

CERTIFIED FOR PARTIAL PUBLICATION*

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,	
Plaintiff and Respondent,	
v.	
JOSE BENITEZ,	
Defendant and Appellant.	

C044648
(Super. Ct. No. 00F08367)

APPEAL from a judgment of the Superior Court of Sacramento County, Joseph H. Orr, Judge. Affirmed.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Ray Brosterhous and Jesse N. Witt, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of sections I, II and IV of the Discussion.

A jury convicted defendant Jose Benitez of 30 counts of molesting the two children of his brother's girlfriend. It also sustained the allegation that the offenses involved more than one victim. Based on these findings, the trial court sentenced the defendant to state prison for two consecutive indeterminate life terms for at least 30 years, with concurrent terms for all the remaining convictions.¹

On appeal, the defendant contends the prosecutor committed misconduct, and the trial court erred when it failed to instruct the jury to consider the past criminal conduct of a witness, allowed his trial to proceed in his absence after he failed to appear on the final day of trial, and violated his constitutional right to have a jury determine every necessary fact. In the published portion of our opinion we reject this last contention by holding that the proviso in Penal Code section 667.61, subdivision (c)(7) (that a

¹ Both parties assert that the court also imposed a consecutive six-year determinate term. This is not correct. The reporter's transcript clearly quotes the court stating that, "For Counts Two through Ten, the Court will impose the mid term . . . to run concurrent with each other and with the first count. [¶] For Counts 12 through 30, the defendant will be sentenced to the mid term . . . concurrent with each other and concurrent with Count 11 [¶] So that the aggregate state prison sentence is 30 years to life." The misapprehension may stem from unclear notations on the first pages of the two abstracts of judgment for the determinate sentence, which do not describe the term on count two as concurrent. However, the final pages indicate that the determinate sentence is "to run c/c with indeterminate."

defendant is unqualified for probation), is not an element of the enhancement to be negated upon proof to a jury. We shall affirm.

The defendant's arguments do not require us to summarize the entirety of the testimony at trial. To the extent necessary for context, we will incorporate facts in the Discussion.

DISCUSSION

I

Based on evidence at trial that the mother of the victims inflicted what might be considered cruel or inhuman corporal punishment on them, which is a crime of moral turpitude (*People v. Brooks* (1992) 3 Cal.App.4th 669, 672), the defendant sought an instruction that the jury could consider this conduct to assess her credibility. The court denied the request.

The defendant discusses at length what he characterizes as the close credibility contest between him and the victims before at last addressing the prejudice in denying this instruction involving their mother. He notes that part of his defense was a claim that the mother instigated false accusations against him, and thus the mother's credibility was a material issue.

However, the mother's credibility is an issue one degree away from the central issue of the victims' credibility. Whether *the mother* was telling the truth in denying that she

induced the victims to lie has only marginal value to determining whether *the victims* are telling the truth.

On this subsidiary issue of the mother's credibility, there was evidence that she had a reputation for lying and had induced the children to lie in the past. This was far more central to the determination of this issue than the fact that she *might* be a liar because she *might* be an abusive parent. The trial court instructed the jury on the principle that the character of a witness for truthfulness or dishonesty could be a factor in credibility, and defense counsel highlighted evidence of her dishonest nature in closing argument. Moreover, on the primary issue of the children's credibility, defense counsel argued that the evidence of the mother's possible abuse of the victims showed that she could coerce the victims into making false accusations.² As a result, we do not discern any prejudice from the failure to include an instruction to consider the mother's allegedly abusive conduct on the issue of *her* credibility.

II

During closing argument, defense counsel responded to the prosecutor's discussion of the credibility of the victims by reassuring the jury that it did not need to consider the girls to be liars in order to acquit the defendant. The logic behind

² One of the defendant's brothers had suggested to the police that the mother was upset with the defendant for unknown reasons, that she wanted to break up the fraternal bonds for unknown reasons, and that the children may have lied because they did not like being babysat at the defendant's residence.

this assertion is somewhat obtuse. Defense counsel argued that there was evidence of their mother and interviewers influencing the victims' statements, and if the jury only had "a suspicion that something happened . . . [or] a strong belief that something happened, those . . . are inadequate states of mind. You have to be convinced beyond a reasonable doubt as to the truth of the charges"; thus, the jury could simply conclude the prosecutor had not sustained her burden of proof rather than calling the girls liars.

