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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE EUGENE CROSS,

Defendant and Appellant.

G044769

(Super. Ct. No. 06NF4190)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Richard M. King, Judge. Affirmed.

Patricia L. Brisbois, 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, A. Natasha Cortina and
Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant George Eugene Cross was convicted of rape. Because the jury found true the sentencing enhancement allegation that the rape was committed during the course of a burglary, with the intent to commit rape (Pen. Code, § 667.61, subd. (d)(4)), defendant was given a mandatory 25-year-to-life sentence.

On appeal, defendant contends there was insufficient evidence to support the jury's true finding on the sentencing enhancement allegation. We disagree. Under all the circumstances, it was reasonable for the jury to infer that defendant formed the intent to rape the victim at the time he entered the apartment.

Defendant also contends on appeal that the trial court prejudicially instructed the jury with CALCRIM No. 375. We conclude the trial court did not err in giving the challenged instruction.

We therefore affirm.

STATEMENT OF FACTS

On December 29, 1997, 17-year-old Christina P. was home alone in the apartment she shared with her mother (Tina S.), her brother, and her boyfriend. About midnight, Christina answered a knock on the door. She did not recognize the man at the door, but described him as a black man in his 20's, about six feet tall, with short hair, a moustache, and a goatee. The man asked, "is Tina home?" When Christina replied, "no," the man explained that Tina S. owed his friend \$100, and asked to wait for her. Christina allowed the man to come inside, and they watched television together while waiting for Tina S. to return.

After about 10 minutes, the man asked Christina to give him a massage, but she refused. He then asked to see Christina's acrylic nails. When Christina extended her left hand, the man firmly grabbed her wrist and told her to stand up. He then put his hand around her neck, and told her to turn off the kitchen lights. The man told Christina to lie

down on a mattress in the living room and remove her clothes. The man said, “don’t make any noise or I’ll hurt you.” Christina was scared. He asked Christina if she were on birth control, and then raped her. Christina was crying. The man told Christina, while he was raping her, to place a pillow over her face; she thought he was going to kill her by suffocating her. The man made Christina dress again, looked through her purse, and told her not to tell anyone what had happened or he would return and hurt her; he then left the apartment.

Christina’s boyfriend soon returned home; while driving Christina to his mother’s house, he flagged down a police officer to report the rape. (There was no telephone in the apartment.) Christina underwent a sexual assault examination at a hospital; vaginal swabs were collected and provided to the police. Christina disclosed to the doctor who conducted the examination that she and her boyfriend had engaged in consensual intercourse about 12 hours earlier.

In 2004, the police received information of a “DNA cold hit” identifying defendant as a possible suspect in the rape of Christina. Further testing of defendant’s DNA profile showed he was a major contributor of the sperm found during Christina’s medical examination in 1997. Defendant’s sperm could have been deposited within one and one-half days of the sample being taken.

In 2006, Christina was shown a photographic lineup that included a photo of defendant from 1995; Christina was not able to make a positive identification, but thought defendant and one other person in the lineup looked similar to the man who attacked her.

Christina testified at trial that she did not know defendant. Tina S. testified she did not recognize defendant as someone she had seen or met.

The trial court took judicial notice that (1) in September 1996, defendant pleaded no contest to committing sexual battery against T.R. in September 1995; and (2) in August 2003, a jury convicted defendant of two counts of forcible rape against

C.R., committed in January 2002, and one count of forcible rape, two counts of sexual penetration with a foreign object with force, and two counts of forcible oral copulation against T.R. #2, committed in July 2002. (T.R. and T.R. #2 were different women.)

T.R. testified at the trial in this case that after she got off work about 9:00 p.m. one evening in September 1995, she went to defendant's apartment to wait for her bus; T.R. had met defendant a few months before and considered him to be a friend. T.R. and defendant watched television for 20 or 25 minutes. When T.R. tried to leave, defendant locked the front door and turned off the lights. Defendant forced T.R. to the ground, then put his hand on her throat and squeezed it while telling her not to scream. Defendant removed T.R.'s clothing, and raped her.

Defendant testified at trial that he met Christina and had consensual sex with her about six times between October and December 1997. He claimed the last time he and Christina had sex was on December 27 or 28, 1997. Defendant denied ever going to Christina's apartment. Defendant also denied committing the uncharged sex offenses against T.R., C.R., and T.R. #2.

