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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. HECTOR ABEL PERALES, Defendant and Appellant.	B235379 (Los Angeles County Super. Ct. No. BA362542)

APPEAL from a judgment of the Superior Court of Los Angeles County. Judith Champagne, Judge. Affirmed.

Verna Wefald, 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, Senior Assistant Attorney General, Steven D. Matthews and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Hector Perales was convicted, following a jury trial, of four counts of a lewd act on a child under the age of 14 in violation of Penal Code section 288, subdivision (a),[1] five counts of oral copulation or sexual penetration with a child under the age of 10 in violation of section 288.7, subdivision (b), three counts of sodomy with a child under the age of 10 in violation of section 288.7, subdivision (a), and one count of possession of matter depicting a minor engaging in sexual conduct in violation of section 311.11, subdivision (a). The jury found true the allegations that the lewd acts involved multiple victims within the meaning of section 667.61, subdivisions (b) and (e). The trial court sentenced appellant to a total of 58 years to life in state prison.

Appellant appeals from the judgment of conviction, contending that the trial court abused its discretion in refusing to sever the charge involving conduct in 2002 from the other charges, denying his motion to dismiss the count involving acts in 2002 for preindictment delay and ruling on the admissibility of multiple images and videos of child pornography. We affirm the judgment of conviction.

Facts

1. Count 13

In April 2002, appellant was dating a woman named Lizette, and would visit her in her home every day. Lizette, her four-year-old niece L., and L.'s mother, father and grandfather all lived in the home. On April 7, 2002, Lizette, appellant, L. and L.'s father and mother went to a restaurant. L.'s mother took her to the bathroom. There, L. mentioned that appellant had a "big wee-wee." L.'s mother asked how L. knew that, and L. replied that appellant had shown it to her. L.'s mother asked if appellant had done anything else to her. L. said, "If I tell you, he's not going to take me to the zoo."

On April 11, 2002, L.'s father called the police. Officers came to their home. L. told police that appellant came into her room one day while she was watching Pokemon and touched her. L. used a doll to explain that appellant had touched her genitals and

[1] All further statutory references are to the Penal Code unless otherwise indicated.

anal area with his hands and penis. She said that it hurt when appellant "pushed his wee-wee and hand against" her. L. also said that appellant had her orally copulate him. L. said that appellant told her that he would take her to the zoo if she did not tell anyone what he had done.

The trial in this matter took place in 2011, when L. was 13 years old. Her memory had faded and she could recall very few details of events in 2002. She testified that appellant touched her genital and anal area and showed her his penis. She recalled that he told her that if she did not tell anyone what he did, he would take her somewhere. She was unable to identify appellant at trial. She had previously identified appellant at the preliminary hearing, however.

2. Counts 1-7 and 9-12

From 2007 through 2009, sisters I. and V. lived next door to appellant. There was about a four year age difference between the sisters. When V. was six and seven years old and I. was eight to ten years old, they went to appellant's house and played games on a computer in appellant's room. Appellant also took V. and I. a number of places in his car.

On various occasions, when V. was at appellant's house, appellant touched V.'s anal area while she was playing games, digitally penetrated V.'s anus and vagina, touched his penis to V.'s anal area and sodomized her. Once in the house and once in his car, appellant showed V. his penis. He made her touch his penis. Once he touched her genital area. He penetrated her vagina with his penis several times. Once he took a photo of V.'s genital area with her clothes on and once he took a photo of that area while V. was naked.

On various occasions when I. was in appellant's room and his car, appellant touched her vaginal and anal areas, digitally penetrated her vagina and anus causing pain, showed her his penis and told her to touch it, and kissed her on the mouth. He tried to penetrate her anus with his penis, but she pulled away. He also forced her head toward his penis, but she pulled away. Appellant told her not to tell anyone what he did to her.

Both I. and V. agreed that no adult was present when appellant touched them and his bedroom door was always closed. Sometimes when appellant touched one sister, the other was present. Sometimes appellant's young sister or his young daughter was present.