In rebuttal, the prosecutor argued, "the defense did tell you that you don't . . . have to find they lied to find him not guilty [¶] That's not true. These girls sat up here and they told all of you that the defendant . . . molested them. [¶] If you find him not guilty, you have to find that that testimony is false, that they are lying on the stand about that. [¶] But I don't think you will. As I've said several times, I believe that you will look at the evidence and you will find Jose Benitez guilty on all counts."

On appeal, the defendant renews the claim that one could believe the victims but still find a reasonable doubt as to guilt, and thus the prosecution's rebuttal amounted to a dilution of the burden of proof. Frankly, we do not comprehend how one can believe the victims yet not be convinced that the acts they related actually happened (unless there is a qualifier lurking within this reasoning under which the jury did not need to find that the victims were *consciously* lying).

Ultimately, it does not matter whether we understand or not, because defense counsel never objected to the argument. While the defendant briefs the "plain error" doctrine and whether it would relieve the requirement of an objection, in point of fact we *must* apply the forfeiture rule if the purported prosecutorial misconduct could have been cured with a requested admonition. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) The supposed misstatement regarding the burden of proof is not within that narrow category of exceptions to the presumption that jurors heed admonitions. (*Bruton v. United States* (1968) 391 U.S. 123, 135 [20 L.Ed.2d 476]; see *Richardson v. Marsh* (1987) 481 U.S. 200, 211 [95 L.Ed.2d 176].) This issue is foreclosed on appeal.³

III

As noted above, after returning 30 verdicts that found the defendant guilty of committing nondescript lewd and lascivious acts upon two victims under the age of 14 (Pen. Code, § 288, subd. (a) [subsequent undesignated section references are to this code]), the jury returned the self-evident finding that these violations involved two or more victims "within the meaning of . . . Section 667.61(e)(5)." Under section 667.61 (the internal cross-references in which

³ The defendant asserts trial counsel was ineffective. However, the failure to object does not establish a breach of prevailing professional norms absent egregious circumstances not present here. (*People v. Catlin* (2001) 26 Cal.4th 81, 165.)

render it a veritable hall of mirrors), a defendant convicted of any offense in subdivision (c) under one circumstance contained in subdivision (e) is subject to an indeterminate life term of at least 15 years. (*Id.*, subd. (b).) Among the qualifying offenses (*id.*, subd. (c)(7)) is section 288, subdivision (a), unless the defendant is eligible for probation (§ 1203.066, subd. (c)). Among the circumstances that qualify the offense for an enhanced sentence under section 667.61 is committing a "subdivision (c)" offense against more than one victim. (§ 667.61, subd. (e)(5).)

Under *Blakely v. Washington* (2004) 542 U.S. ____ [159 L.Ed.2d 403] (*Blakely*), any fact other than "recidivism" that increases the punishment for an offense beyond the "statutory maximum" (the maximum a trial court may impose on facts necessarily reflected in the jury verdict for the offense) must be the subject of a jury finding. (*Id.* at ____ [159 L.Ed.2d at pp. 413-414].) Here, pursuant to the pleading and proof provision of section 667.61, subdivision (i), the jury expressly found the defendant guilty of an offense within the meaning of subdivision (e)(5), which in turn incorporates any offense in subdivision (c) committed against multiple victims.⁴

⁴ Section 667.61 provides, in relevant part, as follows:

"(b) Except as provided in subdivision (a) [circumstances not applicable here], a person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible

for release on parole for 15 years except as provided in subdivision (j).

"(c) This section shall apply to any of the following offenses:

"(1) A violation of paragraph (2) of subdivision (a) of Section 261.

"(2) A violation of paragraph (1) of subdivision (a) of Section 262.

"(3) A violation of Section 264.1.

"(4) A violation of subdivision (b) of Section 288.

"(5) A violation of subdivision (a) of Section 289.

"(6) Sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

"(7) A violation of subdivision (a) of Section 288 [of which the defendant was convicted, as noted ante] unless the defendant qualifies for probation under subdivision (c) of Section 1203.066. [¶] . . . [¶]

"(e) The following circumstances shall apply to the offenses specified in subdivision (c): [¶] . . . [¶] (5) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim [also present here]. [¶] . . . [¶]

"(h) Probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person who is subject to punishment under this section for any offense specified in paragraphs (1) to (6), inclusive.

"(i) For the penalties provided in this section to apply, the existence of any fact required under subdivision (d) [not applicable here] or (e) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact."

