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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ROMAN HERNANDEZ,

Defendant and Appellant.

B235560

(Los Angeles County
Super. Ct. No. BA367752)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig J. Mitchell, Judge. Affirmed.

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

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Lawrence M. Daniels and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Appellant Roman Hernandez appeals from the judgment entered upon his conviction by jury of one count of lewd acts with a child under the age of 14 (Pen. Code, § 288, subd. (a), count 2)¹ and continuous sexual abuse of a child (§ 288.5, subd. (a), count 3).² The trial court denied probation and sentenced appellant to state prison for 24 years, consisting of eight years on count 2 and 16 years on count 3.

Appellant's sole contention on appeal is that the trial court erred in allowing the prosecution to reopen its case after the jury began deliberations.

We find no abuse of discretion and affirm.

FACTS

Prosecution Case

Appellant, age 28, lived with his wife Monica and their twin babies in an apartment building in Los Angeles. Nine-year-old K.B. lived with her parents in an apartment across the hallway from appellant. Starting in June 2009, K.B. visited appellant's apartment on a regular basis to play with the babies. K.B. usually played with the babies in the living room but sometimes stayed with Monica in the kitchen. Monica was always present when K.B. visited appellant's apartment.

Approximately two or three months after K.B. began visiting appellant's apartment he began kissing her. On the first occasion, K.B. was in the living room playing with the babies. Monica was in the kitchen washing dishes. Appellant who was sitting on the bed in the living room, called K.B. over to him and kissed her "inside" the mouth. K.B. was scared and confused. She told Monica she had to leave and then returned to her parent's apartment. K.B. was embarrassed and afraid to tell Monica or her parents what appellant did to her.

¹ All further statutory references are to the Penal Code unless otherwise stated.

² The jury deadlocked on count 1, sexual intercourse with a minor 10 years old or younger (§ 288.7, subd. (a)). The trial court declared a mistrial on that count and it was dismissed.

K.B. visited appellant's apartment the next day to play with the babies because she thought appellant would not do it again. While K.B. was playing with the babies, appellant "got close" and kissed her in the mouth. K.B. was offended and left. Appellant continued to kiss K.B. every time she visited his apartment. Appellant also began touching K.B.'s chest, at first over her clothing, but later began touching her skin under her clothing. Appellant told K.B. not to tell anybody what he did.

In January 2010, K.B. was in the apartment playing with the babies when Monica had to go to the market. Appellant whispered to K.B. to stay in the apartment and not leave with Monica. K.B. stayed because she was afraid that if she left with Monica appellant would kiss her even more the next time she visited the apartment. After Monica left, appellant locked the door. He kissed K.B. and made her leave the babies. He rubbed her chest under her clothes. He sat her on the bed and asked if she had a boyfriend. She said no. He told her to touch his penis and she said no. He grabbed her hand and made her touch his erect penis inside his pants, then dragged her to the bathroom closet by the back of her shirt. She kicked and punched him. Once in the closet, appellant pulled K.B.'s pants and underwear down, and "shoved" his penis in her vagina, which "really hurt." He held her hands up so that she could not hit him anymore. He took out his penis: there was "yellow stuff" on his penis. Appellant stopped when he heard a sound from the apartment doorknob. He left the bathroom and unlocked the apartment door. Monica entered the apartment and K.B. went home. K.B. never visited appellant's apartment again.

Approximately one month later, K.B. told her 10-year-old friend and neighbor F.F., what happened in the bathroom. F.F. told K.B. to write a letter to appellant "to set him up." K.B. wrote that she did not like it when appellant kissed and made love to her. She asked appellant to write a letter and tell her when he would be alone so that she could come over. K.B. and F.F. planned to go to appellant's apartment together and when appellant did something to either of the girls they planned to scream and call K.B.'s mother. K.B. placed the letter on the door of appellant's apartment. K.B.'s mother saw

the letter on the door and took it and read it. At first K.B. told her mother that appellant had only kissed her and touched her. The following morning she told her mother about the sexual assault in the bathroom closet.

Following appellant's arrest, Los Angeles Police Detective Renee Medel interviewed appellant at the jail, with the assistance of two Spanish-speaking officers, Detectives Jon Hurd and George Granillo.³ Appellant was advised of his constitutional rights and agreed to talk. The recorded interview was played to the jury. Detective Medel testified that the tape recorder was on the entire time she was in the interview room with appellant and everything that was said by appellant and the police officers was recorded.

Defense Case

In February 2010, Maria Cachola, a nurse practitioner at LAC-USC Medical Center Violence Intervention Program Clinic, interviewed K.B. and conducted a physical examination of her. She found that K.B. showed no physical signs of sexual abuse.

Dr. Steven Gabaeff, an emergency room physician, reviewed the report of K.B.'s physical exam. He testified that the exam was completely normal and opined that he would have expected to see physical evidence such as damage to the hymen if sexual penetration had occurred.

Appellant testified on his own behalf. He stated that he made admissions during his police interview because Detective Medel threatened to take his children away from him, and one of the other officers told him that K.B. was pregnant and they had appellant's DNA. The detectives left him alone in the room on four or five occasions and turned off the tape recorder each time before leaving.

