Filed 9/4/18 P. v. Rosas CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. PASCUAL ROSAS, Defendant and Appellant.	B284617 (Los Angeles County Super. Ct. No. BA438900)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Abzug, Judge. Affirmed with directions.

Mark S. Givens, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Pascual Rosas appeals from a judgment of conviction entered after a jury found him guilty of continuous sexual abuse of a child (Pen. Code, § 288.5, subd. (a)[1]; count 1—Stephanie V.), committing a lewd act upon a child (§ 288, subd. (a); count 2—Arianna D.),[2] and two counts of attempted commission of a lewd act upon a child (§§ 288, subd. (a), 664; counts 3 & 4—Arianna D.). The jury found true the allegation defendant committed crimes against more than one victim (§ 667.61, subds. (b), (e)(4)). The trial court sentenced defendant to concurrent terms of 15 years to life on counts 1 and 3 (count 2 as reflected in the verdict form) and imposed concurrent terms of three years on counts 4 and 5 (3 and 4 as reflected in the verdict form). The court imposed various fines and assessments, ordered defendant to register as a sex offender, and ordered him to submit to AIDS testing.

On appeal, defendant contends the police violated his *Miranda*[3] rights when they obtained incriminating statements from him. He also contends the trial court failed to make the probable cause determination required by section 1202.1,

---

1 All further statutory references are to the Penal Code.

2 The counts as reflected in the verdict forms relate to counts 1 and 3 and 4 and 5 of the Information, respectively. The original count 2 had been dismissed at the preliminary hearing and the adjustment in numbering on the verdict form was made to avoid confusing the jurors with the circumstance that the Information contained no count 2. The court confirmed the renumbering of count 3 of the information as count 2 on the verdict form orally and in a minute order.

3 *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] (*Miranda*).

subdivision (e)(6)(A)(iii) and (v), before ordering him to submit to AIDS testing. We agree the trial court erred in not making that assessment before ordering the AIDS testing order and remand for further proceedings as to that issue. In all other respects, we affirm the judgment.

BACKGROUND

A. *Prosecution*

Defendant and Laura Ortiz (Ortiz) lived across the street from Ortiz's uncle on Sydney Drive in East Los Angeles in or about the year 2008. Yesenia O. and her five children—including Stephanie, who then was about eight years old, and Arianna, who then was about five years old—lived with Ortiz's uncle. The families regularly got together for barbecues or parties either at the uncle's home or at defendant and Ortiz's home.

Defendant and Ortiz later moved to a home on Ford Boulevard. Yesenia and her children moved to a home on Seabrook Avenue.

Stephanie (age 15 at the time of trial) testified that defendant touched her vagina more than once. The first time was when she was at his Ford Boulevard home for a family get together. Defendant pulled Stephanie into his room while she was walking down the hallway toward the bathroom, and he locked the door behind her. He sat her on the edge of the bed, stood in front of her, reached under her skirt and touched her vagina over her underwear. She was scared and began to cry. She then walked away and did not tell anyone what happened.

The second time was when she was at the Sydney Drive home for a family get together. Stephanie was in the living room

with her grandmother, who was nearly blind, and defendant. Defendant called Stephanie over to him. She tried to ignore him, but her grandmother told her to go over to him. She went over and sat on the floor. Defendant lifted her dress and touched her vagina. Stephanie panicked and ran outside. She did not tell anyone what happened, because she did not know if they would believe her.

The third time was at her ninth birthday party at her home on Seabrook Avenue. She went into her mother's room to put one of her birthday presents on the bed. Defendant followed her into the room and locked the door. Defendant sat on the bed. Stephanie sat on the floor and crossed her legs so that defendant could not touch her again. Defendant grabbed her by the arm and pulled her closer to him. He lifted her skirt and touched her vagina underneath her underwear. She was scared and did not know what to do. She pushed him away. He offered to pay her money if she let him touch her. He said he would not do anything else; she would not have to have sex with him. She said no and ran out of the room crying. Her mother asked her what was wrong, and she said that she fell down. She did not want to tell her mother what really happened.

