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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. FARID FARHOUMAND, Defendant and Appellant.	B271960 (Los Angeles County Super. Ct. No. BA324118)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick N. Wapner, Judge. Affirmed.

William L. Heyman, 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, Margaret E. Maxwell and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Farid Farhoumand appeals from a judgment of conviction after a jury found him guilty of child custody deprivation and kidnapping for the purpose of committing rape. Farhoumand contends insufficient evidence supported the aggravated kidnapping conviction because no evidence suggested that when he kidnapped the victim he intended to rape her. He further contends the trial court made an evidentiary and an instructional error. We affirm.

BACKGROUND

A. Abduction

From 2004 to 2006, Farhoumand was in a relationship with R.P., with whom he shared an apartment.

On May 12, 2004, their daughter, S.F., was born.

On several occasions thereafter, R.P. discovered magazines and DVD's belonging to Farhoumand that contained nude photographs of prepubescent and adolescent girls. When confronted, Farhoumand told R.P. it was "normal" for him to have the pornography, and she should be grateful he was not cheating on her.

On June 6, 2006, R.P. and S.F. moved out of the apartment.

On February 21, 2007, R.P. returned to the apartment with S.F. to retrieve some documents and children's clothing. When Farhoumand saw R.P. speaking with a male neighbor he became verbally abusive and threw things at her. R.P. fled to seek help, and while she spoke with another neighbor she saw Farhoumand drive away with S.F.

That same day, Farhoumand called a child abuse hotline and alleged R.P. and her father, G.P., were sexually abusing S.F. The next day, he informed R.P. he would not return S.F. to her.

R.P. petitioned the Los Angeles Superior Court to regain custody of S.F., but Farhoumand failed to attend any court hearings or produce the child. In late April 2007, he took S.F., now almost three years old, to Mexico, and for the next five and a half years hid with her in several locations.

During their time abroad, Farhoumand changed residences often, failed to enroll S.F. in school, and, beginning when she was around four years old, sodomized her and forced her to orally copulate him. This occurred frequently, for years, up to the moment they were discovered, and Farhoumand apprehended, by foreign police in 2012.

In 2012, Interpol located Farhoumand and S.F., and on October 20, 2012, S.F. was returned to the United States by way of Costa Rica.

B. Interviews

S.F. was interviewed several times. On November 2, 2012, she told Los Angeles Police Detective Terrie Jones that Farhoumand frequently beat her, forced her to orally copulate him until he ejaculated, masturbated until he ejaculated on her, and sodomized her. She stated she believed the first sexual encounter occurred when she was about seven years old.

On November 6, 2012, S.F. told Maryanne Lague, a sexual assault nurse, that Farhoumand frequently sodomized her.

On April 11, 2013, S.F. told Dr. Tom Lyon that Farhoumand anally penetrated her with his penis "all the time," frequently licked her "private part" and put his penis "in" it, and forced her to orally copulate him until he ejaculated. The Lague and Lyon interviews were recorded.

C. Trial

Farhoumand was charged with child custody deprivation (Pen. Code, § 278.5, subd. (a)),[1] kidnapping (§ 207, subd. (a)), and kidnapping for the purpose of committing rape (§ 209, subd. (b)(1)).

At trial, R.P. testified she discovered pornographic magazines of "very young girls" having no breasts or pubic hair hidden in her apartment. Farhoumand told her it was "normal" for him to have the pornography.

S.F., now nine years old, when asked how old she had been when Farhoumand began molesting her, testified, "Maybe like – oh. Maybe like – maybe like four years old." (This varied from her report to police.) Detective Jones testified that in her police interview, S.F. had described years of abuse. And video recordings of S.F.'s interviews with Lague and Lyon were played for the jury.

Farhoumand's defense was that he took S.F. to Mexico to protect her from R.P. and G.P. (the maternal grandfather), who were sexually abusing the child. At trial, Dr. Jasmine Tehrani, a clinical psychologist, opined that as of 2013, Farhoumand suffered from "delusional disorder, persecutory type," meaning he pertinaciously harbored paranoid beliefs. Nahid Alikhan, an emergency response children's social worker with the Department of Children and Family Services, testified that Farhoumand had called a child abuse hotline on February 21, 2007, to report that R.P. and G.P. were sexually abusing S.F.

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[1] Undesignated statutory references will be to the Penal Code.

The jury found Farhoumand guilty of custody deprivation and kidnapping to commit rape. The trial court dismissed the simple kidnapping charge and sentenced Farhoumand to life in prison without the possibility of parole, plus five years pursuant to section 667.85, which prescribes an enhanced penalty for kidnapping a child with intent to make the abduction permanent.

