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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JENNA MARIE RICHMOND,

Defendant and Appellant.

2d Crim. No.B277406
(Super. Ct. No. KA102775-01)
(Los Angeles County)

A jury convicted Jenna Marie Richmond of oral copulation of a person under 14 years of age (Pen. Code, § 288a, subd. (c)(1))¹ and lewd acts upon a child (§ 288, subd. (a)). She was sentenced to five years in state prison.

We conditionally reversed and remanded for the trial court to review certain privileged records in camera to determine whether they contain information relevant to the credibility of prosecution witnesses. (*People v. Richmond* (Jan. 26, 2016, B258109) [nonpub. opn.].) The trial court did so and found no

¹ All statutory references are to the Penal Code.

such evidence. We have conducted our own review of the records and we consider additional issues. We affirm.

FACTS

Richmond worked at the Leroy Haynes Center (the Center), a residential facility for severely emotionally disabled children. Two of the children over whom Richmond had charge were Angel and Q.

Q. reported that he saw Richmond having oral sex with Angel in one of the Center's vans and Richmond and Angel engaged in sexual intercourse in a bathroom. Angel denied anything inappropriate occurred. A unit manager at the Center saw Angel wearing a class ring. The ring had Richmond's initials inside. Angel said he found the ring.

During trial the court sustained objections to questions about Angel's and Q.'s behavioral problems as privileged medical information. In Richmond's motion for a new trial, she requested that the trial court issue a subpoena duces tecum for documents including Angel's and Q.'s therapy records. The court refused.

We reversed and remanded for postjudgment proceedings. We stated:

"The trial court shall compel the Center to produce all the records Richmond sought from the Center. The trial court shall view these records in camera and determine whether they contain information relevant to the credibility of prosecution witnesses. Depending on its findings, the court may find [it] necessary to examine certain witnesses in camera.

"The matter is conditionally reversed. The trial court shall make findings on its determination for possible review. If it determines the information contained in these records will have no appreciable effect on the outcome of these proceedings, it shall

state [its] reasons for these findings and rearraign Richmond and pronounce judgment

“On the other hand, if the trial court finds the information withheld denied Richmond a fair trial, it shall grant Richmond a new trial.” (*People v. Richmond, supra*, B258109.)

The trial court reviewed the sealed behavioral and youth camp records in camera. The court found the records would have no appreciable effect on the trial. The court made a detailed statement of the reasons for its finding. That statement is contained in sealed reporter’s transcripts.

The trial court reimposed the five-year prison sentence.

DISCUSSION

I

Richmond contends the trial court erred in refusing to disclose the records to the defense.

But requiring the trial court to release the records to Richmond after it found they are of no value to the defense would defeat the entire purpose of the in camera review.

We have conducted our own review of the sealed records and the trial court’s sealed statement of the reasons for its finding. We are satisfied the trial court complied with our instructions, including properly balancing Richmond’s right of confrontation against the witness’s right of privacy. We agree with the trial court’s conclusion. The records are of no value to Richmond. Under the circumstance, there is no basis for compelling the trial court to disclose the records to the defense.

II

Richmond contends trial counsel provided ineffective assistance when he failed to discover Q.’s juvenile court record.

Richmond argues Q.'s juvenile court files show three burglaries, three robberies, one of them an armed robbery, and mental health hospitalizations at two different facilities. Q. also made a terrorist threat by threatening to kill a social worker. Finally, Q. told a social worker that if he did not like the Center, he would call the police and report he was being harmed. Richmond claims Q. carried out his threat by accusing her.

This issue was the subject of a petition for habeas corpus filed by Richmond in the trial court. The trial court denied the petition.

A defendant claiming ineffective assistance of counsel has the burden of showing counsel's representation fell below an objective standard of reasonableness, and but for counsel's unprofessional errors, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Mayfield* (1993) 5 Cal.4th 142, 185.) Where the record does not show why defense counsel acted or failed to act in a professional manner, the conviction must be affirmed unless counsel was asked for an explanation and failed to provide one, or there could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) The prejudice prong requires the defendant to show but for counsel's errors there is a reasonable probability the defendant would have obtained a more favorable result. (*In re Wilson* (1992) 3 Cal.4th 945, 950.)

Assuming trial counsel's failure to discover Q.'s juvenile history was deficient, Richmond fails to show prejudice. The jury was aware that Q. was housed in a level 12 residential treatment facility, just one level below a locked psychiatric treatment facility. The jury must have been aware that Q. had a very troubled history.

Q.'s threat that if he did not like the Center's program he would tell the police he was being harmed was aimed at getting Q. released from the program. It is not clear how reporting that Angel was being harmed would get Q. released from the program. If Q. wanted to be released from the program, the most obvious way was for him to fabricate a story that he, not Angel, was being harmed.