When I. was between the ages of eight and ten years old, her neighbor Alma M. noticed that I. seemed very sad. In September 2009, I. told Alma that appellant had been molesting her. She also described a situation where appellant molested V. I. asked Alma to tell appellant's mother, who lived with appellant, about the molestation, so that appellant would stop. Alma spoke with V., who also described acts of molestation. V. said that the last time appellant had touched her was the day before.

Alma relayed the girls' statements to their mother, Guadalupe. On September 22, 2009, Alma and Guadeloupe went to the girls' school and spoke with a counselor, Ms. Ortiz. After Ms. Oritz spoke with V. and I., she called the police, who came to the school. Los Angeles Police Department Officer Malik Wilds interviewed V. and I. separately.

I. told Officer Wilds that for the past two years she had been going to appellant's house to use the computer. Once she was in his room, he would close the door. Appellant would come up behind her, reach inside her pants and touch her vagina and anus. He would also pull out his erect penis and tell her to touch it. If she did not, he would grab her hand and put it on his penis. Appellant took photos of her on his cell phone. I. saw appellant put his hands into V.'s pants as well. Appellant told her not to tell anyone about what he did.

V. told Officer Wilds that on numerous occasions when she was using appellant's computer, he would come up behind her, put his hands into her pants and digitally penetrate her anus and vagina. As a result, her anus hurt. V. also said that appellant would show her his erect penis and tell her to touch it. If she did not, he would grab her hand and put it on his penis. V. also said that appellant orally copulated her and took photos of her with his cell phone. She said that appellant had molested her the previous day.

V. and I. were taken to the police station, where they spoke separately with detectives. V. told Detective Jorge Oseguera that appellant had sodomized her on multiple occasions in his bedroom. She also said that he had touched her anus and vagina and digitally penetrated it multiple times in his room and his car. He had also forced her to orally copulate him. V. said that appellant molested her in some way every time she went to his house.

V. was taken to the hospital, where she was examined by Sexual Assault Nurse Examiners Mary Cabrera and Lisa Pinkney. The examiners found blood on V.'s underwear, which was the same underwear she had worn the day before. They also found multiple injuries to V.'s anus which were consistent with having been caused by sodomy. V. had a history of constipation, and some of her injuries could have been caused by constipation. Other injuries were not typically caused by constipation.

3. Count 14

The day after he interviewed the girls, Detective Oseguera served a search warrant on appellant's house. Appellant's room contained two desktop computers and three laptop computers. One of the desktops appeared to have an internet connection. Another desktop computer was found in the closet. Detective Oseguera also found numerous hard drives, compact discs, and thumb drives in the room. He also found an iPhone and a small video camera.

Detective Kirk Hunter examined the computers and found 33 images of children who were engaged in sexual activity or nude on the desktop computer that had an internet connection. He found 190 such images and 25 such videos on one of the laptop computers. He also discovered that 70 such images had been deleted from the laptop.

4. Defense

Appellant did not testify. He offered the testimony of various adults who had lived in his house during some or all of the time in question.

Nestor Orellana, appellant's mother's long-time live-in boyfriend, testified that his bedroom was 20 feet from appellant's room, and he had a home office directly across from appellant's room. Appellant usually kept his door open. Orellana came in and out

of the house during the day, and never unexpectedly found appellant at home with V. and I. V. and I. did come over frequently to play with Orellana's daughter or to borrow movies. V. and I. did sometimes play on appellant's computer.

Appellant's mother, Laura Perales worked outside the home and came home at 4:00 p.m. When she got home, appellant was at work. V. and I. were never there. V. and I. did come over to borrow movies, and she had seen them playing on appellant's computers.

Appellant's sister-in-law Samantha Bracamontes lived in the house from 2004 to 2006, and was a stay-at-home mom. I. and V. came to the house and played video games, but she never saw appellant in the room with the girls and never saw appellant close the door to his room while the girls were there.

