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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOHN PAUL MCPHERSON, Defendant and Appellant.	B265732 (Los Angeles County Super. Ct. No. KA100634)

APPEAL from an order of the Superior Court of Los Angeles County, Thomas C. Falls, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

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By way of this appeal, defendant John Paul McPherson seeks to undo his plea of no contest to continuous sexual abuse of a child under 14, lewd and lascivious conduct with a child under 14, and misdemeanor annoying or molesting a child under 18. He argues the trial court abused its discretion in rejecting his motion to withdraw his plea based on purported newly discovered evidence purportedly showing that a letter written by one of the victims contained an altered word. The (assumed) altered word "raped" was not significant because defendant was neither charged nor convicted of rape, and the victim admitted that defendant did not rape her. The trial court did not abuse its discretion in concluding the purported new evidence was insubstantial and defendant failed to demonstrate good cause to withdraw his plea. We affirm.

BACKGROUND

Ten years before this case commenced, in 2003, C. (one of defendant's victims) first reported defendant's sexual conduct. Her allegations were deemed unfounded, and her then-friend Gabrielle was interviewed but did not report any of defendant's sexual conduct.

1. Preliminary Hearing

In 2013, at the preliminary hearing, then 19-year-old C. testified that when she was between five and seven years old defendant kissed her on the mouth at least twice, and put his tongue in her mouth. Defendant touched her vaginal area twice. When she was in fifth grade, C. wrote her mother a letter describing defendant's conduct. C. testified that she used the word "raped" in her letter to her mother, but at the time of her testimony knew that defendant had not raped her.

Then 20-year-old Gabrielle testified that when she was four or five years old defendant, her stepfather, would punish her by directing her to remove her clothing, spank her, and touch her vaginal area. When Gabrielle was six or seven years old, defendant would direct her to rub his penis after he spanked her. Defendant sometimes took her hand to force her to rub his penis. When she was eight or nine years old, defendant directed Gabrielle to kiss his penis, telling her that her mother hurt it.

Gabrielle testified defendant forced her to kiss his penis numerous times. When Gabrielle was in third or fourth grade, defendant twice directed her to put her mouth around his penis. Defendant kissed Gabrielle on the lips, but he never put his tongue in her mouth. When she was about 16 years old, defendant video-recorded Gabrielle wearing only her shirt and paid her for allowing him to record her. Another time when he recorded her, defendant unbuttoned her blouse.

Fourteen-year-old R. Doe testified that defendant told her he was a photographer and asked her to pose as a model. She knew defendant because she lived with her father in the same house as defendant. When she posed, defendant asked her to take off her bra, and R. complied. Defendant gave her $5 because her shirt opened during the photo shoot. R. was uncomfortable with defendant seeing her breasts and uncomfortable that he gave her money. She posed for his photographs on other occasions, but she always wore a bra.

A police officer testified that after police searched defendant's residence, Gabrielle's mother provided police with photographs she claimed had been found in defendant's residence.

2. Information

In a nine-count information, defendant was charged with continuous sexual abuse of a child under 14 (C.). (Pen. Code,[1] § 288.5, subd. (a).) With respect to Gabrielle, he was charged with continuous sexual abuse (§ 288.5, subd. (a)), and six counts of lewd acts upon a child (§ 288, subd. (a)). He also was charged with possession of a matter depicting a minor engaging in sexual conduct with respect to R. (§ 311.11, subd. (a).)

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[1] Undesignated statutory citations are to the Penal Code.

3. Defendant's Trial Brief

According to defendant, Gabrielle reported the incident with R., which resurrected the allegations involving C. In his trial brief, defendant argued that the defense was "challenging the authenticity of" the letter C. gave her mother.

Defendant argued that the allegations involving C. were untrue. They previously were deemed unfounded. In addition, defendant emphasized that Gabrielle previously was interviewed and denied any sexual conduct on defendant's part. Defendant argued that with respect to R. the photographs were lawful and were intended to assist her in creating a portfolio for modeling or acting roles.

Defendant asserted the first degree burglary charges were filed against Gabrielle's mother for burglarizing defendant's residence. Police had searched the residence and did not find the photographs, which defendant claimed Gabrielle's mother planted after the residence had been searched.

4. Plea

In the midst of jury selection, defendant pled no contest to one count of continuous sexual abuse of a child under 14 (§ 288.5, subd. (a) (Gabrielle)); one count of lewd or lascivious conduct with a child under 14 (§ 288, subd. (a) (C.)); and one count of annoying or molesting a child under 18 (§ 647.6, subd. (a)(1) (R.)). Defendant signed an acknowledgement that the court would sentence him to state prison for 15 years. In the written form, he acknowledged that no one made any promises to him. At the hearing, when asked by the court "anything other than what I have said to you in open court, any other promises been made to you?," defendant responded "no, sir." When asked by the prosecutor "has anyone promised you anything other than what's stated on the record to get you to plead in this case?," defendant responded "no."

Defendant stipulated that there was a factual basis for his plea. Defendant's attorney also stipulated that there was a factual basis for the plea. The court found that his plea was freely and voluntarily made.