Farhoumand timely appealed.

DISCUSSION

I. Sufficiency of the Evidence

"Every person who forcibly . . . takes . . . any person in this state, and carries the person into another country . . . is guilty of kidnapping." (§ 207, subd. (a).)

Section 209 describes aggravated forms of kidnapping and prescribes an increased punishment of life imprisonment for them. These include kidnapping a person to commit rape, oral copulation, or sodomy. (§ 209, subd. (b)(1).) For a kidnapping to be aggravated, the perpetrator must have the specific intent when the kidnapping begins to commit the underlying offense. (*People v. Davis* (2005) 36 Cal.4th 510, 565-566.) A person could not kidnap his victim to commit rape within the meaning of the statute if the intent to rape was not formed until after the kidnapping had occurred. (*People v. Tribble* (1971) 4 Cal.3d 826, 831.)

Farhoumand contends insufficient evidence supports the finding that he intended at the time he kidnapped S.F. to commit rape. We disagree.

R.P. testified that before the kidnapping, Farhoumand possessed child pornography depicting prepubescent girls, and he told her it was normal to do so. He kidnapped S.F. only after R.P. petitioned the court to regain custody of her. And beginning

shortly after the kidnapping, Farhoumand sexually abused S.F. on an ongoing basis for years, up to the moment he was apprehended. From these facts, the jury could reasonably infer Farhoumand possessed a prurient interest in very young girls, planned to sexually abuse S.F. when she became old enough for his purposes, and abducted her in order to secure access to the child for future inappropriate sexual behavior.

Farhoumand argues that evidence that he waited more than a year to sexually abuse S.F. indicates that at the time of the abduction he had not yet formed the intent to abuse her. Further, he argues, evidence that he suffered from a delusional disorder and believed, whether reasonably or not, that R.P. and G.P. were sexually abusing S.F. indicates he absconded with her only in order to protect her.

Although the evidence may have entitled the jury to draw this conclusion, our review is to determine only if substantial evidence supported the verdict. Evidence that might have led to a different verdict is immaterial unless it compels exculpation as a matter of law.

Here, no evidence established that Farhoumand waited more than a year to sexually abuse S.F. He abducted her in late April 2007, a few weeks before her third birthday. At trial, when she was nine years old, she testified the abuse began when she was "maybe like four years old." We are not confident that a nine-year-old's recollection that a series of events began when she was "maybe like four years old" establishes a hard timeline. The jury could reasonably conclude the abuse began earlier than S.F.'s fourth birthday, or later. In any event, Farhoumand's waiting to abuse S.F. does not compel the conclusion that he formed the intent to do so only after he abducted her.

"When the definition [of a crime] refers to defendant's intent to do some further act or achieve some additional consequence . . . . [t]here is no real difference, . . . only a linguistic one, between an intent to do an act already performed and an intent to do the same act in the future." (*People v. Hering* (1999) 20 Cal.4th 440, 445.) Sexual predators sometimes plan long ahead. (E.g., *Los Angeles County Dept. of Children & Family Services v. Superior Court* (2013) 222 Cal.App.4th 149, 158 [sexual predator engaged in years long "planning and deliberate behaviors" to facilitate future inappropriate sexual activities]; *Doe v. Roman Catholic Archbishop of Los Angeles* (2016) 247 Cal.App.4th 953, 966 [same]; *United States v. Long* (D.C. Cir. 2003) 328 F.3d 655, 665-666 [expert testified that sex offenders often plan and act over a long period of time]; *Morris v. State* (Tex.Crim.App. 2011) 361 S.W.3d 649, 660-661 [collecting cases dealing with sexual grooming].)

The jury could reasonably conclude from Farhoumand's prurient interest in very young girls and his abduction of S.F. and years-long abuse of her beginning shortly thereafter that he planned early on to abuse her when she became old enough for his tastes, and was precipitated to act on his pre-formed plan prematurely when R.P.'s court-assisted efforts jeopardized his access to the child.

The jury was also not compelled to believe that Farhoumand sincerely thought in 2007 that S.F. needed to be protected from imminent sexual abuse at the hands of R.P. and G.P. (See § 207, subd. (f)(1) [a person who takes a child under the age of 14 years in order "to protect the child from danger of imminent harm" is not guilty of kidnapping].) He was not diagnosed with a delusional disorder until 2013. And his own

sexual abuse of S.F. for years suggests he does not scruple to protect children from abuse. Even if Farhoumand did abduct S.F. to protect her from R.P. and G.P., the jury could conclude he abducted the child not to protect her from all danger of imminent harm, but only from *a* danger of harm, i.e., a danger arising from someone other than himself. A person who abducts a child to protect her from sexual abuse at the hands of another because he wishes to be the sole abuser is not acting to protect the child from danger of imminent harm.

