P. v. Holm

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,	2d Crim. No. B206383
Plaintiff and Respondent,	(Super. Ct. No. 123451)
v.	(Santa Barbara County)
JON CHARLES HOLM,	
Defendant and Appellant.	

Jon Charles Holm appeals from the judgment entered following his conviction by a jury on two counts of committing a lewd act upon a 15-year-old child more than 10 years younger than appellant. (Pen.Code, 288, subd. (c)(1).)[1] He was sentenced to prison for the upper term of three years on count 1 plus a consecutive sentence of eight months (one-third of the two-year middle term) on count 2.

Appellant contends (1) the trial court erroneously denied his request to compel respondent to disclose the victim's address; (2) his voir dire of the jury panel was erroneously restricted; (3) respondent was erroneously permitted to amend the second amended information; (4) he was denied his constitutional right to a unanimous verdict; (5) he "was convicted on 2 counts alleged in a superseded pleading and was not convicted on any count pending before the court"; the trial court erroneously denied his request for special findings by the jury; (7) he was denied his constitutional right to be advised of the charges against him; and (8) the trial court abused its discretion in imposing a three-year upper term sentence on count 1 of the information. We affirm.

Facts

Prosecution Case

The victim, identified at trial as "Jane Doe" to provide confidentiality, was born in June 1990. Since her birth, she had been raised by her grandparents. Appellant, born in 1974, was a Santa Barbara County deputy sheriff.

On about November 1, 2005, when the victim was 15 years old, she went to a sheriff's substation and made a report to appellant about a girl who had been threatening her. Later that night, appellant came to the victim's house to complete the report. The victim invited him upstairs to her bedroom, where they kissed. The victim's grandparents "were downstairs just hanging out." When appellant left, he said to the victim, "Call me anytime."

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The following day, the victim telephoned appellant and asked him to come to her house that night because she wanted to make another report. When appellant arrived, he gave her his cellular telephone number. The victim was "ecstatic" and "knew that [she] loved him." They "kiss[ed] a lot."

A sexual relationship developed between appellant and the victim. One day when appellant was in the victim's bedroom, she orally copulated him. On a second occasion, appellant and the victim had sexual intercourse on the victim's bedroom carpet. Appellant ejaculated partially inside the victim and partially on the carpet. On a third occasion, after sexual intercourse appellant ejaculated on a blanket in the victim's bedroom. On a fourth occasion, appellant and the victim had sexual intercourse by a tree on a golf course.

Sometime around December 2005 the victim's friend, M.H., spent the night at the victim's house. At about 8:00 or 9:00 p.m., appellant arrived and went to the victim's bedroom. He was in full uniform. He handed his firearm to M.H. and let her hold it in her hands. While M.H. played video games, appellant and the victim "were hugging and kissing and kind of like caressing each other." Appellant touched the victim "[k]ind of all around. On her hips and back and legs" as well as "her bottom."

During the criminal investigation, deputy sheriffs went to the victim's bedroom and removed portions of the carpet for DNA testing. The testing showed that the carpet contained appellant's sperm.[2]

Defense Case

Appellant denied having had any sexual contact with the victim. The defense theory was that deputy sheriffs had planted appellant's semen on the victim's bedroom carpet. During closing argument, defense counsel told the jury that the deputies,"for either political reasons or for their own careers or to prove a case, or whatever, went out in the middle of the night to [appellant's] residence, went through a trash can, obtained a condom, or more than one condom, took the condom to [the victim's] residence and emptied the condom to set up and frame [appellant]."

Appellant's wife testified that she and her husband had sexual intercourse about three or four times a week. Appellant always used a condom. After sexual intercourse, appellant "would tie [the condom] in a knot" and put it inside a plastic grocery bag in a waste basket. Either appellant or his wife would tie up the grocery bag and deposit it in the trash can outside.

Appellant's next-door neighbor testified that one night she had heard a "rustling of people going through [appellant's] trash." She looked through the slats of her fence and saw two people "digging through a trash can." One person said, "Hurry up, let's get out of here before we get caught." The other person responded, "Let's find it, let's grab it, let's go." She then saw two people walking very quickly on the sidewalk. That night appellant and his wife were in Hawaii on vacation.