Arianna (age 13 at the time of trial) testified that defendant touched her vagina more than once when she and her family were at his home. She was four or five years old at the time. On one occasion, she and other children were in defendant's bedroom at the Ford Boulevard home, watching a movie. Arianna was sitting on the floor with her legs crossed. Defendant was sitting very close behind her. He put his hand inside her underwear and started touching her vagina. She was confused and did not understand what he was doing. She did not

tell anyone what he had done. She testified that he had done this to her before and had given her money so that she would not tell her parents.

On another occasion, defendant took her into a dark bedroom. He stood in front of her and pulled down his pants. He did not touch her.

In 2015, when Arianna was in fifth grade, she was sent to the school counselor for behavioral problems. She told the counselor that the babysitter's husband had molested her over a period of several months when she was in second grade. The counselor reported the molestation.

Detective Mayra Zuniga of the Los Angeles County Sheriff's Department interviewed Yesenia. Yesenia told the detective that Stephanie and Arianna said that defendant touched them inappropriately.

On March 19, 2015, Detective Zuniga went to defendant's home and spoke to him briefly about her investigation. She asked him to come to the sheriff's station to discuss the matter with her.

The next contact with the police was on August 11, 2015, when defendant voluntarily went to the sheriff's station where he agreed to take and did take a polygraph examination. He also spoke with Deputy Castellanos on the same visit while Detective Zuniga listened to the conversation from another room. Defendant denied touching Stephanie and Arianna inappropriately. This interview lasted about two hours.

Detective Zuniga then went into the interview and also questioned defendant. Defendant admitted he "maybe" touched the girls once, but he was not sure because he had been drinking. Eventually, he admitted touching Stephanie and Arianna's

vaginas over their clothing. At Detective Zuniga's suggestion, defendant wrote a letter to the girls, apologizing for what he had done and asking their forgiveness.[4]

B. *Defense*

Ortiz testified she began her relationship with defendant in 2008. As far as she knew, defendant was never alone with Stephanie or Arianna. Stephanie and Arianna never came to their homes on Ford Boulevard or Sydney Drive. Ortiz and defendant did not go to Stephanie's birthday party in 2010, because Ortiz and Yesenia were not speaking to each other at that time. Ortiz was tired of Yesenia borrowing money from her and not repaying it.

Ortiz and defendant did visit Yesenia's home on Sydney Drive because Ortiz's aunt and uncle lived there. They went there once on Thanksgiving and once for a birthday party for Yesenia's son. Defendant did not leave Ortiz's sight on these occasions.

Ortiz denied she or defendant ever babysat Yesenia's children.

Defendant testified in his own behalf. He testified he and Ortiz moved to Sydney Drive across the street from her uncle in mid-2009. While they lived on Sydney Drive, Yesenia's children never came to their home. When he and Ortiz went to her uncle's home, he did not spend time with Yesenia's children.

---

[4] A video recording of this second interview was played for the jury.

Defendant and Ortiz moved to Ford Boulevard in mid-2010. Yesenia and her children never came to their home. He never babysat the children.

Defendant saw Yesenia's children on two occasions at Ortiz's uncle's house: Thanksgiving 2008 and a birthday party for Yesenia's son. Other than those two occasions, any time he went to the uncle's house it was to drink beer with the uncle, and Ortiz was always with him. He was never alone with Stephanie or Arianna. He could not recall ever watching a movie with Arianna.

Defendant had no contact with Yesenia after March 2010. He did not like it that Yesenia encouraged Ortiz to drink and was constantly asking for money.

Regarding things he said during his interviews at the police station, defendant explained he had type 2 diabetes and needed to eat and take his medication at specific times, or he would experience difficulties. The sheriffs questioned him for over three hours, during which time he had no food, water, or medication. This left him "in a bad way."

Defendant reviewed the video recording of the interview. He acknowledged making incriminating statements but explained that the sheriffs used the fear of something happening to his daughter against him. They also asked the same questions over and over again, and finally he just agreed with them. Additionally, although he looked okay on the video, his diabetes was elevated: "[W]hen I told them I was diabetic, they tested me for it and I was above 400."

