of an objection on federal constitutional grounds constituted ineffective assistance of counsel, we analyze the merits of Brammer's argument without addressing the Attorney General's forfeiture argument. (*People v. Williams* (1998) 61 Cal.App.4th 649, 657, citing, e.g., *People v. Marshall* (1996) 13 Cal.4th 799, 831.)

citing *People v. Jablonski* (2006) 37 Cal.4th 774, 805.) Evidence substantially more prejudicial than probative (see Evid. Code, § 352) is evidence that, broadly stated, poses an intolerable risk to the fairness of the proceedings or to the reliability of the outcome. (*Hamilton, supra*, at p. 930, citing *Jablonski, supra*, at p. 805.) A court's exercise of discretion will be disturbed on appeal only if the court ruled "in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125, quoting *People v. Jordan* (1986) 42 Cal.3d 308, 316.)

The evidence of Brammer's past cocaine use was marginally relevant on the issue of his relationship with his stepgranddaughter. The charges he faced at trial involved sexual molestations, however, not the possession or the use of a controlled substance. Analyzing a claim analogous to his, our Supreme Court rejected the argument that a court's admission of a defendant's statement that he was a "professional thief" was prejudicial. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1048-1050.) "In the context of this case, none of the statements was particularly prejudicial. Defendant was charged with being a serial killer, not a thief. The trial court could reasonably find it highly unlikely the jury would convict defendant of being a serial killer despite a reasonable doubt on that score because it heard evidence that he described himself as a thief, professional or otherwise. It did not abuse its discretion." (*Id.* at p. 1050.) Likewise, the admission of Brammer's statement admitting his past cocaine use was not an abuse of discretion.

A court's evidentiary rulings generally do not impermissibly infringe on a defendant's constitutional rights. (*People v. Prince* (2007) 40 Cal.4th 1179, 1238.) The admission of relevant evidence does not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair. (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) With commendable candor, Brammer acknowledges that he "essentially admitted having sex with the girls" when he spoke with the detective when

she interviewed him and when he spoke with his stepgranddaughter when she went to his house wearing a wire. Even so, he argues that the evidence at issue was prejudicial since other evidence cast doubt on the credibility of his stepgranddaughter and his stepdaughter alike. On the record before us, he fails to persuade us.

2. *Prosecutor's Use of Word "Monster"*

Brammer argues that the prosecutor's characterization of him as a "monster" was prosecutorial misconduct and that his attorney's failure to request an admonition after the court sustained his objection was ineffective assistance of counsel. The Attorney General argues that he forfeited his right to appellate review by not requesting an admonition and that he fails to show error or prejudice.⁴ We agree with the Attorney General.

The prosecutor's use of the word "monster" arose from a comment Brammer himself made during his interview with the detective, the videotape of which the jury saw. After he admitted having sex with his stepgranddaughter and his stepdaughter, he said, "Yeah – yeah. That's you know like I said, I – I'm not the *monster* that – I know that was wrong what I did, you know, totally wrong. But in the same turn, too, you know, a lot of times I didn't want to do nothing and they would come at me to...", and the detective asked, "To invite you?," to which he replied, "...yeah." (Italics added.)

In argument to the jury, the prosecutor repeated Brammer's own words from the interview and then appended a comment. "Then he goes on to say this: 'Yeah. Yeah, that's, you know, like I said, I'm not the *monster* that – I know that was wrong what I did, you know, totally wrong, but in the same time you know, a lot of times I didn't want to do nothing, they would come at me.' You're not a *monster*? Really? Yes, you are.

⁴ In the interest of judicial efficiency, we analyze the merits of Brammer's argument without addressing either his ineffective assistance of counsel argument or the Attorney General's forfeiture argument. (See fn. 3, *ante*.)

Yes you are. You are a *monster*, Mr. Brammer.” His attorney objected. Sustaining the objection, the court directed the prosecutor to “move on.” (Italics added.)

Under the federal standard, prosecutorial misconduct that infects a trial with such unfairness as to make the resulting conviction a denial of due process is reversible error. Under the state standard, prosecutorial misconduct requires reversal if the prosecutor uses deceptive or reprehensible methods to persuade the court or the jury and a result more favorable to the defendant without the misconduct was reasonably probable. (*People v. Martinez* (2010) 47 Cal.4th 911, 955-956 (*Martinez*), citing *Darden v. Wainwright* (1986) 477 U.S. 168, 181, *People v. Wallace* (2008) 44 Cal.4th 1032, 1071, and *People v. Price* (1991) 1 Cal.4th 324, 447.)

A prosecutor is given wide latitude during argument to the jury, so argument that amounts to fair comment on the evidence or reasonable inferences or deductions drawn from the evidence may be vigorous. (*People v. Stanley* (2006) 39 Cal.4th 913, 951.) In a murder, rape, and sodomy case, our Supreme Court portrayed the prosecutor’s references to the defendant in argument to the jury as a “monster,” an “extremely violent creature,” and a “beast who walks upright” as, “for the most part,” “fair comment on the evidence.” (*People v. Farnam* (1992) 28 Cal.4th 107, 125, 199-200.) Rejecting a claim of misconduct in the prosecutor’s references to the defendant in argument to the jury as a “human monster” and a “mutation” in a multiple murder case, our Supreme Court characterized those terms as “permissible comment regarding egregious conduct on defendant’s part.” (*People v. Sully* (1991) 53 Cal.3d 1195, 1210, 1249.) The prosecutor’s “exaggerated expressions were brief and isolated instances,” the court emphasized, “and emanated from the heinous details of defendant’s crimes and defendant’s own statements about his conduct.” (*Id.* at p. 1250.)