A psychiatrist testified that the victim had been diagnosed as suffering from bipolar disorder, intermittent psychosis, depression, and substance abuse disorder. She had abused alcohol, marijuana, cocaine, opiates, and methamphetamine. Her medical records showed that she had experienced hallucinations and had been prescribed psychotropic medications. On at least five occasions, the victim was hospitalized for mental health problems. In March 2006 she was hospitalized because of "suicidal behavior."

In juvenile court on July 14, 2005, the victim admitted charges of residential burglary and subornation of perjury.

I

The Victim's Address

Appellant contends that the trial court erroneously denied his request to compel respondent to disclose the victim's address. Appellant argues that he was entitled to the address pursuant to section 1054.1, subdivision (a), which requires the prosecuting attorney to disclose to the defense "[t]he names and addresses of persons the prosecutor intends to call as witnesses at trial."

Appellant further argues that the court's refusal to compel disclosure of the victim's address "violated the due process clauses of both our state and federal Constitutions" because it impeded his ability to "prepare for his defense."

Appellant was given the address of the victim's grandparents. They were her legal guardians, and she was residing with them when the offenses were committed. But at the time of appellant's request, the victim was living in a group home for emotionally disturbed children. She had been placed there by the juvenile court. Appellant wanted this address, but the trial court refused to compel its disclosure.

The juvenile court had denied an earlier request by appellant to compel disclosure of the address of the group home. However, it had directed respondent to "cooperate in making the [victim] available for an interview at a location mutually agreed to by [the parties]." The juvenile court said that, if appellant wanted to correspond with the victim, he should deposit his letters with the court and they would be forwarded to her.

"An appellate court 'generally review[s] a trial court's ruling on matters regarding discovery under an abuse of discretion standard.' [Citation.] Furthermore, ' "The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." ' [Citation.]" (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 366.)

The trial court did not abuse its discretion. It reasonably concluded that, in view of the particular circumstances of this case, the disclosure of the address of the victim's grandparents and legal guardian was sufficient to satisfy discovery requirements. With the grandparents' address, appellant could contact persons living in the neighborhood where the victim had resided when the crimes had occurred. Appellant was not denied access to the victim. The prosecutor agreed to "attempt to make [her] available to a defense investigator for an interview at an agreed upon location." According to the prosecutor, appellant declined this offer. Appellant was permitted to correspond with the victim through the juvenile court, and he cross-examined her at the preliminary hearing.

Moreover, appellant's counsel was his father-in-law.[3] The trial court could have reasonably concluded that, because of this familial relationship, the disclosure to counsel of the address of the group home was unwarranted. Pursuant to section 1054.2, disclosure of the victim's address to "a defendant [or] members of the defendant's family" is not allowed "unless specifically permitted . . . by the court after a hearing and a showing of good cause." (***Id.***, subd. (a)(1).)

In addition, there was evidence that contact with defense counsel would be harmful to the victim. The victim's personal counsel, who was representing her in a civil action against appellant, declared under penalty of perjury that "any contact by [appellant's counsel] would be detrimental to her mental health."

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Finally, public policy considerations supported the trial court's refusal to compel disclosure of the address of the group home. The trial court declared: "There's good reason that I don't give you the address of the home for emotionally disturbed children because there's a separate public policy going on over there, and there are other children involved, and I don't know the dynamics of children involved, and I don't know how disruptive and problematic it would be for the other children who have nothing to do with this case to have you or your investigator poking around over there."

Since the trial court acted within its discretion in refusing to compel disclosure of the address of the group home, we reject appellant's contention that the refusal violated his constitutional right to due process. We also reject his contention that the court erroneously denied his "motion to exclude the alleged victim from testifying on the grounds the defense was not given the address of the alleged victim." (Capitalization omitted.)

II

Jury Voir Dire

Appellant contends that the trial court erroneously denied his request to ask prospective jurors the following questions concerning his theory that deputies had planted his semen on the victim's bedroom carpet:

"51. In this case the Defense contends that the alleged victim is not a reliable witness because of her Juvenile Court record and her history of mental disorder. The Defense also contends that the investigating officers from the Santa Barbara Sheriff's Department knew that the alleged victim was not a reliable witness and knew that they needed evidence such as DNA evidence to convince the jury that the defendant is guilty. The Defense also contends that at least 2 investigating officers of the County of Santa Barbara Sheriff's Department . . . went to [appellant's] residence, obtained one or more condoms that were used by [appellant] and his wife when they had sexual intercourse, and that these officers obtained the used condom or condoms from the defendant's trash and emptied the contents of at least one condom on the carpet in the alleged victim's bedroom so that they would be able to prove a case against [appellant]. If these allegations are made, would you be more likely to believe them than not or would you be able to listen to all the evidence on both sides of the case before reaching your decision on this issue?