Dr. Iris Blandon-Gitlin is a psychologist whose area of expertise is the factors that affect the reliability of statements made by witnesses and suspects. She testified concerning the

various techniques used by law enforcement during interrogations to create a stressful environment and convince a suspect to confess. She noted that due to stress suspects may not be thinking properly and may just repeat what they think the interrogating officers want to hear. Additionally, certain interrogation tactics, such as presenting false evidence or lying to suspects, lead to a high level of errors, such as unreliable information and false confessions. In her opinion some of the tactics used in the interview of defendant were coercive and could lead to a false confession.

C. *Rebuttal*

Yesenia's former husband, Rodrigo D., testified that defendant and Ortiz frequently came to his Sydney Drive home. They came to every party and sometimes came over even when there was no party. The children were present during these visits.

Defendant and Ortiz also visited Rodrigo and his family after they moved to Seabrook Avenue. The family visited defendant and Ortiz at the Sydney Drive and Ford Boulevard homes. Rodrigo had Ortiz watch Stephanie and Arianna when he was looking for a new home because he did not have room in his car to take the children on those trips.

CONTENTIONS

Defendant contends the incriminating statements obtained from him during the second interview in the police station were obtained in violation of *Miranda* and that, if that issue was waived below, it established his trial counsel rendered ineffective

assistance mandating reversal. He also contends the order that he submit to HIV testing was deficient as the trial court did not first determine there was probable cause for the testing order.

DISCUSSION

A. *Defendant's Contention His* Miranda *Rights Were Violated*

Defendant claims the incriminating statements he made in his interviews were obtained in violation of *Miranda* and should have been excluded because his questioning amounted to a custodial interrogation without prior advisement of his *Miranda* rights. The People argue that this claim was forfeited by his counsel's failure to object to the admission of the statements he made during his visit to the sheriff's station on August 11, 2015.

1. *Applicable legal principles*

"The Fifth Amendment provides that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.' (U.S. Const. 5th Amend. . . .) To safeguard a suspect's Fifth Amendment privilege against self-incrimination from the 'inherently compelling pressures' of custodial interrogation (*Miranda*, *supra*, 384 U.S. at p. 467), the high court adopted a set of prophylactic measures requiring law enforcement officers to advise an accused of his right to remain silent and to have counsel present prior to any custodial interrogation (*id*. at pp. 444-445)." (*People v. Jackson* (2016) 1 Cal.5th 269, 338-339.) "A statement obtained in violation of a suspect's *Miranda* rights may not be admitted to establish guilt in a criminal case. [Citation.]" (*Id*. at p. 339.)

"It is settled that *Miranda* advisements are required only when a person is subjected to 'custodial interrogation.' [Citations.]" (*People v. Davidson* (2013) 221 Cal.App.4th 966, 970; accord, *People v. Leonard* (2007) 40 Cal.4th 1370, 1400.) "An interrogation is custodial when 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" (*Leonard*, *supra*, at p. 1400, quoting from *Miranda*, *supra*, 384 U.S. at p. 444.)

"Whether a person is in custody is an objective test: the pertinent inquiry is whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. [Citation.] The totality of the circumstances is considered and include '(1) whether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of the questioning.' [Citation.] Additional factors are whether the officer informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect's freedom of movement, whether the police were aggressive, confrontational, and/or accusatory, and whether the police used interrogation techniques to pressure the suspect. [Citation.]" (*People v. Davidson*, *supra*, 221 Cal.App.4th at pp. 971-972.) The question is whether, under the circumstances surrounding the interrogation, "'a reasonable person in [the] defendant's position would have felt free to end the questioning and leave' [citation]." (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1400; see *People v. Zamudio* (2008) 43 Cal.4th 327, 341.)

To be properly raised on appeal, the issue whether a defendant was in custody at the time he or she made statements

to the police which arguably are incriminating must first be raised in the trial court. Thus, under Evidence Code section 353, subdivision (a), "a judgment can be reversed because of an erroneous admission of evidence only if the record contains an objection both '"timely made and so stated as to make clear the specific ground of the objection"' or motion. [Citation.] If a defendant fails to make a timely objection on the precise ground asserted on appeal, the error is not cognizable on appeal. [Citation.]" (*People v. Polk* (2010) 190 Cal.App.4th 1183, 1194.)