The court later described the events leading up to the plea. According to the court, the prosecutor made it clear that the plea would not be conditioned on C.'s handwriting exemplar. Both counsel agreed that the plea was not conditional.

5. Motion to Withdraw Plea

Defendant filed a motion to withdraw his plea on the ground that newly discovered evidence justified the withdrawal of the plea. Subsequent to the plea, defendant's handwriting expert questioned whether the same person who wrote the letter C. testified she had given her mother also wrote the word "raped" in that letter. The handwriting expert indicated that the word "raped" may not have been written by the individual who prepared the remainder of the letter.

Based on the expert's analysis, defendant moved to withdraw his plea. He argued that the word "raped" in the letter was so significant it would have altered the outcome of the case. Defendant's declaration in support of his motion provided that he was "informed that prior to sentencing my attorneys would have the opportunity to have a handwriting expert review the letter in question, and determine, as I firmly believed, that it was altered and/or forged in some way . . . and that if such evidence could be produced, that the letter was changed or altered in any way, we would file a motion to withdraw my pleas and proceed to trial, which would likely be granted." Defendant averred that he would not have entered his plea had he been aware of the true facts regarding the letter. He averred that he was innocent.

At the hearing, defendant was not sworn but stated that he was acting under duress because he faced a life sentence, and the prosecutor limited the duration of the deal for a 15-year sentence.

The court rejected defendant's arguments. The court found "it was crystal clear that this plea was not a conditional plea premised on what came out from this letter. . . ." "[I]t was not a conditional plea, and your client knew that when he entered the plea." The court sentenced defendant to 15 years in state prison. It issued a certificate of probable cause to appeal.

DISCUSSION

On appeal defendant argues, there was good cause to set aside his plea because he properly believed that his plea was contingent on the results of the expert's analysis. He argues that he "pled no contest because he believed that he could change his plea if it could be determined that his credibility would be bolstered by the expert's analysis of the fresh complaint letter" and "both parties knew that the plea was linked to the results of the report." As we explain, defendant's argument lacks merit.

"Section 1018 provides, in part: 'On application of the defendant at any time before judgment . . . , the court may, . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . This section shall be liberally construed to effect these objects and to promote justice.' The defendant has the burden to show, by clear and convincing evidence, that there is good cause for withdrawal of his or her guilty plea. [Citations.] 'A plea may not be withdrawn simply because the defendant has changed his [or her] mind.' [Citation.] The decision to grant or deny a motion to withdraw a guilty plea is left to the sound discretion of the trial court. [Citations.] 'A denial of the motion will not be disturbed on appeal absent a showing the court has abused its discretion.' [Citations.] 'Moreover, a reviewing court must adopt the trial court's factual findings if substantial evidence supports them.'" (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1415-1416.)

Here, the trial court did not abuse its discretion. Contrary to defendant's arguments there was neither newly discovered crucial evidence supporting his defense nor a conditional plea. There is no record support for defendant's argument that the plea was conditioned on the results of the handwriting analysis. The trial court explained that the plea was not conditional, and both counsel agreed with the trial court's description. Nothing in the form signed by defendant and counsel identifies it as conditional. Nothing in the oral record of the plea identifies the plea as conditional. At the hearing, when he pled no contest defendant twice agreed that there were no other promises to induce his plea.

Even if defendant's plea had been conditional, the results of the handwriting analysis do not bolster defendant's defense. It was undisputed that defendant did not rape C. C. testified that she misused the word "rape" when she wrote the letter. Because defendant's conviction was not based on any rape, the term "raped" was of minimal importance regardless of whether C. wrote it or someone else inserted it. The expert's analysis did not alter any defense defendant knew about and could have presented had he decided to proceed with trial instead of pleading no contest. Defendant's own trial brief sets forth his defenses—including his challenge to the authenticity of C.'s letter, Gabrielle's mother's planting evidence, and Gabrielle's prior denial of any sexual conduct on defendant's part. His trial brief therefore demonstrates that he was aware of the potential defenses prior to his decision to plead no contest.

Finally, although defendant averred that he believed that he would be able to move to withdraw his plea if the letter were changed in any way, the trial court was not required to credit defendant's averment, especially in light of the unanimous agreement of the court and all counsel that the plea was not conditional. (*People v. Caruso* (1959) 174 Cal.App.2d 624, 636 [trial court was not required to credit affidavits in support of motion to withdraw plea].) Defendant's statement that he acted under duress also is unsupported by the record. Just as in *People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208, here "[n]othing in the record indicates he was under any more or less pressure than every other defendant faced with serious felony charges and the offer of a plea bargain." (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.)

This court has held that a plea is not knowingly and voluntarily made when the defendant is not provided exculpatory evidence. (*People v. Ramirez* (2006) 141 Cal.App.4th 1501, 1506, 1508.) That principle is not applicable to this case because the prosecution did not withhold critical evidence from defendant. Defendant's reliance on *Ramirez* therefore is misplaced. In sum, we find no abuse of discretion in the trial court's denial of defendant's motion to withdraw his plea.

DISPOSITION

The order denying defendant's motion to withdraw his plea is affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.