II. Admission of Interview Videos

Farhoumand contends the trial court erred in admitting the video recordings of S.F.'s interviews with Lague and Lyon. We disagree.

Pursuant to Evidence Code section 1360, a hearsay statement by a minor victim of sexual abuse is admissible if the circumstances of the statement provide sufficient indicia of reliability and the prosecution alerts the defense in a timely fashion that the statement will be offered. The section provides in pertinent part: "In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse . . . is not made inadmissible by the hearsay rule if all of the following apply: [¶] . . . [¶] (2) The court finds . . . that the time, content, and circumstances of the statement provide sufficient indicia of reliability [¶] . . . [¶] [and] the proponent of the statement makes known to the adverse party the intention to offer the statement . . . sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement."

We review admission of evidence pursuant to Evidence Code section 1360 for abuse of discretion. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367.)

Here, the prosecution notified the defense on January 6, 2014, that it would offer a recording of the Lyon interview. It notified the defense on January 7 or 8 that it would offer the Lague recording. The jury was sworn in on January 9, 2014.

At a hearing outside the presence of the jury, the trial court found the Lyon recording "provide[d] clear indicia of reliability," stating, "It's in a comfortable setting. The witness is clearly at ease, at least after a while she was. [¶] The way that the questions were asked were open-ended; they were nonconfrontational. Every effort was made not to put words in her mouth but to get the story from her."

Although the trial court made no similar express finding as to the Lague recording, it admitted both recordings, over defense objection. The recordings were played for the jury, and transcripts were handed out but later retrieved.

The recordings were properly admitted. The prosecution notified the defense on the day trial opened that the Lyon recording would be offered, and the next day that the Lague recording would be offered. This afforded the defense an adequate opportunity to prepare to meet statements made during the interviews by the sole victim in the case. And the trial court expressly found the Lyon recording provided clear indicia of reliability, and by admitting the Lague recording impliedly found it did so as well.

Farhoumand argues the trial court was required to make an express finding of reliability as to statements made during the Lague interview. The argument is without merit. A ruling on

the admissibility of evidence implies whatever factual finding is prerequisite thereto. (Evid. Code, § 402, subd. (c).) No authority requires that the reliability finding necessary under Evidence Code section 1360 be made expressly as opposed to impliedly. Farhoumand does not argue that statements in either interview were made under circumstances that actually cause them to lack sufficient indicia of reliability.

Farhoumand argues the prosecution notified the defense too late of its intent to offer the recordings, which deprived the defense of a sufficient opportunity to meet statements made in the interviews. We disagree. Evidence Code section 1360 requires only that the prosecution disclose its intention to offer a child victim's statement before trial begins. (*People v. Roberto V.*, *supra*, 93 Cal.App.4th at p. 1371.) For purposes of this rule, trial begins when the jury is sworn in. (*Ibid.*) Here, the defense knew about the prosecution's intention to offer the Lyon and Lague recordings on January 6 and 7, 2014, three and two days, respectively, before trial began when the jury was sworn in on January 9. The notice was therefore proper. Further, S.F. was the sole victim in this case and the main witness. Farhoumand's defense counsel could not possibly have been surprised by statements she made in the interviews.

Farhoumand argues the Lyon and Lague recordings were cumulative under Evidence Code section 352. We disagree.

Pursuant to Evidence Code section 352, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . necessitate undue consumption of time."

The Lague interview was conducted just four days after S.F. spoke with police in an interview that had not been recorded.

Although Detective Jones testified as to what S.F. told her, the Lague interview enabled the jury to view S.F.'s demeanor at the closest possible moment in time after her return to the United States. In the interview, S.F. described only one sex act: Farhoumand frequently sodomized her. The Lyon interview was conducted five months later, in April 2013. In it, S.F. described more acts of sexual abuse: Farhoumand anally penetrated her with his penis "all the time"; frequently licked her "private part" and put his penis "in" it; and forced her to orally copulate him until he ejaculated. Each of the interviews thus offered new material, and each was conducted closer in time to the abuse than S.F.'s January 2014 testimony, giving the statements added credibility. In our view, the trial court did not abuse its discretion in admitting the Lyon and Lague interviews over an objection that they were cumulative with other evidence.

