Filed 5/17/04 P. v. Wilkerson CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL WILKERSON, Defendant and Appellant.	D042017 (Super. Ct. Nos. SCD159400 and SCD160878)

APPEAL from a judgment of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed.

Michael Wilkerson appeals from a judgment convicting him of 25 counts of lewd and lascivious conduct upon a child 14 or 15 years of age by a perpetrator at least 10 years older (Pen. Code,[1] § 288, subd. (c)(1)); one count of corporal injury to a cohabitant (§ 273.5, subd. (a)); one count of forcible rape (§ 261, subd. (a)(2)); one count of forcible oral copulation (§ 288a, subd. (c)(2)); one count of assault by means of force likely to

produce great bodily injury (§ 245, subd. (a)(1)); three counts of employment of a minor to sell or carry marijuana (Health & Saf. Code, § 11361, subd. (a)); and one count of employment of a minor to sell or carry a narcotic (Health & Saf. Code, § 11353, subd. (b)).

Wilkerson argues: (1) the finding that he was convicted of a prior serious felony was not supported by substantial evidence; (2) the ruling precluding a mistake of age defense to the section 288, subdivision (c)(1) charges was unconstitutional; and (3) the admission of prior sexual offense and domestic violence evidence pursuant to Evidence Code sections 1108 and 1109 was unconstitutional. We reject his arguments and affirm the judgment.

FACTUAL BACKGROUND

The issues raised on appeal do not require a lengthy recitation of the facts. The facts underlying the convictions include Wilkerson's ongoing, and at times physically abusive, sexual relationship with a 15-year-old girl when he was 45 years old. Additionally, Wilkerson raped and engaged in forcible sexual conduct with a 14-year-old girl, and physically assaulted a woman with whom he had a sexual encounter. To the extent further factual details are relevant to the issues on appeal, we will present them in our discussion which follows.

---

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

DISCUSSION

I. *Prior Serious Felony Conviction*

Wilkerson was sentenced to a total of 57 years 6 months in prison. His sentence includes a five-year enhancement for a prior serious felony conviction (§ 667, subd. (a)) based on his alleged juvenile conviction for armed robbery on January 5, 1973. He asserts there is insufficient evidence to prove his prior conviction.

The prosecution must prove all the elements of an enhancement beyond a reasonable doubt, including that the defendant was convicted and that the conviction was for an offense within the definition of the enhancement. (*People v. Haney* (1994) 26 Cal.App.4th 472, 475.) On appeal, we must ascertain whether there is evidence which is "'reasonable, credible, and of solid value—such that a reasonable trier of fact could find'" the allegation to be true beyond a reasonable doubt. (*People v. Williams* (1996) 50 Cal.App.4th 1405, 1413.) We "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) A trier of fact is entitled to draw reasonable inferences from certified records offered to prove a prior conviction. (*People v. Williams, supra*, 50 Cal.App.4th at p. 1413.) Certified prison records are an acceptable means of proving a prior serious felony conviction. (§ 969b; see *People v. Prieto* (2003) 30 Cal.4th 226, 259; *People v. Lizarraga* (1974) 43 Cal.App.3d 815, 820.)

To prove the prior serious felony conviction, the prosecution presented a certified copy of a booking card from the California Youth Authority (CYA) for Wilkerson. The booking card contains Wilkerson's fingerprints and states that he was "arrested or

received" on February 13, 1973, and that the "charge or offense" was armed robbery and possession of a sawed-off shotgun. The portion of the booking card addressing the final "disposition or sentence" states "Kern County Juvenile Court."

Wilkerson argues there is insufficient evidence to prove he was convicted of armed robbery because the CYA booking card proves only he was arrested and charged with armed robbery but does not prove he was convicted of that offense. The People assert that Wilkerson would not have been sent to the CYA facility unless the allegations against him were found to be true by the juvenile court.

The trial court could reasonably infer from the booking card that the juvenile court made a true finding regarding the armed robbery offense referenced on that card. The fact that Wilkerson was booked at CYA indicates that he was adjudicated to be a delinquent in need of the highest level of treatment in the juvenile system. (See 1 Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 7th ed. 2004) § 53.45, p. 1579 [CYA commitment for juvenile is akin to adult prison].) At the point of CYA booking, the juvenile court has rendered its disposition and the juvenile is committed to the institution. (See *In re Teofilio A.* (1989) 210 Cal.App.3d 571, 577-578.) CYA is not an institution which books a juvenile *before* a true finding for an offense; rather, CYA booking only comes into operation once a juvenile has incurred the true finding and is sent for detention at the facility. Thus, contrary to Wilkerson's suggestion, the CYA booking card does not refer to preconviction arrest and charges, but rather refers to postconviction placement at a detention facility. Because CYA does not handle detention of juveniles prior to court adjudication of the charged offense, there would be no reason

for a CYA booking card to reference any offense other than the one forming the basis for the CYA commitment. In short, given the nature of CYA, the "charge or offense" notation on the booking card necessarily refers to the adjudicated disposition by the juvenile court.