Section 1203.066 provides, in relevant part:

The jury, of course, had already found the defendant guilty of section 288, subdivision (a). What the defendant faults is the lack of an explicit jury finding that he was ineligible for probation.

Contrary to defendant's contention, we find that the proviso in Penal Code section 667.61, subdivision (c)(7) (that a defendant is unqualified for probation) is not an element of the enhancement to be negated upon proof to a jury. Rather, it is a legislative grant of authority to the trial court to entertain a request for probation (should a defendant satisfy the criteria in section 1203.066, subd. (c)) despite eligibility otherwise for sentencing under section 667.61. Unlike the defendant, we do not find that this interpretation would render the proviso redundant. Subdivision (h) of section 667.61 concerns the *prohibition* of a grant of probation to persons committing the offenses in the *other six paragraphs* of subdivision (c) (§§ 1-6), which is an apparent effort to dispel any ambiguity resulting from the lack of any express reference to the subject of probation in those paragraphs. Thus, subdivision (c)(7)'s proviso and subdivision (h) do not address the same issue.

"(a) Notwithstanding Section 1203 or any other law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, nor shall a finding bringing the defendant within the provisions of this section be stricken pursuant to Section 1385 for, any of the following persons:
[¶] . . . [¶] (7) A person who is convicted of committing a violation of Section 288 or 288.5 against more than one victim."

Finding a defendant ineligible for probation is not a form of punishment, because probation itself is an act of clemency on the part of the trial court. (*People v. Superior Court (Kirby)* (2003) 114 Cal.App.4th 102, 105-106.) Because a defendant's eligibility for probation results in a *reduction* rather than an increase in the sentence prescribed for his offenses, it is not subject to the rule of *Blakely*. (Cf. *People v. Barasa* (2002) 103 Cal.App.4th 287, 293, 294-295 [eligibility for diversion]; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 270-271 [section 654].) As a result, the enhancement of his molestation convictions did not offend his constitutional rights.

IV

A

After his arrest in late November 2000, the defendant (a Mexican national with family in both countries) posted a \$40,000 bond and obtained his release on bail in March 2001.⁵ He was present at the waiver of his preliminary hearing in May 2001, and appeared at various other proceedings leading up to the start of his trial in March 2002. The defendant attended the first seven days of trial, at which point the court recessed for five days. The court reconvened in its regular courtroom at the scheduled time. After a delay of 45 minutes, the court

⁵ As the probation officer later discovered, the defendant had provided a false social security number and was an illegal immigrant.

announced to the jury that "The defendant . . . has been unavoidably detained, but owing to the pressure of the next witness to apparently get back to her job, we have decided to proceed in his absence. And that is not to concern you in any way as to why he is not here."⁶ The defense rested, and the prosecutor called a rebuttal witness. An attending emergency room physician, she said she had treated a cut on the head of one of the victims in March 1998, which she did not have any basis to believe was a sign of child abuse. Her testimony covered slightly more than three pages of transcript. After reading a stipulation regarding possibly inaccurate dates, the prosecution rested. The trial court then instructed the jury, the parties argued, and the jury retired to deliberate.

The court turned to the issue of the defendant's absence. It was then noon. The defendant had not contacted the court, and defense counsel had been unsuccessful in his attempts to contact various of the defendant's siblings, or in his call to a home phone number for the defendant that an unknown person at one of the siblings' homes had provided.⁷ The court found that the trial could proceed because the defendant was aware of its time and location and thus was voluntarily absent. (§ 1043,

⁶ The clerk's minutes assert that defense counsel waived the presence of the defendant. Because we do not rely on this fact, we do not address whether counsel lacked authority to waive his presence in this context.

⁷ Defense counsel did not explain why he did not have a phone number for his client.

subd. (b) (2).) The prosecutor expressed her belief that the defendant could have been assisted in an escape to Mexico; the court noted that if that were the defendant's plan, he had probably had a long head start. The court recessed until 1:30 p.m. to discuss issuing a bench warrant.

When the court reconvened that afternoon, defense counsel stated that he had not been able to find out anything new during the lunch break. The court revoked the defendant's bail and issued a \$50,000 bench warrant. After the jury returned its verdicts on the following day, the court superseded the previous bench warrant with one that did not provide for bail. The defendant apparently was arrested in Rancho Cordova on May 22, 2003. The issue of his absence or any reason for it did not arise in the subsequent court proceedings.