III. Jury Instruction

Farhoumand contends the trial court erred in failing to instruct the jury with an optional portion of CALCRIM No. 3550. We disagree.

CALCRIM No. 3550, titled "Pre-Deliberation Instructions," provides in pertinent part as follows: "Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors. Do not hesitate to change your mind if you become convinced that you are wrong. But do not change your mind just because other jurors disagree with you. [¶] Keep an open mind and openly exchange your thoughts and ideas about this case. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion. Please treat one another courteously. Your role is to be an impartial judge of the facts, not

to act as an advocate for one side or the other. [¶] . . . [¶] . . . Your verdict [on each count and any special findings] must be unanimous. This means that, to return a verdict, all of you must agree to it. [*Do not reach a decision by the flip of a coin or by any similar act*.]" (Italics added.)

Farhoumand argues the trial court erred in failing to give the optional instruction that the jury "not reach a decision by the flip of a coin." He argues the paucity of evidence in this case suggests the jury "might" have reached its guilty verdict by coin toss.

We reject the argument out of hand. Putting aside that CALCRIM No. 3550 by its terms instructs juries to reach verdicts based on reason rather than the toss of a coin even without the optional "flip of a coin" language—a juror is instructed to "decide" the case after "discuss[ion]" with other jurors, to "keep an open mind," to openly exchange "thoughts and ideas" about the case, and to "judge" the facts—nothing in the record before us suggests the jury reached its verdict by the flip of a coin or any similar act.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

I concur:

LUI, J.

JOHNSON, J., Dissenting.

I disagree with the majority's conclusion that substantial evidence supported the conviction of kidnapping for the purpose of committing rape in violation of Penal Code section 209, subdivision (b)(1) (count 2). Farid Farhoumand's (Farhoumand) possession in 2006 of magazines and DVDs depicting nude girls without breasts or pubic hair (which R.P. testified looked about 13 or 14 years old) is not substantial evidence that a year later, on or about April 20, 2007, he kidnapped his daughter S.F. (who was then not yet three years old) intending at that time to orally copulate, rape, and sodomize her at some time in the future. The majority cites only the images as evidence of his intent a year later. (Maj. opn. *ante*, at p. 6.) No reasonable juror could conclude beyond a reasonable doubt that his possession of the images, without more, shows that he intended to rape his two-year-old daughter S.F. when, during a custody dispute, he transported her to Mexico. As revulsed as we are by his subsequent sexual crimes against S.F., our task is to examine the record for evidence of his intent to commit those crimes *at the time of the kidnapping*, a substantial time after his possession of the material and some time before he committed the crimes. On the record before us, I cannot agree that the magazines and DVDs possessed by Farhoumand in 2006 are "evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt" (*People v. Johnson* (1980) 26 Cal.3d 557, 578) of intending at the time of the kidnapping in 2007 to orally copulate, rape, and sodomize two-year-old S.F. sometime in the future.

The majority cites *People v. Hering* (1999) 20 Cal.4th 440, 445 for the proposition that there is only " 'a linguistic [difference], between an intent to do an act already performed and an intent to do the same act in the future.' " (Maj. opn. *ante*, at p. 7.) The superior court made statement in the context of differentiating general from specific intent. In any event, surely the possession of magazines and DVDs depicting nude 13 and 14-year-old girls is not the same act as the rape, oral copulation, and sodomy of a four year old years later. *Los Angeles County Dept. of Children & Family Services v. Superior Court* (2013) 222 Cal.App.4th 149, 151–152, 158, 162, also cited by the majority opinion *ante*, at page 7, describes an expert's testimony that a father with convictions of sodomizing a 10 year old and a six year old, both boys, and who had failed to register as a sex offender as required, presented a risk of sexually grooming and eventually sexually molesting his son. No such prior convictions appear here; no expert testimony regarding sex offenders was presented to the jury; and this is a criminal case, not a dependency case in which the question is whether there is a substantial risk to a child (and in which there is a presumption that prior convictions and status as a registered sex offender are prima facie evidence supporting dependency jurisdiction). *Doe v. Roman Catholic Archbishop of Los Angeles* (2016) 247 Cal.App.4th 953, 966 addresses payments made by priests to the young men they repeatedly sexually abused, and has no relevance to the facts here. Finally, the out-of-state cases cited also discuss expert testimony regarding grooming by sex offenders, which is entirely absent from the evidence before the jury in this case.

Revulsion is not a substitute for evidence. I therefore would reverse the conviction of aggravated kidnapping in count 2. Accordingly, I respectfully dissent.

JOHNSON, J.