PROCEDURAL HISTORY

On November 30, 2006, the People filed a felony complaint charging defendant with one count of forcible rape, with a sentencing enhancement allegation that the rape was committed during the commission of a first degree burglary. (Pen. Code, §§ 261, subd. (a)(2), 667.61, subds. (b), (e)(2), 460, subd. (a).) In June 2009, the People amended the information to add a second sentencing enhancement allegation under Penal Code section 667.61, subdivisions (a) and (d)(4).¹ Following a jury trial, defendant was convicted of forcible rape, and the two sentencing enhancement allegations were found to be true.

¹ An earlier amendment to the information, adding a count for burglary, was dismissed as untimely under the statute of limitations.

The court sentenced defendant to 25 years to life, pursuant to Penal Code section 667.61, subdivisions (a) and (d)(4). The trial court stayed execution of the sentence under the section 667.61, subdivisions (b) and (e)(2) sentencing enhancement. Defendant did not receive any presentence custody credits, because he was already incarcerated for the crimes against C.R. and T.R. #2. The sentence in the present case was to be served consecutively to the sentences in his earlier sexual assault cases against C.R. and T.R. #2. Defendant timely appealed.

DISCUSSION

I.

WAS THERE SUBSTANTIAL EVIDENCE DEFENDANT COMMITTED BURGLARY BY INTENDING TO COMMIT RAPE OR THEFT WHEN HE ENTERED THE RESIDENCE?

Defendant argues there was insufficient evidence supporting the jury's true findings on the burglary sentencing enhancement allegations, requiring reversal for resentencing on the rape conviction.² "In considering a challenge to the sufficiency of

² In the opening appellate brief, defendant argues that if there was not substantial evidence supporting the burglary sentencing enhancement allegations, defendant's conviction must be reversed, because the case would be barred by the applicable statute of limitations. The rape of Christina occurred on December 30, 1997; an arrest warrant was issued on December 6, 2006, and the information was filed December 20, 2007. At the time Christina was raped, the statute of limitations for rape was six years. (Pen. Code, former § 800.)

Before the limitations period for this crime expired, however, the Legislature changed the limitations period for rape to 10 years. (Pen. Code, former § 803, as amended by Stats. 2000, ch. 235, § 1.) Through a series of amendments, this rule was ultimately codified in Penal Code section 801.1, subdivision (b). (See Stats. 2001, ch. 235, § 1; Stats. 2004, ch. 368, § 1, enacting Assem. Bill No. 1667 (2003-2004 Reg. Sess.); Stats. 2005, ch. 2, § 3, enacting Sen. Bill No. 16 (2005-2006 Reg. Sess.); Stats. 2005, ch. 479, § 2, enacting Sen. Bill No. 111 (2005-2006 Reg. Sess.)) Therefore, the limitations period for the rape of Christina was extended to December 29, 2007.

Then, effective January 1, 2006, Penal Code section 801.1, subdivision (a) was added; that statute extends the limitations period for certain sexual offenses committed against minors until the victim's 28th birthday. This statutory enactment further

the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] ‘A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.’ [Citation.]” (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

Penal Code section 667.61, the “One Strike” law, “was enacted to ensure serious and dangerous sex offenders would receive lengthy prison sentences upon their first conviction. [Citation.] Section 667.61 mandates indeterminate sentences of 15 or 25 years to life where the nature or method of the sex offense ‘place[d] the victim in a position of *elevated vulnerability*.’ [Citation.]” (*People v. Palmore* (2000) 79 Cal.App.4th 1290, 1296.) In this case, defendant was alleged to have raped Christina during the commission of first degree burglary, with the intent to commit rape (Pen. Code, § 667.61, subd. (d)(4)), or with the intent to commit theft or another felony (*id.*, § 667.61, subd. (e)(2)). The true finding on the section 667.61, subdivision (d)(4) sentencing enhancement allegation required the trial court to impose a sentence of 25 years to life, rather than to choose between the upper, middle, and low terms of 11, nine, and seven years, respectively. (Pen. Code, § 264, subd. (c)(2).) (The trial court would have been required to impose a sentence of 15 years to life on the section 667.61,

extended the limitations period in this case to a date in mid-2008. Defendant concedes in his reply brief that the criminal action against him was timely commenced. Therefore, he has changed his argument, and only contends that if there is not substantial evidence to support the burglary sentencing enhancement allegations, the case must be remanded for resentencing.

subdivisions (b) and (e)(2) enhancement; the trial court stayed execution of that sentence.)