Appellant's girlfriend and the mother of his child Maricela Gracia testified that appellant's job, first at an Apple store and then working for Original Productions, kept him out of the house from the morning until about 6:30 p.m. He did come home from the production job between 2:30 and 3:30 p.m. for lunch. Most of the computers and computer related equipment in his room were for side jobs he did involving data recovery. He also owned some websites and when he showed the websites to Gracia, graphic images of body parts would "pop up."

According to Gracia, V. and I. came over the house twice a week to play with her daughter and Orellana's daughter. They also borrowed movies. On a few occasions, V. and I. used the computers in appellant's room. Gracia and her daughter were always present.

On September 21, 2009, appellant was at work during the day, came home about 3:30 p.m., picked up Gracia and their daughter, and drove them to the daughter's preschool. Gracia ran an errand and appellant returned to work. Gracia picked up their daughter and met appellant at a place where they bought and ate snow cones.

Discussion

1. Motion to sever

Appellant contends that evidence of his 2002 conduct involving L. was weak, not cross-admissible and unduly inflammatory and so the trial court's refusal to sever the 2002 count violated his right to due process.

Section 954 provides that an accusatory pleading may charge "two or more different offenses of the same class of crimes or offenses." The statute also provides that "the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." (§ 954.) Joinder of charges is preferred to promote efficiency. (*People v. Scott* (2011) 52 Cal.4th 452, 469.)

The denial of a motion to sever is reviewed for an abuse of discretion based on the information available to the court when it ruled on the motion. (*People v. Elliott* (2012) 53 Cal.4th 535, 552.) To show an abuse of discretion, the defendant must make a clear showing of prejudice. (*Ibid*.)

In determining whether a trial court abused its discretion, the relevant factors to be considered are "whether (1) the evidence would be cross-admissible in separate trials, (2) some charges are unusually likely to inflame the jury against the defendant, (3) a weak case has been joined with a strong case, or with another weak case, so that the total evidence may unfairly alter the outcome on some or all charges, and (4) one of the charges is a capital offense, or joinder of the charges converts the matter into a capital case." (*People v. Scott*, *supra*, 52 Cal.4th at pp. 469-470.) If the evidence supporting the offenses would be cross-admissible in separate trials, "that circumstance normally is sufficient, standing alone, to dispel any prejudice and justify a trial court's refusal to sever the charged offenses." (*Id*. at p. 470.)

Here, it appears that the evidence of the two sets of conduct would be cross-admissible pursuant to Evidence Code section 1108. Appellant argued in the trial court that the admissibility went only one way: evidence of the 2002 conduct could be

admitted at a trial of the 2008-2009 offenses, but evidence of the 2008-2009 conduct could not be admitted at a trial of the 2002 offenses. The plain language of Evidence Code section 1108 provides for admission of "evidence of the defendant's commission of *another* sexual offense or offenses." (Evid. Code, § 1108, subd. (a), italics added.) Appellant has not cited and we are not aware of any case law limiting the admission of evidence under Evidence Code section 1108 to prior or earlier sexual offenses.

Appellant argued in the trial court that the 2002 case was more inflammatory because it involved a younger child and more offensive touching. L. was almost 5 years old at the time of the offense.[2] V. was six years old when appellant began molesting her and I. was eight. This is not a great disparity in age. (*People v. Crosby* (1988) 197 Cal.App.3d 853, 860 [victims were two years apart in age; joinder was proper since "[t]here was no great disparity in age and neither victim was an infant," and there was not a great disparity in the apparent vulnerability of the victims.].) The lewd acts against L. consisted of appellant showing her his penis, touching her genital and anal areas with his hand and penis, and making her orally copulate him. The lewd acts against V. involved showing her his penis, touching her anal and genital areas, penetrating both areas digitally and with his penis and orally copulating her. The lewd acts against I. were similar. Thus, the lewd acts were quite similar and were equally offensive.