During his interview with the detective, Brammer attempted to minimize his culpability by denying he was a “monster” even while acknowledging what he did was “wrong.” Referring to that part of the interview in argument to the jury, the prosecutor

simply used Brammer's own word, as a characterization rather than as a denial. During a horrid course of conduct over a period of years, Brammer repeatedly molested two young girls, impregnated each, had each get an abortion, had each engage in sex acts with the other, and had sex with each hundreds of times. The compelling evidence of his guilt, including the testimony of each victim and his admissions not only to the detective but also to his stepgranddaughter while she wore a wire, persuades us there is no reasonable likelihood that the jury misconstrued or misapplied the prosecutor's comments. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1304, citing *People v. Clair* (1992) 2 Cal.4th 629, 662-663.) Under both the federal standard and the state standard, the record belies Brammer's claim of prosecutorial misconduct. (See *Martinez, supra*, 47 Cal.4th at pp. 955-956 and cases cited.)

3. *Dates of Commission of Sex Crimes*

Brammer argues that his conviction of continuous sexual abuse requires vacating his convictions of two other sex crimes that he committed during the same time period. The Attorney General argues that the jury necessarily found that he committed the latter two crimes during different time periods. We agree with Brammer.

The information charged Brammer with the commission of continuous sexual abuse (count 1; § 288.5) “[o]n or between February 9, 2002 and February 9, 2003,” of oral copulation of a child under the age of 14 and over 10 years younger (count 2; § 288a, subd. (c)(1)) “[o]n or between February 9, 2000 and February 9, 2002,” and of a lewd or lascivious act on a child 14 or 15 years of age by a person at least 10 years older (count 6; § 288, subd. (c)(1)) “[o]n or between February 9, 2003 and September 1, 2003.” The dates of the charges in counts 2 and 6 overlap the dates of the charge in count 1, and all three counts charge crimes against his stepgranddaughter, so the information violates the

continuous sexual abuse statute, which expressly precludes charging the crimes in counts 2 and 6 against the same victim within the same time period. (§ 288.5, subd. (c).)⁵

Even so, the Attorney General argues, the jury necessarily found that the crimes took place during different time periods because the prosecutor eliminated any possible overlap in his argument to the jury by telling the jurors Brammer’s stepgranddaughter’s age in those three counts. Not so. By statute, charging the continuous sexual abuse in count 1 precludes charging the crimes in counts 2 and 6. (§ 288.5, subd. (c).) Nothing in the prosecutor’s argument to the jury can change the terms of the statute.

People v. Cortes (1999) 71 Cal.App.4th 62 held that, “under section 288.5, a prosecutor need only allege the minimum period of time necessary to prove the elements of the offense. This view is consistent with the plain meaning of the statutory language, prevents multiple convictions for a course of conduct and the acts comprising it, and, most importantly, facilitates the protection of children from continuous sexual abuse.” (*Id.* at p. 79; see *People v. Johnson* (2002) 28 Cal.4th 240, 248.) Even if charging the continuous sexual abuse in count 1 with a different minimum period of time might have avoided the statutory proscription, that is not the charge before us.

4. Court Security Fees

The Attorney General argues that the court’s failure to impose a mandatory court security fee on each of Brammer’s convictions requires modification of the judgment.

⁵ “No other act of substantial sexual conduct, as defined in subdivision (b) of Section 1203.066, with a child under 14 years of age at the time of the commission of the offenses, or lewd and lascivious acts, as defined in Section 288, involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved in which case a separate count may be charged for each victim.” (§ 288.5, subd. (c).)

(§ 1465.8, subd. (a)(1)); *People v. Roa* (2009) 171 Cal.App.4th 1175, 1181; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-867.) Brammer agrees. So do we.

DISPOSITION

The matter is remanded with directions to vacate Brammer’s convictions on two counts charged in violation of the statutory proscription against multiple convictions (Pen. Code, § 288.5, subd. (c)) – his count 2 conviction of oral copulation of a child under the age of 14 and over 10 years younger (§ 288a, subd. (c)(1)) and his count 6 conviction of a lewd or lascivious act on a child 14 or 15 years of age by a person at least 10 years older (§ 288, subd. (c)(1)) – and to impose the mandatory court security fee on each remaining conviction (§ 1465.8, subd. (a)(1)).

The court is directed to amend the abstract of judgment accordingly and to send a certified copy of the abstract of judgment so amended to the Department of Corrections and Rehabilitation. Brammer has no right to be present at those proceedings. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1234-1235.) In all other respects, the judgment is affirmed.

Gomes, J.

WE CONCUR:

Cornell, Acting P.J.

Franson, J.