

Ex. 5

Court of Appeal, Fourth Appellate District, Division Three - No. G042955

S187439

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

CHRISTOPHER DAVID KROHE, Defendant and Appellant.

The petition for review is denied.

SUPREME COURT
FILED

NOV 23 2010

Frederick K. Ohlrich Clerk

Deputy

GEORGE

Chief Justice

COPY

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

COURT OF APPEAL-4TH DIST DIV 3
FILED

DIVISION THREE

SEP 14 2010

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER DAVID KROHE,

Defendant and Appellant.

Deputy Clerk _____

G042955

(Super. Ct. No. 06NF0657)

OPINION

Appeal from a judgment of the Superior Court of Orange County, W.

Michael Hayes, Judge. Affirmed.

Michael B. McPartland, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Garrett Beaumont and
Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Christopher David Krohe guilty of six counts of forcible child molestation (Pen. Code, § 288, subd. (b)(1)) and three counts of aggravated sexual assault on a child (Pen. Code, § 269, subd. (a)). In a bifurcated trial, the trial court found defendant had served two prior separate prison terms and had one prior serious felony conviction. The trial court sentenced defendant to a total term of 76 years to life.

Defendant raises a single issue in his appeal. He contends the trial court abused its discretion by admitting evidence that he threatened and choked his mother subsequent to the charged offenses. The evidence was first admitted to impeach mother's testimony denying defendant committed acts of violence. But the court instructed the jury it could also consider the evidence on the issues of defendant's intent, whether his conduct was the result of mistake or accident, and whether defendant acted in accordance with a plan, scheme, or pattern of conduct. Because defendant denied choking his victim during his assaults, the evidence was properly admitted, the jury was properly instructed, and we affirm the judgment.

FACTS

Defendant is the victim's father. He had no contact with her or her mother until the victim was in first grade. After some initial meetings in public places, arrangements were made to have the victim stay during overnight visits at the house defendant shared with his mother and other roommates. The victim was 14 years old at the time she testified.

The victim testified she first started visiting defendant at the latter's mother's house when she was 10 years old. She would spend Friday through Sunday at defendant's, every other weekend. She stated defendant started to molest her when she was 11 years old; all the molestations took place in defendant's mother's bedroom. The room was equipped with a queen bed and a twin bed and defendant slept in the queen bed

while his daughter slept in the twin bed. Defendant's mother slept on a futon in the living room. After these visitations had taken place for about a year, defendant started to touch various parts of the victim's body under her clothing, including her chest and vagina. Defendant used his hands, his tongue, his mouth, and his penis to touch her. The sexual touching continued for months and took place more than once during each visit.

Defendant locked the bedroom door before assaulting the victim. He placed his body on the victim's, using his weight to hold her down so she could not get up. Although the victim told him to stop, defendant failed to comply. Defendant directed the victim to disrobe and inserted his penis into her vagina after she did so. It hurt the victim and she cried. When the victim struggled and loudly told defendant to stop, he told her to shut up and choked her by putting a hand around her neck and a hand over her mouth and under her nose. As the victim tried to move to be able to breathe, defendant held her tighter.

After this conduct had continued over a period of time, the victim's mother noticed the girl was behaving unusually while defendant was present and asked her what was wrong. The victim refused to answer and locked herself in the bathroom. When defendant tried to open the door and the victim's mother again asked her what was wrong, she ran away after stating "ask my dad." Mother asked defendant what was going on and he stated "we've been doing it." When she asked what he meant, he stated, "Oh, we've been having sex." Thereafter, mother called defendant's mother and the police. The sheriff's officer who responded and interviewed the victim noticed she had bruises on her neck. The victim told the officer the sexual relations had been taking place regularly for a year.

Defendant's mother also called the police after receiving the phone call from the victim's mother and reported her granddaughter had been sexually assaulted.

DISCUSSION

The prosecution called defendant's mother as a witness. She generally denied knowledge of events or making statements, including that defendant and his daughter shared a bedroom telling the investigation officer they did, and reporting her granddaughter had been sexually abused. She continued in her denials even after being confronted with a recording of her conversation with the police. She denied having "known [her] son to have been violent in the past," having made a police report of physical violence between her and her son, and that he had put his hands around her neck in a tight grip. After extensive discussion between court and counsel outside the presence of the jury, the court permitted admission of evidence that mother had reported such conduct to the police.

Initially, the court indicated the evidence was admitted to impeach mother's credibility. But ultimately the court instructed the jury it could consider this evidence "for the limited purpose of deciding whether or not: [¶] The defendant acted with the intent and purpose required to prove the offenses alleged in this case; [¶] The defendant's alleged actions were the result of mistake or accident; [¶] The defendant acted in accordance with a plan, scheme or pattern of conduct to commit the offenses alleged in this case."