"52. Do you believe that it is possible for a County of Santa Barbara deputy sheriff investigating a case to be guilty of such acts as alleged by the Defense in this case?

"53. Would you be willing to listen to all the evidence in this case before deciding whether [appellant] is guilty or whether he was set up by the grandparents and deputies of the Santa Barbara County Sheriff's Department investigating this case?"

"[T]he trial court has 'considerable discretion . . . to contain voir dire within reasonable limits' [citations]. . . . Limitations on voir dire are subject to review for abuse of discretion. [Citations.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 990.)

The trial court did not abuse its discretion. It could have reasonably concluded that the proposed questions would be used for an improper purpose: to educate the jurors as to appellant's version of the facts, to prejudice them against the prosecution, to

indoctrinate them, and to argue the defense theory of the case. " 'It is, of course, well settled that the examination of prospective jurors should not be used " 'to educate the jury panel to the particular facts of the case, . . . to prejudice the jury for or against a particular party, to argue the case, [or] to indoctrinate the jury . . . .' " ' [Citations.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 492-493.)

III

Amendment of Second Amended Information

The second amended information alleged that all of the crimes had been committed between November 1, 2005, and January 31, 2006. At trial the court permitted an amendment extending the time period approximately two months to April 7, 2006. Respondent requested the amendment because of appellant's testimony that, on April 7, 2006, he had visited the victim in her bedroom when her friend, M.H., was present. M.H. testified that, while in the bedroom, she had seen appellant and the victim "hugging and kissing and kind of like caressing each other." Appellant touched the victim "kind of all around. On her hips and back and legs" as well as "her bottom."

Appellant contends that the amendment violated section 1009 and his constitutional rights because the evidence at the preliminary examination failed to show that any offense had been committed either when M.H. was present or after January 31, 2006. At the preliminary examination, the victim testified that M.H. had been present in the victim's bedroom when she and appellant "were kissing and holding each other." The victim indicated that this incident had probably occurred sometime in November 2005.

"[S]ection 1009 gives the trial court discretion to permit an amendment of the information to charge any offense shown by evidence taken at the preliminary examination, at any time during trial, provided the defendant's substantial rights are not prejudiced thereby. [Citation.] Section 1009 preserves a defendant's substantial right to trial on a charge ofwhich he had due notice. [Citation.] In other words, section 1009 protects a defendant's right to due process." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 903-904.)

The second amended information was not amended to charge an offense not shown by the evidence taken at the preliminary examination. The victim's testimony that, in M.H.'s presence, she and appellant "were kissing and holding each other" provided sufficient probable cause to hold appellant to answer for a violation of section 288, subdivision (c)(1). (See *People v. Martinez* (1995) 11 Cal.4th 434, 452 ["section 288 is violated by 'any touching' of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child"]; *People v. Slaughter* (1984) 35 Cal.3d 629, 637 [" 'a magistrate conducting a preliminary examination must be convinced of only such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused' "].)

The information was amended to conform to appellant's testimony that any incident witnessed by M.H. had occurred on April 7, 2006. "[A]n information may be amended to conform to proof at any stage of the proceeding so long as the defendant's substantial rights are not compromised [citations] . . . ." (*People v. Carr* (1988) 204 Cal.App.3d 774, 780, fn. 7.) Because the amendment was based on appellant's own testimony, it could not have violated his substantial rights. (See *People v. O'Hara* (1960) 184 Cal.App.2d 798, 812 [since defendant testified that he first met victim in 1958, no substantial right was prejudiced by amendment changing year of offense from 1957 to 1958; "[i]t is reasonable to conclude that defendant was not surprised or misled by the amendment"].) Accordingly, the trial court did not abuse its discretion in permitting the amendment of the second amended information.[4]

IV

Unanimous Verdict

Appellant contends: "Because the jury was not able to reach a unanimous verdict on a specific act committed by Appellant . . . , the constitutional requirement of unanimity has not been met in this case." Appellant's contention is based on a declaration from a juror. The juror stated that the jury had "found 2 separate situations involving lewd or lascivious conduct on the part of [appellant]." One situation was the incident witnessed by M.H. The juror described the second situation as follows: "[Appellant's] semen was found on the carpet, indicating sexual activity on the part of [appellant], the time or times and circumstances, whether sexual intercourse, oral copulation or otherwise unknown." Appellant argues that this description of the second situation shows that the jury "was not able to agree what specific acts were committed."

