Filed 3/28/12 P. v. Flores CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSE FLORES, Defendant and Appellant.	B231621 (Los Angeles County Super. Ct. No. NA050924)

APPEAL from a judgment of the Superior Court of Los Angeles County. James Otto, Judge. Affirmed.

Edward J. Haggerty, 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, Steven D. Matthews and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Flores appeals from the judgment following his convictions of raping and committing a lewd act upon a child—his teenage daughter. We affirm.

FACTS AND PROCEEDINGS BELOW

In the May 2000, Flores illegally brought his daughters B and J to the United States from Mexico. B was 13 years old and J was 14. The girls lived with Flores, his wife Sharlene, their baby and Sharlene's children from a prior relationship, Derek, age 13, and Collette, age 11.

The evidence showed that Flores began molesting B soon after she came to live with him. In April 2001, B was watching television in the living room when Flores sat down next to her and kissed her on the cheek, on the neck and touched her breasts. He next pulled down B's underwear and inserted his penis in her vagina. He continued having intercourse with her even after she told him he was hurting her. When he was finished having sex with B, Flores told her to go take a shower. She did as instructed and noticed she was bleeding from her vagina. B testified she submitted to Flores's attack because she was afraid that he would beat her if she resisted. She stated he frequently beat her with a belt when he was upset with her over something she did.

A month after the first incident Flores had sexual intercourse with B on the floor of the living room. B testified that she did not resist because: "I was scared. If I wouldn't do whatever he said, I was going to get beat. He would have spanked me."

Three or four weeks later, Flores came to B as she lay on the living room couch watching television. He kissed her, removed his pants and her pants and then placed his penis in her vagina. After a while, he pulled his penis out of B and masturbated.

Flores also touched J's breasts on three occasions. On one occasion he put his mouth on her breasts, opened his pants and forced her to touch his penis.

On October 6, 2001, Flores ordered B to come into the kitchen and massage his arm. As she did so, Flores pulled up her shirt and pulled down her pants. Flores had the zipper of his pants open and his penis exposed. He was touching and kissing B when

Sharlene walked in. Sharlene screamed and began hitting Flores in the face and on the head. She told Flores to get out of the house. She then called her brother-in-law who picked up the children and took them to his house. A short time later, Flores moved out of the family home and fled to Mexico. A warrant was issued for Flores's arrest.

On October 17, 2001, Dr. Lynne Ticson performed a sexual assault examination of B and observed a tear of B's hymen. In Dr. Ticson's opinion, the tear was caused by "blunt force trauma" and that trauma was consistent with a vaginal penetration six months earlier, the time of Flores's first sexual assault on B.

B and J were placed in foster care and Sharlene moved to Denver with her children. In mid 2002, Sharlene and Flores reunited and lived in Denver with Collette and the other children until 2009 when Flores was arrested and returned to Los Angeles.

At trial, B's stepsister, Collette, testified for the defense. She stated that she lived in the same house as Flores during the time he allegedly molested B and J and that he never touched her "in an inappropriate way."

Following a jury trial, Flores was convicted of two counts of raping B and one count of committing a lewd act upon her. The court sentenced Flores to an aggregate prison term of 22 years. Flores filed a timely appeal.

DISCUSSION

I. ANY ERROR IN REJECTING THE ORIGINAL JURY'S VERDICTS WAS HARMLESS.

The jury as originally constituted reached verdicts as to some of the counts and the foreperson signed the verdict forms attesting to these findings. The verdicts were never recorded by the court clerk, however. Before the jury reached verdicts on the remaining counts, the court excused Juror 11 for medical reasons and replaced him with an alternate. The court then sealed the findings of the original jury and instructed the reconstituted jury to begin deliberations anew as to all counts.

Flores contends that the court should not have ordered the reconstituted jury to deliberate on all counts but should have accepted the original jury's verdicts on the counts it agreed upon. The People argue the court properly allowed the reconstituted jury to return verdicts on all counts.

We need not decide whether the court erred in submitting all counts to the reconstituted jury. Even if the court erred, Flores cannot show prejudice because the two juries reached identical verdicts on the counts they decided. Both juries found Flores guilty on count 3 (rape) and count 7 (lewd conduct) and not guilty on count 5 and 6 (forcible oral copulation).

II. THE COURT DID NOT ERR IN EXCLUDING EVIDENCE THAT B AND J WERE PARTICIPATING IN SATAN WORSHIP AND WITCHCRAFT AT THE TIME OF THE ALLEGED MOLESTATIONS.

Prior to trial the prosecution moved to exclude any evidence that B and J were participating in Satan worship and witchcraft at the time Flores allegedly molested them. Flores argued such evidence was admissible on the issue of the girls' credibility. The court ruled that absent expert witness testimony on how Satanism or witchcraft impacted a person's credibility, the proffered evidence would confuse the issues and be unduly prejudicial and time consuming.