Here, burglary required defendant's entry into the apartment with the intent to commit a felony. (Pen. Code, § 459; *People v. Wallace* (2008) 44 Cal.4th 1032, 1077.) “[T]he gist of [burglary] is *entry* with the proscribed intent, and . . . such an entry constitutes the completed crime of burglary ‘regardless of whether . . . any felony or theft actually is committed.’” (*People v. Allen* (1999) 21 Cal.4th 846, 863, fn. 18.) The jurors in this case were correctly instructed that to make true findings on the Penal Code section 667.61, subdivisions (d)(4) and (e)(2) sentencing enhancement allegations, they must find (1) defendant entered an inhabited house; (2) when he entered the house, he intended to commit rape, or to commit theft or another felony; and (3) after he entered the house, he committed rape. (CALCRIM Nos. 3178, 3180.) Only the second element is at issue in this case: Was there sufficient evidence to support the jury’s finding that defendant intended to commit rape, or intended to commit a theft or other felony, before he entered Christina’s apartment?

Evidence of the intent required for burglary “is seldom established with direct evidence but instead is usually inferred from all the facts and circumstances surrounding the crime. [Citations.]” (*People v. Lewis* (2001) 25 Cal.4th 610, 643.) Here, the jury could reasonably infer that defendant intended to rape Christina when he entered the apartment. Defendant knocked on the door around midnight, and asked for Tina S. by name. After determining Tina S. was not home, defendant tricked Christina into letting him into the apartment by claiming Tina S. owed defendant’s friend money, and asking to wait for Tina S. to return. Defendant then lulled Christina into a sense of security by watching television with her for about 10 minutes before sexually assaulting her. Defendant threatened to hurt Christina if she made any noise, and told her to place a pillow over her face. Additionally, the evidence of uncharged sex offenses establishes a pattern of defendant’s forcibly raping vulnerable women. (*People v. Story* (2009) 45

Cal.4th 1282, 1297-1298 [evidence of the defendant's other sexual offenses was admissible to prove burglary based on entering with intent to rape].)

Therefore, under all the circumstances, it was reasonable for the jury to infer that when a sleepy, 17-year-old Christina opened the apartment door late at night, clad only in a T-shirt and boxer shorts, defendant immediately formed the intent to rape her. "When a strange man enters a woman's bedroom, covers her mouth with his hand, grasps her wrist while she screams and kicks, releases her when she bites his hand, and makes no effort to take any property, it is reasonable to infer that he intended to commit rape, particularly when such an intent is shown by his attempt to rape another woman under similar circumstances." (*People v. Nye* (1951) 38 Cal.2d 34, 37.)

We note that defendant rifled through Christina's purse before leaving her apartment. In 1997, Christina told the investigating officer she thought defendant was looking for her identification, but, at trial, she acknowledged she did not know what he was looking for, and defendant's actions might have been consistent with an intent to commit theft. In light of our conclusion that there was substantial evidence supporting the Penal Code section 667.61, subdivision (d)(4) sentencing enhancement allegation, we need not address whether there was substantial evidence to support the section 667.61, subdivision (e)(2) sentencing enhancement allegation.

II.

DID THE TRIAL COURT ERR BY INSTRUCTING THE JURY WITH CALCRIM No. 375?

Defendant contends the trial court erred by instructing the jury with CALCRIM No. 375 in addition to CALCRIM No. 1191, because the evidence of uncharged sex offenses was admitted under Evidence Code section 1108, not under Evidence Code section 1101, subdivision (b). Defendant does not argue that any of the evidence was improperly admitted; indeed, he did not object to the admission of much of it. On appeal, defendant argues that the trial court giving CALCRIM No. 375 violated

his due process rights because “it improperly allowed the jury to find [defendant] planned or intended to commit rape, and thus committed burglary, in order to find the allegations under Penal Code section 667.61 to be true.”³

In a pretrial motion, the prosecutor sought to admit evidence of defendant’s sexual offenses against T.R., C.R., and T.R. #2, pursuant to Evidence Code sections 1101, subdivision (b)⁴ and 1108.⁵ (For reasons that are not relevant to the issues on appeal, the pretrial motions were heard about 20 months before the jury trial began.) Defendant did not object to the admission of the evidence regarding the sexual offense against T.R. in 1995, and did not object to the trial court taking judicial notice that defendant entered a no contest plea to a charge of sexual battery in that case. Defendant

³ The Attorney General initially argues defendant forfeited his right to raise this issue on appeal, because he agreed to the giving of the instruction. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192.) The trial court asked defendant’s trial counsel if he objected to the court instructing the jury with CALCRIM No. 375; defendant’s trial counsel replied, “[n]o.” We may review an instruction on appeal, despite the defendant’s failure to object to it, if the giving of the instruction affected the defendant’s substantial rights. (Pen. Code, § 1259.) Additionally, defendant argues that, to the extent his trial counsel should have objected to the instruction, defendant received ineffective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

⁴ Evidence Code section 1101 provides: “(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person’s character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.” (Evid. Code, § 1101, subs. (a), (b).)