³ Detective Granillo acted primarily as the interpreter but also questioned appellant at times.

DISCUSSION

A. Contention

Appellant contends that the trial court erred by allowing the prosecution to reopen its case to present additional evidence regarding the length of the police interview of appellant, after the jury had begun deliberating.

B. Standard of Review

The trial court has broad discretion to order a case reopened and to allow the introduction of additional evidence, even after jury deliberations have begun. (*People v. Green* (1980) 27 Cal.3d 1, 42, overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 241; *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3; *People v. Cuccia* (2002) 97 Cal.App.4th 785, 792–793; see also §§ 1093, 1094.)

“‘Factors to be considered in reviewing the exercise of [the trial court’s] discretion include the stage the proceedings had reached when the motion was made, the diligence shown by the moving party in discovering the new evidence, the prospect that the jury would accord it undue emphasis, and the significance of the evidence.’” (*People v. Rodriguez* (1984) 152 Cal.App.3d 289, 295, quoting *People v. Newton* (1970) 8 Cal.App.3d 359, 383.)

“[W]hen faced with questions from the jury, . . . ‘a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury.’ [Citation.]” (*People v. Young* (2007) 156 Cal.App.4th 1165, 1171–1172, quoting *People v. Beardslee* (1991) 53 Cal.3d 68, 97.) The question of whether to allow a party to reopen a case rests within the sound discretion of the trial court and its ruling will not be reversed absent a showing of abuse. (*People v. Marshall* (1996) 13 Cal.4th 799, 836; *People v. Goss* (1992) 7 Cal.App.4th 702, 706.)

C. Proceedings Below

The following evidence was presented during the prosecution's case-in-chief. At the beginning of the transcript of side A of the audio tape,⁴ Detective Medel stated that the time was 12:17 p.m.⁵ At the end of side A, Detective Medel stated "Approximately, thirteen, seventeen hours we are stopping taping." Detective Medel testified that she had been "watching [her] clock knowing that the tape would then turn off on [her] at a certain point because [she] only [had] so many minutes on side A." The detectives left appellant alone in the interview room for four minutes during which time Detective Granillo told Detective Medel what appellant had said during questioning by Detective Granillo that was not translated for her. Detective Medel flipped the tape over to side B and the detectives reentered the interview room. At the beginning of side B, Detective Medel stated "we are going back on tape, we are going back in the room. It is now approximately thirteen twenty-one hours." Detective Medel ended the recorded interview of appellant on side B and stated "Okay. And I'm going to be stopping tape. It is fifteen, forty-two hours."

There was no further testimony by any witness regarding the length of the recorded interview and neither the prosecutor nor defense counsel specifically referenced the length of the interview in closing arguments. The jury began deliberations at 2:42 p.m. and adjourned for the day at 4:00 p.m.

The court received a question from the jury after approximately 30 minutes of deliberations the following morning. The note stated: "We need to clarify the tape side B beginning time and ending time. It is Recorded as 13:21 hours and ends at 15:42 hours—That would be 2 hours and 21 minutes." The trial court confirmed for

⁴ The recording and the transcript of the recording were entered into evidence as People's exhibits 5, and 6, respectively.

⁵ The entire announcement stated "Uh . . . today's date is uh . . . February the seventh, and the time is, uh . . . twelve . . . twelve seventeen . . . at Parker Center Jail. This is detective Medel. Two six nine five four."

counsel that Detective Medel indicated that side B began at 1:21 p.m. and ended at 3:42 p.m. and noted, “Obviously the length of the material contained on side B doesn’t come anywhere close to two hours and twenty-one minutes. So it would appear that there is a discrepancy there.” The jury was summoned and the trial court told them that it was their role to determine if Detective Medel’s testimony accurately represented the length of the recording. After hearing read back of requested testimony on an unrelated issue the jury resumed deliberations at 9:59 a.m.

Sometime later that morning⁶ the prosecutor asked the court if she would be permitted to reopen the People’s case to present testimony for the limited purpose of clarifying the length of the interview on side B of the tape. In a note from the court the jury was asked to advise the court if they “desire[d] to hear additional testimony as to the length of the interview contained on side ‘B’ of the tape.” The jury responded that they did wish to hear additional testimony.

The court indicated that it was inclined to permit the testimony. Defense counsel argued that if the jury doubted the veracity of a witness then it was wrong to allow additional testimony on that issue while the jury was deliberating. The prosecution argued that there was an inconsistency between the length of the recording combined with the brief transcript on the one hand, and the time stated by Detective Medel on the recording, on the other. The trial court allowed the prosecution to reopen for the limited purpose of clarifying the length of the interview on side B of the recording and appellant was also given the opportunity to testify again as to his recollection of the length of the interview. Both parties were then given an opportunity to present oral argument based on the testimony.

Detective Medel was recalled and testified that the interview on side B started at 1:21 p.m. She was certain that it lasted approximately 20 to 22 minutes, and she stopped

⁶ The reporter’s transcript indicates that the court addressed the attorneys regarding the prosecutor’s request at 11:27 a.m.

the tape at the end of the interview at 1:42 p.m. She stated that she was mistaken when she said on the tape that the interview stopped at 3:42 p.m.