Two cases decided by our Supreme Court in 1991 upheld the exclusion of evidence of Devil worship and witchcraft on the issue of credibility. In *People v. Morris* (1991) 53 Cal.3d 152, 210, footnote 10, the court stated: "[T]he prosecution's attempt to impeach one of the inmate witnesses on the ground that she was a former devil worshipper was improper. Devil worship was not shown to have any bearing on the witness's credibility or the issues in this case." In *People v. Sully* (1991) 53 Cal.3d 1195, 1220-1221, the court upheld the exclusion of evidence that a witness had been part of a group that practiced witchcraft. "[T]he impeachment value of the witchcraft evidence was marginal," the court observed, and there was "potential for prejudice: Livingston's mere association with witchcraft, without more, was peripheral to the issue in the case, including her credibility."

The court in the present case did not abuse its discretion in excluding the evidence. Flores did not offer expert witness testimony on how Satanism or witchcraft impacted a person's credibility. Without such a foundation the evidence would have been unduly prejudicial and would have consumed too much time on a peripheral issue.

III. THE COURT DID NOT ERR IN LIMITING COLLETTE'S TESTIMONY THAT FLORES DID NOT MOLEST TO THE PERIOD THAT FLORES ALLEGEDLY MOLESTED B AND J.

After the prosecution introduced evidence of Flores's uncharged acts of sexually molesting J, (see *ante*, at p. 2) Flores sought to introduce rebuttal testimony from Collette that she had lived with Flores since she was 5 years old, she was living with him and her mother, Sharlene, when he was arrested in 2009, and that he had never molested her. The court ruled that Collette could testify that Flores never molested her but, over Flores's objection, limited her testimony to the period during which Flores allegedly molested B and J. Accordingly, Collette testified that "up until the year 2001," Flores never "sexually molested" her nor touched her "in an inappropriate way."

Flores argues that the court erred in limiting evidence that he did not molest Collette to a particular time because it allowed the jury to infer that he molested her after that time. We see no error in the court's ruling.

We are not persuaded that the jury would draw the inference Flores suggests. The jury could more reasonably conclude that defense counsel limited his questions to Collette to the period she, Flores, B and J lived together because the time when Flores allegedly molested B and J was the only relevant time period in the trial.

Furthermore, Collette's testimony was introduced to rebut the inference of J's testimony that Flores had a tendency or propensity to sexually molest young girls. But Collette's testimony was only relevant to rebut that inference if it showed that in a "similar situation" or when "given a similar opportunity," Flores had not behaved in accordance with his alleged tendency or propensity. (*People v. Callahan* (1999) 74 Cal.App.4th 356, 376.) The trial court could reasonably conclude that after Flores returned from Mexico in 2002 and resumed living with Sharlene and 13-year-old Collette the circumstances were no longer similar to those that existed prior to October 2001, when he allegedly molested B and J. B and J were undocumented aliens, new to the country, spoke limited English, did not get along well with Sharlene and, therefore, were unlikely to report Flores's abuse to school officials or the police. Collette was only 11 years old at the time of the molestation and did not share the vulnerabilities of B and J.

IV. FLORES FORFEITED HIS CHALLENGE TO CALCRIM NO. 1112 BY NOT RAISING IT BELOW.

Flores argues that CALCRIM No. 1112, which sets out the elements of the crime of a lewd act on a child, is "impermissibly argumentative" because in addition to defining the elements of the crime it emphasizes certain facts that the prosecution is *not* required to prove, i.e. that the conduct need not actually arouse the sexual desires of the perpetrator or that the child did not consent to the conduct.

Flores did not make this argument below. Since Flores does not contend the instruction is legally incorrect, his failure to challenge its wording in the trial court forfeits his claim on appeal. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1138.) In any case, Flores's argument lacks merit. (*Cf. People v. Flores* (2007) 157 Cal.App.4th

216, 220 [instruction that assault does not require actual touching, intent to use force, or resulting injury was not unlawfully argumentative].)

V. THE FLIGHT INSTRUCTION DID NOT DENY FLORES DUE PROCESS.

The court instructed the jury under CALCRIM No. 372: "If the defendant fled after he was accused of committing the crime, that conduct *may* show that he was aware of his guilt. . . . [I]t is up to you to decide the meaning and importance of that conduct. However, *evidence that the defendant fled cannot prove guilt by itself*." (Italics added.) Flores maintains the instruction unlawfully permitted the jury to infer one fact—guilt—from another fact—flight after being accused of the crime.

We reject Flores's argument for two reasons. First, it is not supported by the plain language of the instruction which tells the jurors that they *cannot* infer guilt solely on the basis of the defendant's flight after being accused of the crime. Second, our Supreme Court upheld the CALJIC flight instruction under an identical due process challenge in *People v. Mendoza* (2000) 24 Cal.4th 130, 179-180. The only difference between the CALCRIM instruction used in our case and the CALJIC instruction used in *Mendoza* is that the former uses the phrase "aware of his guilt" and the latter uses the phrase "consciousness of guilt." We agree with the court in *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1159 that there is no constitutionally significant difference between an awareness of guilt and a consciousness of guilt in the context of the flight instruction.