Moreover, Q. testified that at the time he told the Center staff about Angel and Richmond, he was "really mad" at Richmond. The jury was not persuaded that Q. was motivated by ill will to fabricate his accusations against Richmond.

There is no reasonable probability Richmond would have obtained a more favorable result but for counsel's deficiency.

III

Richmond contends she was denied timely discovery when the prosecutor disclosed on the day of trial that Richmond's high school ring had been recovered from Angel months prior.

On the day before the jury selection, the prosecutor informed the court and Richmond that two days prior the Center staff told him the ring had been recovered from Angel.

Richmond objected to the introduction of the ring into evidence. Defense counsel claimed he had been "sandbagged" and "perhaps" he would have done something different to prepare for trial. He said he did not have the opportunity to tell Richmond that the prosecution had additional evidence. The trial court pointed out that he still had that opportunity because the trial had not begun. Richmond did not request a continuance.

Richmond does not contend the prosecution committed misconduct under *Brady v. Maryland* (1963) 373 U.S. 83. Instead, she contends the prosecution violated her statutory discovery

rights under section 1054.1. Section 1054.1, subdivision (c) requires the prosecutor to disclose relevant evidence obtained as part of the investigation of the charged offense if the evidence is in the possession of the prosecutor or if the prosecutor knows it is in the possession of an investigating agency. The disclosure must be made at least 30 days prior to trial. (§ 1054.7.) If the information becomes known within 30 days of trial, disclosure must be made immediately. (*Ibid.*) The court has available a wide range of consequences for failure to comply with the statute, including fines, contempts and instructions to the jury on evaluating the evidence. (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1758.) Exclusion of the evidence, however, is not appropriate absent a showing of willful conduct and significant prejudice. (*Ibid.*)

Here the prosecutor disclosed the ring two days after he learned of it. Nevertheless, Richmond points out that a member of the Center's staff had the ring for months. A police investigator assigned to the case told the staff member to hold onto the ring. Richmond argues the obligation to disclose falls on both the prosecutor and the police investigating the case. (Citing *People v. Goliday* (1973) 8 Cal.3d 771, 782-783.)

Assuming that the police or prosecutor violated the statute, Richmond makes no showing that the violation was willful. Thus, an exclusion sanction is not warranted. (*People v. Gonzales, supra*, 22 Cal.App.4th at p. 1758.)

Moreover, Richmond makes no showing of prejudice. General statements that the defense was "sandbagged" or that "perhaps" the defense would have done something different are not adequate to show prejudice.

IV

Richmond contends the prosecution committed misconduct in arguing to the jury that the defense could have subpoenaed the van logs. The prosecution knew the defense attempted to subpoena the van logs, but enforcement of the subpoena was denied by the trial court.

Richmond argued to the jury that the prosecution failed to present any evidence, such as logs of a van use kept by the Center, that would corroborate Q.'s testimony of a trip in the van.

In closing argument, the prosecutor replied: "Defense talked about these logs; again, you are speculating about evidence and the existence of what they would have said. Subpoena power is available to both sides. Defense has no burden, but they have the subpoena power as well. The burden is on the prosecution, but we're not to speculate about other stuff; only what you have before you. Look, the dates they're not exact. [Q.] told you, I don't remember the exact dates."

Under the federal Constitution, a prosecutor commits reversible misconduct only if the conduct infects the trial with such unfairness as to make the resulting conviction a denial of due process. (*People v. Davis* (2009) 46 Cal.4th 539, 612.) Here the prosecutor's comment about the defense having the subpoena power did not amount to a denial of due process.

Under California law a prosecutor commits misconduct when he uses "deceptive or reprehensible methods" to persuade the jury. (*People v. Davis, supra*, 46 Cal.4th at p. 612.) In such a case the misconduct is reversible only if it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. (*Ibid.*)

Here the prosecutor should not have commented that the defense has the subpoena power when he knew, or should have known, the defense tried to subpoena the van logs. Nevertheless, the error is harmless.

The offending portion of the prosecutor's comments was brief, consisting of just two sentences. There is no reasonable probability Richmond would have obtained a more favorable result had those two sentences not have been spoken. Second, the prosecutor did not suggest that the jury hold the failure to produce the van logs against Richmond. Instead, the prosecutor reminded the jury that the People have the burden of proof. Finally, as the prosecutor pointed out, the precise date on which the molestation occurred is not crucial to the case.

The judgment is affirmed.

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GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Juan Carlos Dominguez, Judge

Superior Court County of Los Angeles

William P. Daley, Innocence Legal Team, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Ryan M. Smith, Deputy Attorney General, for Plaintiff and Respondent.