We emphasize there is no contention here that the booking card might be an inaccurate recordation of the juvenile court's ruling. Absent such evidence, and based on the presumption that official duty is properly performed, the trial court could reasonably infer that the officials filling out the booking card accurately set forth the offense found true by the juvenile court. (Evid. Code, § 664; *People v. Martinez* (2000) 22 Cal.4th 106, 115-116; *People v. Haney, supra*, 26 Cal.App.4th at pp. 475-476, compare *People v. Williams, supra*, 50 Cal.App.4th at p. 1413 [fingerprint card did not provide substantial evidence of conviction because it differed from abstract of judgment]; see also *People v. Ruiz* (1999) 69 Cal.App.4th 1085, 1091 [fingerprint card properly used to interpret illegible abstract of judgment].)

We note there is language in the above-cited *Ruiz* and *Williams* cases that could be interpreted to suggest that a fingerprint card might not be sufficient on its own to establish a prior conviction without an abstract of judgment or other comparable document. (*People v. Ruiz, supra*, 69 Cal.App.4th at p. 1091; *People v. Williams, supra*, 50 Cal.App.4th at p. 1413.) However, the factual posture of those cases involved the use of a fingerprint card to contradict (*Williams*) or interpret (*Ruiz*) an abstract of judgment. In contrast, here, there is no such ambiguity in the presented evidence. Upon a close reading of *Ruiz* and *Williams,* we do not view these decisions as fashioning a broad rule

forestalling use of a prison fingerprint card to independently prove a prior conviction. Although the preferred practice would be to present a document comparable to an abstract of judgment, under the circumstances of this case the CYA booking card provided substantial evidence of Wilkerson's prior robbery conviction.

II. *Mistake of Age Defense*

The 15-year-old victim of the lewd conduct charges testified that she told Wilkerson she was 19 years old. Based on this testimony, Wilkerson challenges the constitutionality of the trial court's pretrial ruling that mistake of age was not a defense to section 288, subdivision (c)(1)[2] charges of lewd or lascivious conduct upon a child age 14 or 15 years old by a perpetrator at least 10 years older than the victim. Wilkerson recognizes that in *People v. Olsen* (1984) 36 Cal.3d 638, 649 (*Olsen*), the California Supreme Court held that a good faith belief the victim was 14 years or older is not a defense to a section 288, subdivision (a)[3] charge of lewd or lascivious conduct with a child under the age of 14. *Olsen* was decided before the 1988 enactment of section 288(c)(1), which made the lewd conduct offense applicable to children slightly older than those covered by section 288(a). (Historical and Statutory Notes, 48 West's Ann. Penal Code (1999 ed.) foll. § 288, p. 445.) Pointing to the analysis in *Olsen* which characterizes children under age 14 as being of tender years and in need of special protection (*Olsen, supra*, at p. 647), Wilkerson argues these policy concerns do not apply when the victim is 14 or 15 years old.

---

2 Hereafter referred to for convenience as section 288(c)(1).

The court in *People v. Paz* (2000) 80 Cal.App.4th 293 (*Paz*) addressed this precise argument, and extended *Olsen*'s rejection of the mistake of age defense to the lewd conduct offense defined in section 288(c)(1). Based on a review of legislative history, the court in *Paz* concluded that to allow the mistake of age defense would undermine the legislative purpose underlying the enactment of section 288(c)(1). (*Paz, supra,* at pp. 295-296.) The statute was enacted to allow for imposition of felony culpability on offenders whose victims were 14 or 15 years old if the offender was at least 10 years older than the victim. (*Id*. at pp. 296-297.) In order to prevent prosecution of a minor for sexual conduct short of intercourse between consenting teenagers, section 288(c)(1) was consciously crafted to apply only when there is a 10-year age differential between the victim and the perpetrator. (*Paz, supra,* at pp. 296-297.) Premised on the recognition that a 14- or 15-year-old minor can be "'sexually naïve'" and fall victim to a more experienced adult, *Paz* ascertained that the statutory background showed a "legislative desire to protect 14- and 15-year-olds *from predatory older adults* to the same extent children under 14 are protected by subdivision (a) of section 288." (*Id*. at p. 297, italics added.) That is, "section 288 offenses set out a hierarchy of victims, from the most vulnerable—infants and children under subdivision (a)—to those perceived as less vulnerable—young teenagers under subdivision (c)(1). The age distinctions help define the gravity of, and the range of punishment for, the offense." (*Ibid*., italics omitted.)

---

3 Hereafter referred to for convenience as section 288(a).

To support its conclusion, the court in *Paz* observed that section 288(c)(1) allows for a lower range of prison terms than section 288(a), as well as the option of misdemeanor punishment not available under section 288(a).[4] Thus, the sentencing structure of section 288, as well as the absence of any reference to lack of consent as an element of the offense, indicates that the Legislature did not intend to permit defenses based on mistake of age, but rather intended any such good faith mistake to be accommodated at sentencing. (*Paz, supra*, 80 Cal.App.4th at pp. 297-298.)