The trial court correctly ruled that the juror's declaration was inadmissible. The declaration "attempts to impeach the verdict with statements about the jury's alleged subjective collective mental process as to how the verdict was reached. Yet,'evidence about a jury's "subjective *collective* mental process purporting to show how the verdict was reached" is inadmissible to impeach a jury verdict. [Citation.]' " (*English v. Lin* (1994) 26 Cal.App.4th 1358, 1367.) Because the juror's declaration was inadmissible, there is no support in the record for appellant's contention that he was denied his constitutional right to a unanimous verdict.

V

Superseded Pleading

Appellant argues that the second amended information was superseded when the trial court permitted the amendment extending the time period for the commission of the offenses to April 7, 2006. Because the jury verdicts state that appellant is guilty of the crimes charged in counts 1 and 2 "of the 2nd Amended Information," appellant contends that he "was convicted on 2 counts alleged in a superseded pleading and was not convicted on any count pending before the court."

Appellant waived this issue by failing to object to the form of the verdicts.

(*People v. Jones* (2003) 29 Cal.4th 1229, 1259.) In any event, his contention lacks merit. The amendment of the second amended information was by interlineation. A third amended complaint was never filed; the second amended complaint, therefore, was not superseded and remained extant. Even if the verdict forms were defective, we would disregard the defects because the " 'jury's intent to convict of a specified offense within the charges is unmistakably clear, and [appellant's] substantial rights suffered no prejudice. [Citations.]' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; see also *People v. Sourisseau* (1944) 62 Cal.App.2d 917, 927.)

VI

Special Findings

After the jury returned its verdicts, the trial court polled the jury. Appellant then requested that "the jury make a special finding as to what acts they found that [appellant] committed." The court denied the request. It declared: "The form of the verdicts were approved by the lawyers before, and if you lawyers thought you needed to have [the jury] make further findings, then the time for you to do that would have been then and not now." Appellant contends that the denial of his request was reversible error.

We disagree. In advance of the jury's deliberations, counsel may request special findings. (*People v. Arias* (1996) 13 Cal.4th 92, 158.) But after the jury has returned a guilty verdict, such a request is properly denied as untimely. "The law gives a party the right to poll the jurors only on their *verdict*," not on the factual findings underlying their verdict. (***Id***., at p. 1157; see also 1163.)[5]

VII

Contention that Appellant Not Advised of Charges Against Him

"Due process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 317.) Appellant contends that the evidence presented at the preliminary examination failed to provide adequate notice that the charges against him were in part based on the incident in the victim's bedroom witnessed by M.H.

The victim's testimony at the preliminary examination put appellant on notice that he was subject to criminal liability for his conduct during this incident. The victim testified that M.H. had been present in the victim's bedroom when she and appellant "were kissing and holding each other." We recognize that the victim also testified that no "type of sexual activity" had occurred in M.H.'s presence. But the victim's conclusionary characterization of appellant's conduct was not binding on the parties or the court.

VIII

Sentencing

Appellant contends that the trial court abused its discretion in imposing a three-year upper term sentence on count 1 of the information. The selection of the upper term was well within the trial court's discretion. The court found three aggravating factors: (1) "the victim . . . was particularly vulnerable"; (2) appellant "threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process";[6] and (3) appellant "took advantage of a position of trust or confidence to commit the offenses, and that's particularly true because he used his uniform and his badge and the opportunities for access that were provided for him because he was a sheriff's deputy." The only mitigating factor was appellant's lack of a prior criminal record.

Furthermore, the probation report indicated that there was a serious risk that appellant would reoffend: "[D]espite the overwhelming evidence and the jury's conviction, [appellant] continues to maintain his innocence. Not only that, he has concocted an implausible scenario blaming his former law enforcement family of planting his semen in the victim's bedroom. His level of denial of these offenses and his need to place the blame on anyone other than himself makes him a formidable risk for re-offense."

Appellant summarily asserts, without any supporting argument or authorities, that the upper term was unwarranted because "the jury did not make a special finding as to any aggravating circumstances." (Capitalization omitted.) The issue is waived. " ' "[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]" [Citation.]' [Citation.]" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1029.)