Appellant also argued in the trial court that the two cases were weak and bolstered each other. The evidence consisted almost entirely of the victims' testimony, but that does not make the cases weak. Many criminal cases rest on the victims' testimony, and are essentially credibility contests. Even if appellant were correct that the cases bolstered each other, that is not a significant factor in cases such as this one where the evidence is cross-admissible.

For the foregoing reasons, the trial court did not abuse its discretion in denying appellant's motion to sever. Even when a trial court's joinder ruling was proper when

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[2] L. was born in July 1998. Thus, in April 2002, when appellant molested her, she was 4 years and 9 months old.

made, however, reversal is appropriate if the "joinder resulted in gross unfairness amounting to a denial of due process." (*People v. Souza* (2012) 54 Cal.4th 90, 109.) Appellant claims that this is what happened here. He bases his due process claim on the difference in the victims' ages. As we discuss, *ante*, there was no great disparity in the victims' ages and so no prejudice from the fact that L. was two years younger than V. Further, the evidence from different victims was cross-admissible, and would have been heard by the jury even if there had been separate trials. There was no denial of appellant's right to due process.

2. Pre-indictment delay

Appellant contends that the trial court erred in denying his motion to dismiss the charge involving L. for pre-indictment delay, and that the denial denied his right to due process.

The statute of limitations is the primary guarantee against overly stale criminal charges. (*People v. Abel* (2012) 53 Cal.4th 891, 908.) "[T]he right of due process provides additional protection, safeguarding a criminal defendant's interest in fair adjudication by preventing unjustified delays [in filing charges] that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence [citation]." (*Ibid.*)

In order to obtain relief for an undue delay in filing charges, a defendant must demonstrate prejudice from the delay, such as the loss of key witnesses or physical evidence, or loss of memory. Prejudice is not presumed. "In addition, although 'under California law, negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process. . . . If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation.' [Citation.] If the defendant establishes prejudice, the prosecution may offer justification for the delay; the court considering a motion to dismiss then balances the harm to the defendant against the justification for the delay. [Citation.] But if the defendant fails to meet his or her burden of showing prejudice, there is no need to

determine whether the delay was justified. [Citations.]" (*People v. Abel, supra,* 53 Cal.4th at p. 909, fn. omitted.)

A trial court's denial of a motion to dismiss for prefiling delay is reviewed for an abuse of discretion. (*People v. Cowan* (2010) 50 Cal.4th 401, 430.) We defer to the trial court's factual findings if supported by substantial evidence.[3] (*Ibid*.) Whether the delay was unreasonable and prejudicial is a question of fact. (*People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1330.)

Appellant contends that he was prejudiced by the precharging delay because L.'s 2002 interview with police was not recorded and by the time of trial she could not remember very much. He also contends that he was prejudiced because he could not reconstruct his whereabouts on April 2, 2002, the date the molestation allegedly occurred. Counsel submitted a declaration that the defense investigator had been unable to establish a timeline of when appellant might have been alone with L. Counsel also stated in the declaration that he had emailed L.'s aunt, who was appellant's girlfriend in 2002, and she initially agreed to speak with him, but then an hour later emailed him to say that she had been instructed not to talk to him.

Generally, a prosecution witness's faded memory benefits the defendant. (See *People v. Abel*, *supra*, 53 Cal.4th at p. 910.) In some unusual cases, the faded memory of a prosecution witness may prejudice a defendant. (See *People v. Hill* (1984) 37 Cal.3d 491, 498.) Appellant has not explained what unusual facts about his situation made L.'s faded memory prejudicial to him. During the delay, L. apparently developed doubts that anything had occurred. That could only have benefitted appellant.

Appellant did not claim that he was unaware of the accusations when they were made. L.'s family broke off contact with appellant immediately after L. told the family what had happened, and L.'s aunt broke off her relationship with appellant four days later. Thus, appellant certainly had an awareness that something negative had happened.

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[3] The record has not been augmented with a transcript of the hearing on this motion. It is an appellant's burden to make sure the appellate record is complete. (*In re Joshua S.* (2011) 192 Cal.App.4th 670, 682, fn. 7.)