Failure to timely and specifically raise a *Miranda* claim in the trial court waives that issue on appeal. (*People v. Holt* (1997) 15 Cal.4th 619, 667.) "The reason for the rule is clear—failure to identify the specific ground of objection denies the opposing party the opportunity to offer evidence to cure the asserted defect. (*People v. Wright* (1990) 52 Cal.3d 367, 404 . . . .) 'While no particular form of objection is required [citation], the objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility.' (*People v. Williams* (1988) 44 Cal.3d 883, 906 . . . .)" (*Id.* at pp. 666-667; accord, *People v. Polk*, *supra*, 190 Cal.App.4th at p. 1194.)

"'"'The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . .'" [Citation.] '"No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal

having jurisdiction to determine it.'" [Citation.]" (*People v. Polk*, *supra*, 190 Cal.App.4th at p. 1194.)

2. *Additional facts*

In a pre-trial conference, the trial court specifically asked defendant's counsel if he intended to challenge the voluntariness of the statements made to the sheriff's deputies during the August 2015 meeting at the sheriff's station.

The court: "All right. The prosecution intends to introduce the defendant's tape-recorded admissions. According to the prosecution's memo, it's a non-custodial interview. So do you [addressing defense counsel] agree there's no *Miranda* issues we need to address?"

Defense counsel: "I mean, I would argue they claim non-custodial. . . ."

The court: "Well, it's either a duck or a goose. Either you're raising the issue or not. If you're raising a *Miranda* issue . . . , then we need to address it before trial. . . . Think about it and let me know."

Defense counsel did not raise any objection, whether to introduction of the tape of the interview of defendant while at the sheriff's station in August 2015, to the testimony offered by one of the sheriff's deputies who witnessed the interview, or to the written apology defendant wrote to the victims while he was at the station. Instead, defense counsel focused on the opinion testimony of the defense expert witness (Dr. Blandon-Gitlin) with respect to techniques for interviews and interrogations, in particular, on her opinion on the lack of reliability of confessions obtained using particular interview techniques.

3. *Application of Principles*

It is undisputed that defendant failed to object to the contents of his interviews on *Miranda* grounds. His failure to do so constituted waiver of any claim of violation of his Fifth Amendment rights. (*People v. Holt*, *supra*, 15 Cal.4th at pp. 666-667; *People v. Polk*, *supra*, 190 Cal.App.4th at p. 1194.) Therefore, defendant's attempt to raise a *Miranda* issue for the first time on appeal is rejected.[5]

B. *Ineffective Assistance of Counsel Claim*

Defendant utilizes the circumstances surrounding his taking a polygraph exam and speaking with the sheriff's deputies for approximately two hours and the testimony of his expert witness to support his second contention, that his trial counsel was ineffective and that reversal of his conviction is required. We do not agree.

1. *Applicable law*

"To establish a violation of the constitutional right to effective assistance of counsel, a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant in the sense that it 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' (*Strickland v. Washington* (1984) 466

---

[5] Because we conclude defendant waived this issue, we do not discuss his contention regarding the voluntariness of his statements to the sheriff's deputies.

U.S. 668, 686 [104 S.Ct. 2052, 2064, 80 L.Ed.2d 674]; see also *People v. Wader* (1993) 5 Cal.4th 610, 636 . . . .) If a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient. (*Strickland* v. *Washington*, *supra*, . . . at p. 697 . . . .) If the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' (*People v. Pope* (1979) 23 Cal.3d 412, 426 . . . .)" (*People v. Kipp* (1998) 18 Cal.4th 349, 366-367.)

Further, "[t]o demonstrate *deficient performance*, [the] defendant bears the burden of showing that counsel's performance """"fell below an objective standard of reasonableness . . . under prevailing professional norms."""" [Citation.] To demonstrate *prejudice*, [the] defendant bears the burden of showing a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. [Citations.]" (*People v. Mickel* (2016) 2 Cal.5th 181, 198, italics added; accord, *Strickland v. Washington*, *supra*, 466 U.S. at p. 694 [It is the obligation of the defense to affirmatively establish prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome"].)