The *Paz* court also reasoned that because the *Olsen* decision predated the enactment of section 288(c)(1), the Legislature was aware of its holding and could have included language allowing the mistake of age defense had it intended *Olsen*'s holding not to apply to this newly-defined crime. (*Paz, supra,* 80 Cal.App.4th at p. 298.) Further, the Legislature's awareness of the mistake of age issue is shown by the fact that in 1981 it enacted section 1203.066, subdivision (a)(3) which provides that a defendant convicted under section 288 is not eligible for probation unless he or she had an honest and reasonable belief the victim was 14 years or older. (*Paz, supra*, at p. 298; accord *People v. Olsen, supra*, 36 Cal.3d at p. 647.)

Wilkerson argues that *Paz* was wrongly decided. Pointing to the fact that mistake of age has long been a defense to unlawful sexual intercourse with a minor under age 18 (§ 261.5, subd. (a); *People v. Hernandez* (1964) 61 Cal.2d 529, 535-536), he asserts that

---

4 The sentence choices for section 288(a) are three, six, or eight years in prison, whereas for section 288(c)(1) they are one, two, or three years in prison or not more than one year in jail.

the Legislature has not indicated any intent to reject the defense in the context of section 288(c)(1). We are not persuaded. We agree with *Paz*'s analysis and holding—i.e., section 288(c)(1) was enacted to protect 14- and 15-year-old children from lewd conduct committed by adults who are substantially older than the children, and the section should be interpreted to extend the same protections to these children as to those covered by section 288(a). Accordingly, absent an express statement by the Legislature to the contrary, the mistake of age defense is not available for section 288(c)(1) violations.

Attempting to remove his case from the ambit of *Paz*, Wilkerson contends *Paz* is factually distinguishable because the victim in that case told the defendant she was 16 years old (*Paz, supra*, 80 Cal.App.4th at pp. 295, 300), whereas the victim here told Wilkerson she was 19 years old. The court in *Paz* reasoned that because the evidence at most could support a reasonable belief that the victim was age 16, the defendant's conduct could not be characterized as "'morally innocent'" comparable to the conduct of the defendant in *Hernandez* who thought he was having consensual intercourse with another adult. (*Paz, supra,* at p. 300.) We do not find this factual distinction to be pivotal and it does not alter our conclusion. As noted, we are persuaded by the portion of the *Paz* opinion addressing Legislative intent. Because section 288(c)(1) presents a clear mandate to protect sexually vulnerable 14- and 15-year-old children from predatory older adults with no reference to a mistake of age defense, the defense is unavailable regardless of what age the victim pretended to be.

Finally, Wilkerson argues that preclusion of the mistake of age defense results in imposition of culpability without requiring knowledge of the facts that make the act a

crime, in violation of his federal constitutional rights. The California Supreme Court's holding in *Olsen* implicitly rejects the notion that the mistake of age defense is constitutionally required. Courts in other jurisdictions have expressly rejected the argument that the federal Constitution mandates allowance of a mistake of age defense for sex offenses committed against minors, and we agree with this conclusion. (See, e.g., *Nelson v. Moriarty* (1st Cir. 1973) 484 F.2d 1034, 1035-1036 [mistake of age not constitutionally required defense to statutory rape]; accord *People v. Cash* (Mich. 1984) 351 N.W.2d 822, 828.)

III. *Prior Sex Offense and Domestic Violence Evidence*

As an exception to the general rule against use of propensity evidence, Evidence Code sections 1108 and 1109 allow admission of prior sexual offense or domestic violence evidence when a defendant is charged with a sexual or domestic violence offense, as long as the evidence is not more prejudicial than probative under Evidence Code section 352. Pursuant to these exceptions and over defense objection, evidence was presented regarding Wilkerson's prior sexual, physically abusive relationship with a 16-year-old girl when he was 32 years old.

Wilkerson argues admission of the evidence under Evidence Code sections 1108 and 1109, as well as the instructions permitting the jury to use the evidence to infer criminal disposition, violated his federal constitutional rights. Assuming Wilkerson did not waive this constitutional challenge by failing to raise it below, the argument has already been fully addressed by the courts. As to Evidence Code section 1108, the constitutional challenge has been rejected by the California Supreme Court (*People v.*

Falsetta (1999) 21 Cal.4th 903, 916-922 (*Falsetta*); see also *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1013), and by federal courts evaluating a comparable federal statute (see *Falsetta, supra*, at pp. 920-921, and cases there cited). We must defer to the rulings of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

As to Evidence Code section 1109, lower appellate courts have repeatedly applied *Falsetta* to reject constitutional challenges to domestic violence propensity evidence. (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027-1029; *People v. Johnson* (2000) 77 Cal.App.4th 410, 420; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1309-1313; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1096, and cases there cited.) We agree with these appellate court holdings.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.