Finally, there is no reason to believe that L.'s aunt's unwillingness to talk with appellant had anything to do with the passage of time. Thus, her unwillingness to talk to appellant does not constitute prejudice from the delay.

Assuming for the sake of argument that appellant showed some slight prejudice from the delay, any such prejudice was outweighed by the prosecution's justification for the delay. The prosecutor explained in the trial court that the delay was because the People did not feel they had sufficient corroborating evidence to charge appellant based on only L.'s accusations. Once I. and V. came forward, that changed, and the People acted promptly to bring charges involving L., I. and V.

Generally, "[a] court should not second-guess the prosecution's decision regarding whether sufficient evidence exists to warrant bringing charges. 'The due process clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. . . . Prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.'" (*People v. Nelson* (2008) 43 Cal.4th 1242, 1256.)

3. Pornography exhibits

Section 311.11, subdivision (a), prohibits the possession of material depicting a minor engaged in or simulating sexual conduct. A defendant's simultaneous possession of multiple pieces of child pornography is chargeable as only one criminal offense. (*People v. Manfredi* (2008) 169 Cal.App.4th 622, 632; *People v. Hertzig* (2007) 156 Cal.App.4th 398.) Given this limitation, appellant moved to exclude pursuant to Evidence Code section 352 all but one of the videos and images found on his computer. He contends that the trial court abused its discretion and violated his right to due process by declining to view the images and video depicting child pornography before ruling on his motion, and also in denying the motion.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger

of undue prejudice, of confusing the issues, or of misleading the jury." A trial court's ruling on a motion to exclude evidence under this section is reviewed for an abuse of discretion. (*People v. Williams* (2008) 43 Cal.4th 584, 634-635.)

"We do not condone this practice" of ruling on the admissibility of pornography without reviewing it. (*People v. Holford* (2012) 203 Cal.App.4th 155, 174.) However, as the court correctly points out in *Holford*, a trial court may rely on an offer of proof in deciding an Evidence Code section 352 motion. (*Ibid*.)

Here, the trial court stated that it was "experienced in viewing this kind of material." The court understood that the images and videos would be "repugnant." Appellant points out that his trial counsel, an experienced lawyer, characterized the images and videos as "horrifying." There is nothing to suggest that the trial court underestimated the graphic and repugnant nature of the images and videos selected by the prosecutor, or that those selections were worse than the other images and videos found on appellant's computer. All child pornography is, by its nature, "horrifying." Thus, the mere fact that the trial court did not view the images and videos does not amount to an abuse of discretion. (See *People v. Holford, supra*, 203 Cal.App.4th at p. 175 [noting that court accepted parties' agreement that video contained extremely graphic child pornography].)

As to the ruling itself, we see no abuse of discretion. The evidence was directly relevant to prove the charge that appellant possessed child pornography in violation of section 311.11, subdivision (a). It was also relevant to show that appellant had an abnormal sexual interest in children. (Evid. Code, § 1108, subds. (a) & (d)(1)(A).) The prosecution was entitled to refuse to stipulate that the images and videos were material described in section 311.11.

The quantity of pornographic material shown to the jury was small. There were hundreds of images and dozens of videos on the computers in appellant's room. Only eleven images and five videos totaling a few minutes in length were shown to the jury. At least part of appellant's defense was that he did not know about the child pornography on his computers because there were tens of thousands of images on his computers.

Thus, there was strong probative value in showing the jury an array of the pornographic images and videos so that the jury could determine for itself how striking and graphic the images were, and if it was likely that they could be overlooked.

Further, there was not a substantial danger of undue prejudice from the admission of more than one video. Even one video would have shown the jury the offensive and repugnant nature of the pornography. A few more minutes of video and some still images are not likely to have been more prejudicial.

Since there was strong probative value to the presentation of the pornographic material and little to no danger of undue prejudice from the small number of additional videos and images, the trial court did not abuse its discretion in denying appellant's motion to exclude. There was no violation of appellant's right to due process.

Disposition

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.