In any event, neither a judge's nor a jury's finding of aggravating circumstances was a prerequisite to imposition of the upper term. Appellant was sentenced on January 16, 2008. Prior to sentencing, an amended version of section 1170, subdivision (b), became effective. (Stats.2007, ch. 3, 2.) [7] Pursuant to this amended version, "(1) the middle term is no longer the presumptive term absent aggravating or mitigating facts found by the trial judge; and (2) a trial judge has the discretion to impose an upper, middle or lower term based on reasons he or she states." (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992; see also *People v. Sandoval* (2007) 41 Cal.4th 825, 847 [under the amended version, the trial court's reasons for imposing the upper or lower term "no longer must 'include a concise statement of the ultimate facts that the court deemed to constitute circumstances in aggravation or mitigation' "].)

For the first time in his reply brief, appellant contends that he "was sentenced under an ex-post facto law" because his crimes were committed before the effective date of the amendment of section 1170, subdivision (b). This contention is waived because (1) it is not supported by legal argument or citation of authorities (*People v. Hovarter, supra,* 44 Cal.4th at p. 1029); and (2) appellant failed to raise the issue in his opening brief. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4.) In any event, the contention fails on its merits. Our Supreme Court rejected a similar ex post facto claim in *People v. Sandoval, supra,* 41 Cal.4th at pp. 853-857.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

James F. Rigali, Judge

Superior Court County of Santa Barbara

William R. Pardee, for Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, Roberta L. Davis, Deputy Attorney General, for Plaintiff and Respondent.

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[1] All statutory references are to the Penal Code.

[2] During oral argument appellant's counsel stated that there was no evidence that appellant's sperm was commingled with the victim's vaginal fluid. We disagree. During cross-examination, appellant's own expert testified that on area 24 of the carpet he had found appellant's sperm commingled with nucleated epithelial cells consistent with the victim's DNA profile. The expert further testified that "cells from vaginal secretions are nucleated epithelial cells." However, the expert opined that the concentration of nucleated epithelial cells on area 24 was "at a much lower level than we would expect to see from post-coital [vaginal] drainage." According to the expert, these cells did not necessarily originate from the victim's vaginal fluid. He explained that nucleated eptiehlial cells are "mucous-membrane-type cells." They line the inside of the mouth, nose, vagina, and rectum. They are also found underneath the eyelids. Saliva is "filled with these nucleated epithelial cells."

[3] In documents filed with the trial court in March and May 2007, appellant declared that his trial counsel was his father-in-law and that he waived any conflict of interest arising from this familial relationship. In its brief, respondent alleges: "The juvenile court ordered that defense counsel should not have access to the victim's address because defense counsel was appellant's father-in-law." But this allegation is unsupported by the record on appeal.

[4] For the first time in his reply brief, appellant contends that respondent is bound by the magistrate's factual finding at the preliminary examination that "the relevant time period is September 1, 2005, to January 1, 2006." "We reject this contention because, without good cause, it was not raised until the reply brief." (*People v. Adams* (1990) 216 Cal.App.3d 1431, 1441, fn. 2.) In any event, the contention is without merit. We recognize that, if a magistrate has made findings of fact, "those findings are conclusive if supported by substantial evidence. [Citations.]" (*People v. Slaughter*, *supra*, 35 Cal.3d at p. 638.) But it would be

conclusive if supported by substantial evidence. [Citations.]" (*People v. Slaughter, supra*, 35 Cal.3d at p. 638.) But it would be unreasonable to apply this rule to the situation here where the change of dates was based on appellant's testimony at trial and the amendment did not affect the character of the charged offenses, the prosecution's theory of liability, or appellant's defense.

[5] Section 1163 provides: "When a verdict is rendered, and before it is recorded, the jury may be polled, at the request of either party, in which case they must be severally asked whether it is their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation."

[6] This factor is warranted by evidence that appellant sent M.H. an email in which he attempted to dissuade her from testifying. In the email, appellant accused the victim of lying and said that he and his wife were expecting their sixth child. Appellant declared, "I am hoping I can talk to you about what happened between you, [the victim] and I during the times we were together. . . . My family and I would appreciate your help." Attached to the email was a photograph of "two little boys in a swimming pool." M.H. testified that the email caused her "stress" and "sleeplessness." It made her "feel sympathetic or sorry for [appellant]."

[7] Amended section 1170, subdivision (b), provides in relevant part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected . . . ."