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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CHRIS FERNANDO ESCOBAR, Defendant and Appellant.	B279216 (Los Angeles County Super. Ct. No. MA066036)

APPEAL from a judgment of the Superior Court of Los Angeles, Charles A. Chung, Judge. Affirmed.

Heather L. Beugen, 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, and Scott A. Taryle, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Chris Escobar appeals a judgment following his no contest pleas to two counts of lewd acts upon a child under the age of 14 and one count of continuous sexual abuse of a child under the age of 14. He contends that the trial court abused its discretion in denying his motion to withdraw his pleas after he learned that two of his victims, his minor stepdaughters, were giggling when interviewed separately about the sexual abuse. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

Because the convictions were based on Escobar's no contest pleas, the following facts are drawn from the testimony given at Escobar's preliminary hearing conducted on June 10 and 11, 2015.

A. Factual Background

On numerous occasions between 2007 and 2014, Escobar sexually abused three young girls—his two stepdaughters, M.F. and E.F., and their friend, E.J. Escobar also repeatedly sexually abused his developmentally disabled stepson, A.F. Escobar's crimes were discovered when E.J.'s mother overheard the girls discussing the sexual abuse. Escobar was charged with seven counts:

1. M.F. (Counts 1 and 2)

M.F. was born in October 2001. She was six years old when her mother married Escobar in July 2008. M.F. testified that she was about "six or five" years old when Escobar first touched her at their house in Palmdale. She awoke in the middle of the night to find Escobar standing by her bed, touching her vagina through her pajamas. Escobar next sexually abused M.F. when she was in the second or third grade and around seven or eight years old. M.F. was seated on the living room couch in the evening watching television. M.F. testified that Escobar pushed her pants down part way, "opened [her] legs and then he licked [her] vagina."

Afterward, Escobar told M.F., "don't tell your mom." On a third occasion, M.F. awoke in the middle of the night to find Escobar standing next to her bed. She did not feel him touch her, but figured he had done so because of the prior occasions. On a fourth occasion, when M.F. was about eight or nine and living in a different house in Palmdale, she awoke to find Escobar standing next to her bed in his boxer shorts and T-shirt, and then she felt him touch her breasts.

Based on this conduct, Escobar was charged with one count of committing oral copulation or sexual penetration with a child 10 years or younger, in violation of Penal Code section 288.7, subdivision (b) (count 1), and one count of committing a lewd act upon a child under 14 years, in violation of Penal Code section 288, subdivision (a) (count 2).[1]

2. E.F. (Counts 3, 4, and 5)

M.F.'s little sister, E.F., was born in July 2003. On two or three occasions around 2008, when she was about four years old and the family was living in Palmdale, Escobar sexually abused E.F. by licking her breasts, vagina, and anus and inserting his fingers into her vagina. Sometime thereafter, the family moved to Arizona, where Escobar molested E.F. five or six more times. Escobar again sexually abused E.F in the same manner after the family returned to Palmdale when E.F. was in the fourth grade and about nine or 10 years old. E.F. reported that Escobar stopped molesting her when she was 10 or 11 years old.

Based on the conduct occurring in California, Escobar was charged with two counts of committing oral copulation or sexual penetration with a child 10 years or younger, in violation of section

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[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

288.7, subdivision (b) (counts 3 and 4), and one count of continuous sexual abuse upon a child under 14 years, pursuant to section 288.5, subdivision (a) (count 5).

3. A.F. (Count 6)

M.F's and E.F.'s younger brother, A.F., was born in September 2005. A.F. has learning delays, but is at grade level socially. A.F. reported that Escobar, who he described as his "fake dad," inappropriately touched his penis over his clothes "a lot" when he was between six and nine years old.

Based on this conduct, Escobar was charged with one count of committing a lewd act upon a child under 14 years, in violation of Penal Code section 288, subdivision (a) (count 6).

4. E.J. (Count 7)

E.J., a friend of M.F. and E.F. since she was in the second grade, reported that Escobar sexually abused her. When she was in the third grade, Escobar slapped her bottom several times, unsnapped her bra, and pulled her underwear up to give her a "wedgie." E.J. also reported that when she, M.F. and E.F. were changing or showering, Escobar would enter the room for no apparent reason. E.J. occasionally slept over in M.F.'s or E.F.'s bedroom, and on several occasions one or another of them would awaken to find her pants or shorts off.

Based on this conduct, Escobar was charged with one count of lewd act upon a child under 14 years, in violation of Penal Code section 288, subdivision (a) (count 7).

B. Procedural History

Escobar entered pleas of not guilty as to all seven counts. On August 22, 2016, after motion practice and several continuances of the trial date, the case was called for a jury trial. 70 prospective jurors were summoned and, following voir dire, 12 jurors and two

alternates were sworn to try the case. The next day, on August 23, 2016, the parties advised the court that Escobar had accepted the prosecution's offer that he plead no contest to counts 2, 5, and 6, amounting to a prison term of 20 years. The court duly advised Escobar of the consequences of his pleas, secured Escobar's waivers of his rights, and accepted Escobar's pleas of no contest to counts 2, 5, and 6.

Prior to sentencing, the court considered the probation officer's report and heard impact statements from two of Escobar's victims, M.F. and E.F. M.F. testified that Escobar deserved the 20-year sentence or "a little bit longer because other kids don't deserve to be touched [or] to face what I face, and I don't want other kids to be touched like I was." E.F. testified that Escobar "deserves prison because [of] what he did to us and he really harmed us."

On August 23, 2016, the court sentenced Escobar to prison for a term of 20 years, consisting of an upper term of sixteen years on count 5 for committing continuous sexual abuse upon a child under 14 years, plus two consecutive two-year terms (one-third the midterm) on counts 2 and 6 for committing lewd acts upon a child under 14 years. The remaining four counts were dismissed.

On September 9, 2016, the deputy district attorney contacted witness Deputy Lefebvre, who took the victims' initial reports, to inform her that she would no longer have to appear to testify. Deputy Lefebvre told the deputy district attorney that M.F. and E.F. had been giggling at the Palmdale station when they first reported the alleged sexual abuse and that she was not sure whether they were serious or not. On September 10, 2016, the deputy district attorney provided this information to Escobar's counsel.

On September 20, 2016, Escobar filed a motion to withdraw his pleas. In his declaration, Escobar asserted that he would not have entered the plea agreement had he known that M.F. and E.F. "were giggling when they made their initial reports to Deputy Lefebvre, and that the deputy was not sure they were serious." Escobar contended that his ignorance of these facts constituted good cause to permit him to withdraw his pleas and stand trial, particularly because there was no physical evidence to support the allegations against him.

On September 28, 2016, the court heard Escobar's motion. The court inquired whether Deputy Lefebvre had expressed concerns about the "victims' credibility based upon the giggling." The deputy district attorney explained that Deputy Lefebvre "said that the defendant and the victims all showed up at the station and she was a patrol deputy at the time so she wasn't sure what she was responding to. And she interviewed the children separately, and she wasn't sure—I believe the words she used [were], she wasn't sure whether they were serious because the older one was giggling. And that's when I stopped my conversation with her and I contacted the [investigating officer] to get further information from Deputy Lefebvre."

The trial court denied Escobar's motion. The court concluded that "the reporting deputy would never be allowed to testify as to whether she thought the victims were credible or not. [¶] It's common knowledge that people respond to stressful situations very differently. Some people cry, some people grimace, some people are very stoic. Other people actually giggle and laugh when they are incredibly stressed or under pressure." The court stated, "it would be one thing if they came in and were recanting everything and said we were laughing because we thought it was all a big joke and none

of this was serious. All I have are the child victims giggling during the interview." The court considered that "at most the girls, or the victims, would have been asked, did you giggle during this process and why," and concluded that such evidence would not have changed the "outcome of the trial."

The deputy district attorney requested to add to the record that Escobar must have been aware that nervous giggling was in his stepdaughters' character and, "as the court was aware, the victims were actually breaking down and crying when they gave their victim impact statement[s]." The court clarified that it is "speculation that the victims were giggling because they were nervous," and thus the court was not making that finding. This appeal followed.

DISCUSSION

Escobar contends that the superior court abused its discretion by denying his motion to withdraw his no contest pleas. We disagree, and affirm the judgment.

I. Standard of Review

"The decision to grant or deny a motion to withdraw a guilty plea is left to the sound discretion of the trial court. [Citations.] 'A denial of the motion will not be disturbed on appeal absent a showing the court has abused its discretion.' " (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1416 (*Breslin*).) " 'A trial court will not be found to have abused its discretion unless it "exercised its discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice." ' " (*People v. Lancaster* (2007) 41 Cal.4th 50, 71.) "Moreover, a reviewing court must adopt the trial court's factual findings if substantial evidence supports them." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) Pleas "resulting from a bargain should not be set aside lightly and

finality of proceedings should be encouraged." (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103.)

II. Motion to Withdraw a Plea

A defendant seeking to withdraw a guilty or no contest plea may do so before judgment upon a showing of good cause pursuant to section 1018. "Although section 1018 is limited on its face to the period before judgment, the courts have long permitted defendants to move to set aside the judgment as a means of allowing the defendant to withdraw the guilty plea after judgment." (*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1617.) Such a postjudgment motion to withdraw a plea requires the defendant to make "a showing essentially identical to that required under Penal Code section 1018." (*Ibid*.)

"To establish good cause to withdraw a guilty plea, the defendant must show by clear and convincing evidence that he or she was operating under mistake, ignorance, or any other factor overcoming the exercise of his or her free judgment, including inadvertence, fraud, or duress. [Citation.] The defendant must also show prejudice in that he or she would not have accepted the plea bargain had it not been for the mistake." (*Breslin*, *supra*, 205 Cal.App.4th at p. 1416.)

III. The Trial Court Did Not Abuse Its Discretion

The Attorney General conceded that the evidence that Escobar's stepdaughters were giggling was not disclosed until after he entered his pleas.[2] Nor did the Attorney General challenge the

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[2] In his reply brief, Escobar argues for the first time that the trial court abused its discretion when it determined that the prosecution's failure to disclose Deputy Lefebrve's information earlier did not violate *Brady v. Maryland* (1963) 373 U.S. 83. "Points raised for the first time in a reply brief will ordinarily not be

credibility of the deputy's statement that she witnessed the girls giggling. Thus, the issue before the trial court was whether Escobar demonstrated by clear and convincing evidence that his ignorance of the girls' giggling overcame his exercise of free judgment when he entered his pleas.

Escobar contends the trial court abused its discretion by denying his motion to withdraw his no contest pleas. He claims the withheld evidence was "significant" and "critical to [his] defense" because it undermined both witnesses' credibility and established good cause to withdraw his pleas. Escobar asserts the evidence's significance was magnified by the children's delays in making their allegations against him, inconsistencies in M.F.'s testimony at the preliminary hearing, and the lack of physical evidence of sexual abuse.

Escobar argues that under *Breslin*, the denial of a defendant's motion to withdraw a plea may be reversed where there was " 'actually persuasive, independent evidence the victim had committed perjury or if the prosecution had withheld critical evidence.' " (Quoting *Breslin*, *supra*, 205 Cal. App.4th at pp. 1417–1418.) We do not agree that the evidence at issue here was critical, or that it was persuasive evidence of perjury. *Breslin* does, however, illustrate that a court properly considers, as the trial court

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considered, because such consideration would deprive the respondent of an opportunity to counter the argument." (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.) Even were we to consider this argument, the evidence belatedly disclosed here would not meet *Brady*'s materiality standard. (See *People v. Salazar* (2005) 35 Cal.4th 1031, 1050 [a *Brady* violation occurs only if the suppressed evidence is "material," meaning there was a "reasonable probability" that had it been disclosed to the defense, the result would have been different].)

did here, the weight of the newly disclosed evidence in ruling on a motion to withdraw a plea.

In *Breslin*, the defendant was charged with inflicting corporal injury upon her boyfriend. (205 Cal.App.4th at p. 1414.) The police observed dried blood on the victim, and the couple's roommate told the police the victim and Breslin had been arguing and he had seen blood running down the victim's neck when the victim burst into his room to call the police. (*Id*. at p. 1413.) After Breslin entered a guilty plea to the corporal injury charge, the victim provided a declaration to defense counsel stating that he tripped, grabbed Breslin, and was injured when Breslin accidentally fell on top of him. (*Id*. at p. 1414.) The trial court denied Breslin's motion to withdraw her plea, and the appellate court affirmed, finding that "the trial court's decision to place little weight on the victim's recantation was, in fact, relevant in determining whether [the defendant] met her burden of establishing a mistake of fact regarding the existence of a meritorious defense at the time she entered her guilty plea." (*Id*. at p. 1417.)

Here, the trial court was within its discretion to give little weight to the evidence that Escobar's stepdaughters giggled when they were interviewed. The court noted that the victims did not recant their testimony, and there was no evidence that they giggled because they thought their allegations were a joke or were not serious. The trial court stated, "at most the girls, or the victims, would have been asked did you giggle during this process and why." The court concluded, "all I have are the child victims giggling during the interview. So without anything more, I don't think that would have changed . . . the outcome of the trial."

Escobar relies on *People v. Ramirez* (2006) 141 Cal.App.4th 1501 (*Ramirez*), to argue that "the fact that the new evidence does

not 'incontrovertibly exonerate [a] [defendant] is besides the point' " and the " 'state's suppression of favorable evidence is an extrinsic cause which may overcome the exercise of free judgment.' " Escobar cannot stretch *Ramirez* to fit the facts here.

In *Ramirez*, the defendant pleaded no contest to carjacking and evading arrest charges and only later received disclosure of a supplemental police report identifying witnesses who stated the defendant was not present at the carjacking, and was a reluctant passenger during the later police chase. (*Id.* at pp. 1504-1505.) The Court of Appeal reversed the trial court's denial of Ramirez's motion to withdraw his no contest pleas because "[t]he supplemental report identified new defense witnesses, potentially reduced appellant's custody exposure, and provided possible defenses to several charges, thereby casting the case against him in an entirely different light." (*Id.* at p. 1508.) This, the court held, "significantly" weakened the evidence supporting the carjacking charges. (*Id.* at p. 1506.) Here, the evidence of the victims giggling did not cast the case against Escobar in an entirely different light, nor did it significantly weaken the evidence against him.

The trial court will be found to have abused its discretion only when " ' "the court exceeds the bounds of reason, all of the circumstances before it being considered." ' " (*People v. McDonough* (1961) 198 Cal.App.2d 84, 90.) Considering all of the circumstances before the trial court here, we cannot conclude that it abused its discretion. Escobar's stepdaughters first reported the sexual abuse to a patrol deputy on duty at the sheriff's station who did not know what the reports were about before conducting the interviews. There are a range of explanations for why M.F. and E.F. giggled, including stress, nervousness, embarrassment, or even the use of words to describe genitalia that they were unaccustomed to

hearing, especially from a stranger. Evidently, Deputy Lefebrve did not believe the giggling was sufficiently important to include in her report.

Notably, there is no evidence that either M.F. or E.F. giggled during subsequent interviews or when testifying. M.F. and E.F. were interviewed by Detective Evelio Galvez, who testified extensively about those interviews at Escobar's preliminary hearing. Detective Galvez did not testify to any giggling by either of them. Nor did M.F. giggle when she testified at the preliminary hearing. It is also undisputed that both M.F. and E.F. broke down and cried when giving their victim impact statements. Thus, the trial judge had the opportunity to assess the demeanor of both M.F. and E.F. just weeks before ruling on Escobar's motion to withdraw his pleas. In this context, the trial court reasonably could have given the evidence of giggling little weight.

Lastly, Escobar contends it was an abuse of discretion for the court not to credit fully his declaration stating he would not have pleaded no contest had he been aware of the evidence and therefore suffered prejudice. The trial court was not bound to accept as true Escobar's declaration. (*People v. Martinez* (2013) 57 Cal.4th 555, 565 ["the defendant bears the burden of establishing prejudice" and "must provide a declaration or testimony stating that he or she would not have entered into the plea bargain if properly advised," but it "is up to the trial court to determine whether the defendant's assertion is credible"].) Here, the trial court viewed Escobar as having "second thoughts," and stated the fact that Escobar had "now changed [his] mind and want[s] to put on a defense is not a

valid basis for the withdrawal of the plea."[3] (See *People v. Nance* (1991) 1 Cal.App.4th 1453, 1456 ["A plea may not be withdrawn simply because the defendant has changed his mind."].)

On appeal, the " ' "burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." ' " (*Blue Cross of California, Inc. v. Superior Court* (2009) 180 Cal.App.4th 1237, 1258.) Our review of the record does not disclose that the trial court acted in an arbitrary, capricious, or patently absurd manner. To the contrary, the record reflects that the trial court acted within its discretion in denying Escobar's motion, and no miscarriage of justice resulted.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

BENDIX, J.*

We concur:

CHANEY, Acting P. J. JOHNSON, J.

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[3] The Attorney General argued, and may be correct, that the trial court was unlikely to credit Escobar's statement that he would have rejected a favorable plea deal that gave him 20 years, when he faced 150 years to life on the seven counts of sexual abuse against four different children.

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