VI. THE COURT PROPERLY INSTRUCTED THE JURY UNDER THE PROPENSITY INSTRUCTION, CALCRIM NO. 1191.

CALCRIM No. 1191 allows the jury to conclude from evidence of uncharged sex crimes that "the defendant was disposed or inclined to commit sexual offenses, as charged here." Flores contends this instruction violates his right to due process of law because it undermines the presumption of innocence and the requirement for proof beyond a reasonable doubt. He concedes that this argument was rejected by our Supreme

Court in *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016 and that he is raising it for the purpose of preserving it for federal habeas review.

The Supreme Court's opinion upheld a CALJIC instruction, CALJIC No. 2.50.01, but, again, there is no material difference in the wording of the two instructions. (*People v. Cromp* (2007) 153 Cal.App.4th 476, 480.) Therefore, we reject Flores's challenge to CALCRIM No. 1191.

VII. THE COURT PROPERLY DENIED FLORES'S "*TROMBETTA*" MOTION.

Dr. Ticson testified that B's vaginal examination was photographed but at the time of trial she did not know where those photographs were. She never had them she stated. The prosecutor represented to the defense and the court that he had attempted to obtain the photographs from the hospital where B was examined but the hospital informed him it only had the report of the examination, no photographs. The police also sought the photographs prior to trial and received the same information from the hospital.

Flores moved to dismiss the case based on the prosecution's failure to preserve the photographs of B's examination. The court denied the motion on the ground there was no "purposeful destruction" of the photographs. The court did not err.

Initially we observe that this is not a case of the prosecution failing to preserve evidence. It is undisputed that the prosecution never had possession of the photographs. Although our Supreme Court has suggested that there might be situations in which the failure to collect or obtain evidence would justify sanctions against the prosecution, the court has continued to recognize that as a general rule due process does not require the police to collect particular items of evidence. (*People v. Frye* (1998) 18 Cal.4th 894, 943.)

Here, neither the prosecutor nor the police physically or constructively possessed the photographs nor were they responsible for the hospital's maintenance of its records. Because the prosecution had no general duty to acquire evidence it did not possess, there was no due process violation.

Furthermore, whatever circumstances might trigger a duty to obtain exculpatory evidence, such a duty could not be greater than the duty to preserve such evidence. In *City of Los Angeles v Superior Court* (2002) 29 Cal.4th 1, 8, the court explained the parameters of the prosecution's duty to preserve evidence: "[The] failure to retain evidence violates due process only when that evidence 'might be expected to play a significant role in the suspect's defense,' and has 'exculpatory value [that is] apparent before [it is] destroyed.' (*California v. Trombetta* (1984) 467 U.S. 479, 488-489 [104 S.Ct. 2528, 2534, 81 L.Ed.2d 413].) In that regard, the mere 'possibility' that information in the prosecution's possession may ultimately prove exculpatory 'is not enough to satisfy the standard of constitutional materiality.' (*Arizona v. Youngblood* (1988) 488 U.S. 51, 56 [109 S.Ct. 333, 336, 102 L.Ed.2d 281], fn. *.) And . . . when the prosecution fails to *retain* evidence that is potentially useful to the defense . . . there is no due process violation unless the accused can show bad faith by the government. [(*Id*. at p. 58.)]" (Italics added.) In the case before us, the trial court found no evidence of "purposeful destruction" of the photographs by the government nor did it find the government acted in bad faith in failing to obtain evidence it knew was potentially useful to the defense.

VIII. THE LETTER FROM FLORES TO J WAS SUFFICIENTLY AUTHENTICATED.

Over Flores's objection of lack of authentication, the court admitted a letter purportedly written to J by Flores in February 2010 while he was in custody awaiting trial. The letter was sent to J at her uncle Miguel's address in Long Beach.

A writing may be authenticated by any admissible evidence "sufficient to sustain a finding that it is the writing that the proponent of the evidence claims that it is[.]" (Evid. Code, § 1400.) The People argue that the letter was self-authenticated under Evidence Code section 1421 which states: "A writing may be authenticated by evidence that the writing refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the

writing." The People point out that Flores's name, booking number, and address were listed as the return address on the envelope. The court took judicial notice that the booking number on the envelope was Flores's booking number. Additionally, the letter referred to it being "9 long years" since Flores parted from J and B and noted that B's "son is my grandson."

A trial court's finding that sufficient foundational facts have been presented to support admissibility is reviewed for abuse of discretion. (*People v. Lucas* (1995) 12 Cal.4th 415, 466.) We find no abuse of discretion in admitting the letter.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.