We "'defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls

within the wide range of reasonable professional assistance." [Citation.] Defendant's burden is difficult to carry on direct appeal, as [the Supreme Court has] observed: "'Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.'" [Citation.]" [Citation.] If the record on appeal ""sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected,'" and the 'claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.' [Citation.]" (*People v. Vines* (2011) 51 Cal.4th 830, 876, overruled in part on another ground in *People v. Hardy* (2018) 5 Cal.5th 56, 104; accord, *People v. Mickel*, *supra*, 2 Cal.5th at p. 198.)

2. *Application of principles*

We have discussed above that defense counsel was asked to consider—but never did—make an objection to introduction of defendant's inculpatory statements to the sheriff's deputies or to introduction of his written apology to the victims. The trial transcript instead reveals a defense strategy of reliance on the testimony of the defense expert witness to challenge the confession and the written apology which defendant had given to the sheriff's deputies during the interview.

Rather than his being ineffective, the facts and circumstances fully support the conclusion that defense counsel made a strategic choice: to seek to convince the jury that defendant's admissions were to be distrusted—that they were

obtained after an interrogation of a person who had had nothing to eat or drink for several hours. There was even testimony that defendant was diabetic and that that condition may have affected the statements he made to the deputies.[6] The defense strategy was to use this testimony and these circumstances to establish that the statements and apology were not genuine; that defendant's protestations of innocence should be believed instead.

It is the defense's burden to demonstrate "a reasonable probability that . . . the result of the proceeding would have been different"; such a probability must be one "sufficient to undermine confidence in the outcome," here in the verdicts of guilty on all four counts. (*Strickland v. Washington*, *supra*, 466 U.S., at p. 694.) Defendant did not and cannot meet that burden.

Setting aside his statements to the police and his written apology, each of the victims gave compelling testimony. Stephanie and Arianna each testified as to how defendant had molested them on numerous occasions. Thus, as the People argue, even without defendant's confession, there was no probability of a different outcome, let alone "a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

C. *Order that Defendant Submit to AIDS Testing*

Defendant contends, and the People agree, that the trial court erred in ordering him to submit to AIDS testing without

---

[6] By contrast, the People point to testimony by Detective Zuniga that defendant did not appear to be in any physical discomfort, and she would have provided him with food, water, or medical assistance if defendant appeared to have needed it, or if he had requested it.

first having made the statutorily-required probable cause determination. We agree.

Section 1202.1, subdivision (a), provides that "the court shall order every person who is convicted of . . . a sexual offense listed in subdivision (e), whether or not a sentence or fine is imposed or probation is granted, to submit to a blood or oral mucosal transudate saliva test for evidence of antibodies to the probable causative agent of acquired immunodeficiency syndrome (AIDS) within 180 days of the date of conviction. . . ." Section 1202.1, subdivision (e)(6)(A)(iii) and (v), require testing of defendants convicted of lewd or lascivious conduct with a child in violation of section 288 or continuous sexual abuse of a child in violation of section 288.5, "if the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." Section 1202.1, subdivision (e)(6)(B), requires that the finding regarding probable exchange of bodily fluids be entered in the minutes of the court.

Because "involuntary HIV testing is strictly limited by statute and . . . section 1202.1 conditions a testing order upon a finding of probable cause, a defendant may challenge the sufficiency of the evidence [to support such a testing order on appeal] even in the absence of an objection [in the trial court]. Without evidentiary support the order is invalid." (*People v. Butler* (2003) 31 Cal.4th 1119, 1123.) If there is no substantial evidence in the record on appeal to support the order, the appropriate remedy is to remand for further proceedings, at the election of the prosecution, to allow the prosecution to present any additional evidence it may have to establish the requisite probable cause or to strike the testing order. (*Id.* at p. 1129.)

Here, the record contains no substantial evidence that defendant transferred bodily fluids to Stephanie or Arianna and no probable cause assessment. Therefore, the testing order must be stricken, with the matter remanded to the trial court for further proceedings as required by section 1202.1, subdivision (e)(6)(A), at the election of the prosecution. (*People v. Butler*, *supra*, 31 Cal.4th at p. 1129.)

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court which is directed to give the People the opportunity to establish probable cause to believe that bodily fluids capable of transmitting HIV were transferred from defendant to the victims. If the People fail to do so, the trial court is directed to strike the testing order.

GOODMAN, J.*

We concur:

BIGELOW, P. J.

GRIMES, J.

---

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.