Defendant asserts error in admitting the evidence, giving the instruction, and violation of Evidence Code section 352.

The evidence was clearly admissible to impeach mother's denial of violent conduct by defendant. As to the "undue prejudice" on which defendant relies in support of Evidence Code section 352 argument, this was a matter within the trial court's discretion, which "[w]e will not disturb . . . unless defendant affirmatively shows that the court exercised its discretion ""in an arbitrary, capricious or patently absurd manner."" [Citations.] (*People v. Escudero* (2010) 183 Cal.App.4th 302, 310.) Defendant has

failed to do so. His only argument is this evidence showed defendant was a bad person and he needed to be punished for having attacked his mother. Compared to the evidence of defendant's conduct towards his 11-year-old daughter, his having assaulted his mother pales. It is unlikely a jury would find defendant guilty of having continuously molested a young girl because of anger aroused when learning of a bad act directed at his mother.

And there was disputed evidence whether defendant choked the victim when she attempted to resist his assaults. In fact, defense counsel's argument that the victim was mistaken in thinking defendant choked her was rebutted by the prosecutor with a reference to defendant choking his mother. Thus, the jury instruction properly told the jury they could consider this identical conduct towards his mother to determine if the conduct was intentional or accidental, or part of a plan, scheme, or pattern of conduct. Although evidence of defendant's other criminal acts is generally inadmissible to prove defendant's propensity to commit the crimes at issue, such evidence is admissible to show intent, the lack of mistake, and common plan or scheme. (*People v. Walker* (2006) 139 Cal.App.4th 782, 796; Evid. Code, § 1101.)

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.

Not Officially Published
(Cal. Rules of Court, Rules
8.1105 and 8.1110, 8.1115)
2010 WL 3556173
Only the Westlaw citation
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California Rules of Court, rule 8.1115,
restricts citation of unpublished
opinions in California courts.

Court of Appeal, Fourth
District, Division 3, California.

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v.
Christopher David KROHE,
Defendant and Appellant.

No. G042955. | (Super.Ct.No.
06NFO657). | Sept. 14, 2010.

Appeal from a judgment of the Superior Court
of Orange County, W. Michael Hayes, Judge.
Affirmed.

Attorneys and Law Firms

Michael B. McPartland, under appointment
by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane
R. Gillette, Chief Assistant Attorney General,
Gary W. Schons, Assistant Attorney General,
Garrett Beaumont and Tami Falkenstein
Hennick, Deputy Attorneys General, for
Plaintiff and Respondent.

Opinion

OPINION

RYLAARSDAM, Acting P.J.

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*2 After this conduct had continued over a period of time, the victim's mother noticed the girl was behaving unusually while defendant was present and asked her what was wrong. The victim refused to answer and locked herself in the bathroom. When defendant tried to open the door and the victim's mother again asked her what was wrong, she ran away after stating "ask my dad." Mother asked defendant what was going on and he stated "we've been doing it." When she asked what he meant, he stated, "Oh, we've been having sex." Thereafter, mother called defendant's mother and the police. The sheriff's officer who responded and interviewed the victim noticed she had bruises on her neck. The victim told the officer the sexual relations had been taking place regularly for a year.

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*3 And there was disputed evidence whether defendant choked the victim when she attempted to resist his assaults. In fact, defense counsel's argument that the victim was mistaken in thinking defendant choked her was rebutted by the prosecutor with a reference to defendant choking his mother. Thus, the jury instruction properly told the jury they could consider this identical conduct towards his mother to determine if the conduct was intentional or accidental, or part of a plan, scheme, or pattern of conduct. Although evidence of defendant's other criminal acts is generally inadmissible to prove defendant's propensity to commit the crimes at issue, such evidence is admissible to show intent, the lack of mistake, and common plan or scheme. (*People v. Walker* (2006) 139 Cal.App.4th 782, 796; Evid.Code, § 1101.)

The judgment is affirmed.

WE CONCUR: BEDSWORTH, and MOORE, J.

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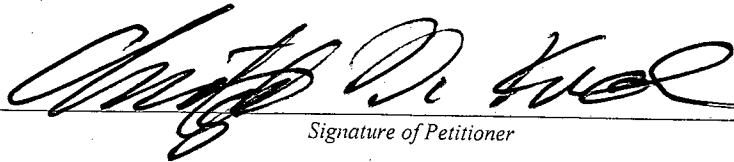
Declaration Under Penalty Of Perjury

If you are incarcerated, on what date did you place this petition in the prison mail system: **11/16/2017**

I, Christopher David Krohe

I declare under penalty of perjury that I am the petitioner. I have read this petition or had it read to me, and the information in this petition is true and correct. I understand that a false statement of a material fact may serve as the basis for prosecution for perjury.

Date: 11/16/2017


Signature of Petitioner

Signature of Attorney or other authorized person, if any