⁵ “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.” (Evid. Code, § 1108, subd. (a).)

also did not object to the admission of the evidence of the sexual offenses against T.R. #2.

After performing a weighing analysis under Evidence Code section 352, the trial court found the certified records showing defendant's no contest plea to the offense against T.R. was a judicial admission, and was therefore admissible under Evidence Code section 1108. The court also performed a section 352 balancing on the convictions for the attacks on C.R. and T.R. #2, and determined they were also admissible under section 1108. While finding the evidence of the uncharged sex offenses was admissible under section 1108, the trial court did not deny the prosecutor's motion under Evidence Code section 1101, subdivision (b); rather, the court specifically noted that it was "not ruling—making a decision under 1101(b)."

When T.R. testified at trial regarding the Long Beach incident, a limiting instruction was neither requested nor given. Additionally, the trial court did not give a limiting instruction, and none was requested, when the court took judicial notice of the court records regarding the uncharged sex offenses against T.R., C.R., and T.R. #2. (Defendant does not argue on appeal that any of this was error.)

The trial court instructed the jury with CALCRIM No. 1191, regarding the evidence of defendant's convictions and no contest plea for uncharged sex offenses in other cases, as follows: "The People presented evidence that the defendant committed the crimes of rape, oral copulation by the use of force, and sexual penetration by the use of force, and felony sexual battery that was not charged in this case. These crimes [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 than 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 rape, 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 rape. The People must still prove each charge and allegation beyond a reasonable doubt.” Defendant agrees the jury was properly instructed with CALCRIM No. 1191.

The trial court also instructed the jury with CALCRIM No. 375, as follows: “The People presented evidence that the defendant committed other offenses that were not charged in this case. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the offenses. Proof by a preponderance of the evidence is a different burden of proof than 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, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the offenses, you may but are not required to consider that evidence for the limited purpose of deciding whether or not the defendant acted with the intent required or the defendant had a plan to commit the offenses alleged in this case. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offenses and the charged offense. [¶] If you conclude that the defendant committed the uncharged offenses, 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 rape as charged in count 1.* The People must still prove the charge beyond a reasonable doubt.” (Italics added.)

Defendant contends the trial court committed error by instructing the jury with CALCRIM No. 375, because the evidence of uncharged sex offenses was admitted only under Evidence Code section 1108, not under Evidence Code section 1101, subdivision (b). Our review of the record convinces us that defendant's initial assumption is incorrect. Before trial, the court correctly concluded that the uncharged sex offenses were admissible under section 1108. The court did not conclude they were inadmissible under section 1101; it simply did not make a ruling on that ground at that time.

The only reasonable explanation for the instruction with CALCRIM No. 375 is that, by the time of and during trial almost two years later, the court had decided the evidence was admissible under section 1101, subdivision (b). (Defendant's trial counsel's failure to request a limiting instruction or to object to the CALCRIM No. 375 instruction strengthens our inference.) The court was correct in doing so. The uncharged sex offenses, while not identical to the charged offense, were sufficiently similar to support an inference that defendant harbored the same intent in each instance. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 401-402.) In each, defendant forcibly raped a woman who was in a vulnerable position. In particular, the circumstances of the offense against T.R. were similar, in that defendant watched television with the victim for several minutes, before putting his hand on the victim's neck or throat, and threatening to hurt her if she screamed or made any noise.

“When considering a challenge to a jury instruction, we do not view the instruction in artificial isolation but rather in the context of the overall charge. [Citation.] For ambiguous instructions, the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction. [Citation.]’ [Citation.]” (*People v. Wallace, supra*, 44 Cal.4th at p. 1075.) When we review the instructions in their entirety, we find no error in the giving of CALCRIM No. 375. As quoted *ante*, the CALCRIM No. 375 instruction, as read to the jury, instructed the jury that it could

consider the uncharged offenses in determining whether “defendant is guilty of rape as charged in count 1. The People must still prove the charge beyond a reasonable doubt.” The jury was not instructed that it could take into account the uncharged offenses in considering the sentencing enhancement allegations under Penal Code section 667.61. Therefore, the trial court did not err.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

O’LEARY, P. J.

ARONSON, J.