B

A defendant's right to be present at trial is protected under the state and federal charters. (*People v. Gutierrez* (2003) 29 Cal.4th 1196, 1202 (*Gutierrez*).) Sections 977 and 1043 implement the state constitutional right. (*Ibid.*) The former governs the manner of a defendant's formal waiver of the right; the latter concerns the power of the trial court to proceed when a defendant voluntarily absents himself after the start of trial without a waiver of his presence. (*Id.* at pp. 1203-1204.) Section 1043 reflects the principle that a defendant's conduct cannot thwart the state's right to proceed with trial. (*Id.* at p. 1204; *Taylor v. United States* (1973) 414 U.S. 17, 20 [38 L.Ed.2d 174].)

The reason for a defendant's absence is the crucial issue, because (as with any waiver of rights) the court must assure that the absence is knowing and voluntary and not for reasons beyond the defendant's control. (*People v. Lewis* (1983) 144 Cal.App.3d 267, 278-279; *People v. Connolly* (1973) 36 Cal.App.3d 379, 384-385 (*Connolly*).) All the facts relevant to a court's determination of this issue are rarely available at the time the court must decide whether to continue; thus, it is sufficient if there is a prima facie case that a defendant has voluntarily gone astray and a reviewing court subsequently considers the entire record on the issue. (*Connolly, supra*, 36 Cal.App.3d at p. 385.) The reasons that the defendant offers on return to court will thus either ratify the preliminary finding or require the reviewing court to order a new trial. (*Ibid.*) Ordinarily, a court should not be hasty in its decision to continue, allowing an adequate amount of time to reach that conclusion, but the record may later vindicate a precipitous declaration of voluntary absence. (*Ibid.*; *People v. Vargas* (1975) 53 Cal.App.3d 516, 526 (*Vargas*).) A court can properly rely on indirect evidence (including conduct) without directly hearing from the defendant. (*Gutierrez, supra*, 29 Cal.4th at pp. 1205-1206.) We review the decision to proceed de novo on the facts as established in the trial court. (*Id.* at p. 1202.)

Contrary to the defendant's suggestion, we do not find any authority requiring a trial court to utter magic words at the

time of its decision to proceed,⁸ though an implicit prima facie finding of voluntary absence at that point will be judged according to the state of the record. Several cases suggest that a prima facie case of voluntary absence exists where a defendant free on bail had previously attended all proceedings and was aware of the time and place that the trial would resume, at least where the defendant subsequently fails to justify the absence. (*Vargas, supra*, 53 Cal.App.3d at pp. 522 & fn. 2, 525-526; *People v. Malloy* (1974) 41 Cal.App.3d 944, 949, 954; *Connolly, supra*, 36 Cal.App.3d at pp. 385-386 [also noting a recidivist allegation for an escape conviction].)⁹ In the present case, the defendant had never previously failed to appear or ever offered any reason why he might have a problem coming to court, he was aware of the time and place of the next session, he did not contact either his attorney or the court, he was aware at that point of the adequacy of the prosecution's

⁸ His citation of *Farace v. Superior Court* (1983) 148 Cal.App.3d 915 for this point is factually inapposite, involving a contempt hearing in the absence of the contemner; there was evidence of improper service of the order to show cause but the court never made findings on the issue before eventually sentencing the contemner.

⁹ By way of contrast, the municipal court in *People v. Shelby* (1980) 108 Cal.App.3d Supp. 7 proceeded to verdict without any indication of the reason for the defendant's absence (and with knowledge that the defendant had surgery scheduled on that date), then set sentencing without notice to the defendant of the date, sentenced him in absentia without inquiring as to his situation, and thereafter refused to entertain the defendant's motion to explain his absence. The appellate division remanded for a hearing on the reasons.

case to convict him (the jury taking only a day to reach the verdicts), and the court was aware of the risk of flight to Mexico. The defendant did not offer any reasons for his absence after his rearrest. Thus, assuming the defendant is not flat-out estopped from raising this fact-dependent issue for the first time on appeal (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1395-1396), the record as a whole makes it clear that it would have been pointless to delay any further (*Vargas, supra*, 53 Cal.App.3d at pp. 524-525) and thus there was no error in proceeding.¹⁰ **(CERTIFIED FOR PARTIAL PUBLICATION.)**

DISPOSITION

The judgment is affirmed.

DAVIS, J.

We concur:

BLEASE, Acting P.J.

HULL, J.

¹⁰ We therefore need not consider whether the defendant satisfied his burden of demonstrating prejudice from his absence. (*People v. Howard* (1996) 47 Cal.App.4th 1526, 1536-1537.)