Appellant was recalled and testified that he estimated that the entire interview lasted about three and a half hours.

At 1:30 p.m. the jury retired for deliberations which continued for the rest of the afternoon and throughout the following day until a verdict was reached at 3:29 p.m.

D. Analysis

We review the factors set forth in *People v. Newton*, *supra*, 8 Cal.App.3d at page 383, to consider the court's exercise of discretion in permitting the prosecution to reopen after jury deliberations had begun.

Appellant argues that the prosecution's request came at an extremely late stage in the proceedings. But the jury had been deliberating for less than two hours and the prosecution's request was in direct response to the jury's question. The court limited the testimony by Detective Medel to the length of the interview on the recording. Appellant was given an opportunity to respond by testifying to his recollection and his attorney had the last word by presenting argument after the prosecutor. The factor of "the stage the proceedings had reached when the motion was made" (*People v. Newton*, *supra*, 8 Cal.App.3d at p. 383) was not shown to disadvantage appellant.

Second, "the diligence shown by the moving party in discovering the new evidence" (*People v. Newton*, *supra*, 8 Cal.App.3d at p. 383) does not work against the prosecution. Here, the prosecutor acted with reasonable speed. The parties first became aware of the jury's question at 9:31 a.m. Within two hours the prosecutor had contacted the court seeking permission to reopen. Appellant argues that this was not "new evidence" and it was available to the prosecution. While it is true that it was not new evidence, there is no evidence that the prosecution chose for tactical reasons not to present it in their case-in-chief. The precise length of the interview on side B of the

recording went unnoticed by both parties until their attention was drawn to it by the jury.⁷ Nor is there any requirement that the evidence must be newly discovered. Appellant argues based on *People v. Sutton* (1887) 73 Cal. 243, 247 that the evidence must be newly discovered. But there, the moving party was seeking a new trial.

Third, “the prospect that the jury would accord it undue emphasis” (*People v. Newton, supra*, 8 Cal.App.3d at p. 383) also cannot be demonstrated. Appellant contends that reopening allowed the prosecution to rehabilitate a key witness. But the scope of the testimony was very narrowly limited by the court to respond only to the jury’s question. The case appellant cites in support of his assertion that the prosecution sought to rehabilitate Detective Medel by clarifying her earlier testimony is inapposite. In *People v. Green* (1960) 180 Cal.App.2d 537, 544, the defendant unsuccessfully moved to reopen to present testimony of a *new* witness to bolster defendant’s testimony. The jury could reasonably have questioned the credibility and accuracy of all of Detective Medel’s prior testimony in light of the fact that she testified that she had previously incorrectly stated the ending time of side B of the recorded interview.

Lastly, “the significance of the evidence” (*People v. Newton, supra*, 8 Cal.App.3d at p. 383) favored a brief reopening to clarify the length of the recorded interview because questions had been raised by appellant as to whether the recording was accurate. Appellant testified that the detectives left the room “about four or five times” during the interview, suggesting that the recording was not complete because it did not contain alleged threats by the detectives to take away his children. In closing argument defense counsel argued that the detectives threatened to take away appellant’s children, and also told him that K.B. was pregnant, which was not recorded on the tape.

The record indicates that side A of the recorded interview started at 12:17 p.m. and ended at 13:17 p.m., a period of 60 minutes which produced 98 pages of transcription.

⁷ In closing argument while referring to the behavior of the detectives during the recorded interview, defense counsel stated, “you just heard them lying for *two* hours on the tape.” (*Italics added.*)

Side B of the recorded interview was transcribed in 30 pages which is approximately one-third of the number of pages for side A. Because the same participants were involved in both parts of the interview, the question and answer exchange remained similarly paced, and there were no observable periods of recorded silence, a reasonable inference would be that the length of the recording should be approximately one-third of side A, or about 20 minutes. But the transcript of the recorded interview indicated that Detective Medel started the tape at 13:21 p.m. and ended it at 15:42 p.m., a period of two hours and 21 minutes.

When the court permitted the prosecution to reopen, Detective Medel's and appellant's recollections of the length of the recorded interview differed. Detective Medel testified that "the first side was approximately 50 to 60 minutes and then the second side was approximately 20, 22 minutes, right in there." When appellant was asked how long the "total interview" lasted, he responded "about three-and-a-half hours."

In *People v. Carter* (1957) 48 Cal.2d 737, 754–757, the Supreme Court found the trial court prejudicially abused its discretion in refusing to allow the defense to reopen to present newly discovered evidence tending to rebut the prosecution's circumstantial case. The court stated that under the circumstances, the defendant's right to a fair trial "should have overcome arguments based on the notion that a criminal trial is a rigorously adversary proceeding in which a party must seize his opportunities when presented or forever lose them." (*Id.* at p. 757.) The People also are entitled to a fair trial. We are satisfied that the trial court properly exercised its discretion to order the case reopened here. In analyzing the issue the court stated that "trials most fundamentally are a search for the truth" and "confusion and obfuscation are inconsistent with such a search."

DISPOSITION

The judgment is affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