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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL CASTRO,

Defendant and Appellant.

2d Crim. No. B237742
(Super. Ct. No. 2009025127)
(Ventura County)

Miguel Castro appeals from the judgment following his conviction by jury of three counts of a lewd act upon a child (M.) in violation of Penal Code section 288,[1] with true findings of substantial sexual conduct as to each count (§ 1203.066, subd. (a)(8)), and one count of an attempted lewd act on a child (§§ 664/288). The trial court sentenced him to state prison for an aggregate term of three years. It also ordered him to pay $50,000 restitution to victim M. for her psychological (noneconomic) loss, and $35,255.23 restitution to her parents for their economic loss. Appellant contends that he was deprived of due process because the prosecution failed to preserve potentially exculpatory evidence, and because the trial court ordered direct victim restitution without a jury determination of the amount of the loss. We affirm.

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

FACTUAL BACKGROUND

Prosecution Evidence

In 1997, appellant worked as a janitor at a chucrch in Moorpark. Six-year-old M. and her parents (R. and L.) attended the church. Appellant was a janitor at the church. L. worked in the church office. She and R. directed its choir. Appellant was a featured soloist in the choir.

M. spent a great deal of time on the church grounds while L. and R. were there. She followed appellant around while he performed his duties. She watched him and wanted to help with his work.

In December 1997, appellant molested M. on at least four occasions at the church. One incident occurred in the closet where the congregation stored decorations. Appellant rubbed M.'s vagina with his hand over her underwear.

Several days before Christmas, M. was in appellant's van, sitting on his lap. Appellant rubbed her vagina, over her clothing. R. saw M. in the van sitting on appellant's lap, and it made him uneasy.

A day or so later, when a Mariachi band was at the church, M. and appellant were in the kitchen. He knelt or stood behind her, and rubbed his hand around her vagina, over her underwear, for several minutes. Appellant frequently told M. not to tell anyone that he had touched her.

On December 22, 1997, M. followed appellant into a restroom at the church. He stopped cleaning, stood behind M., with his arms around her, and rubbed her vagina with his hand, over her underwear, for several minutes. She heard him breathing in her ear. He then urinated, showed her his penis, and asked her if she wanted to touch it. M. asked if she could leave. Appellant answered, "No, just come touch it. Just once." M. believed she touched it twice with two fingers so she could leave.

After the restroom incident, M. realized that appellant's touching her was inappropriate. L. testified that M. approached her and said, "Mom, Miguel was touching me, and I want you to tell him to stop it." M. said that appellant was touching her private

parts, her vagina. M. described appellant's "pushing with his butt" as he stood behind her, with his arms around her.

L. and R. reported the incident to a priest at church. M. and L. gave statements to the police in December 1997, and early 1998. M. used a doll to show investigating officers how appellant had touched her vagina. The officers interviewed appellant in January 1998.

In 1998, when L. learned that "the case was not going to court," she told M. L. testified that M. didn't understand why "she . . . wasn't going to be able to tell her story. . . . She felt like . . . that was wrong and she should be able to tell . . . the courts what had happened to her." M. testified that she had "felt very uncomfortable, like something really bad had happened . . . when [appellant] asked [her] to touch his penis." Her elementary school "psychiatrist" would call her "out of class," and M. would "sit in her office and color." She knew "something was going on," and that "all of the adults were making a fuss." She liked "to get out of class and go color."

Several years later, M. saw a movie at school about good and bad touching. That movie made her realize that something horrible had happened when appellant touched her. She felt hurt, ashamed and depressed for many years. In November 2008, L. and M. were working at their polling place on Election Day. M. saw appellant and his wife at the polling place. When she saw him, M. realized that appellant had been living a "normal" life, while she had suffered from depression for years, which required her to take anti-depressant medication and attend psychiatric therapy. Shortly after Election Day, M. complained to the police that appellant had molested her when she was a child.

On July 6, 2009, Ventura County Sheriff's Detectives Chavez and Tougas interrogated appellant.[2] During the interrogation, appellant admitted that he had touched M.'s vagina two to three times over her clothing, for sexual reasons. He further admitted

[2] A video recording of the interrogation was played for the jury, which also received a written transcript of the interrogation. Tougas asked appellant questions in English. Chavez, who spoke Spanish, interpreted Tougas's questions by translating them into Spanish, or rephrasing them in English, for appellant.

that he might accidentally have touched her vagina in the church restroom. He estimated that he touched M.'s vagina for "one minute maximum." He also admitted that he had "crossed the line" when he touched her. Appellant cried when he admitted he touched M. He also asked for forgiveness. He thought that the touching occurred during a period of one year or less (three months to one year).

Defense Evidence

Appellant presented several character witnesses, including his wife and other church members, who testified that he is not the kind of person who would do anything inappropriate with a young child. They never saw him do anything like that at church.

DISCUSSION

The Prosecution Did Not Deprive Appellant of Due Process By Failing to Preserve Potentially Exculpatory Evidence

Appellant contends that the prosecution deprived him of due process by failing to preserve potentially exculpatory evidence. We disagree.

Law enforcement agencies have a duty to preserve evidence "that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta* (1984) 467 U.S. 479, 488, fn. omitted; *People v. Zapien* (1993) 4 Cal.4th 929, 964.) Such evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Trombetta*, at p. 489.) Absent a showing of bad faith on the part of the police, the failure to preserve the evidence does not constitute a due process violation. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57-58; *People v. Roybal* (1998) 19 Cal.4th 481, 510.)

The case went to trial in 2011. The day before jury selection, defense counsel filed a "motion for discovery" seeking copies of twelve tapes from the 1997-1998 investigation that were mentioned in documents it received from the prosecution. During proceedings that day, the prosecutor stated that the sheriff's department had only two of the interview tapes, including one that was recorded in 2009. Several missing tapes

contained interviews of M. and her parents. Defense counsel stated, ". . . I do think that we need another further motion and I will be ask[ing] to file a *Trombetta* motion to ascertain why these tapes from 1997, which are the only true evidence in this case, are not here." (*California v. Trombetta, supra*, 467 U.S. 479.) The next day counsel acknowledged that *Trombetta* required a showing that the missing items would have been exculpatory and the agency knew they were exculpatory but failed to preserve them. He claimed that "[w]ithout the benefit of listening to those tapes, [he had] no way of knowing whether . . . they would have been exculpatory." The court denied the *Trombetta* motion.

The record belies counsel's claim that he could not know whether the tapes would have been exculpatory without listening to them. There is no suggestion that the participants (witnesses or investigators) in the taped interviews were unavailable. The discovery motion shows the defense received reports prepared in 1997 and 1998 by Detectives Miramontes and Englander, who conducted those interviews. The prosecution listed Miramontes as a potential trial witness. Moreover, during his opening statement, appellant's counsel gave a detailed description of statements M. and L. made to detectives in 1997 and 1998. Appellant failed to make the requisite showing that the missing tapes "possess[ed] an exculpatory value that was apparent before [they were lost or] destroyed, and [were] of such a nature that [he] would be unable to obtain comparable evidence by other reasonably available means."" (*California v. Trombetta, supra*, 467 U.S. at p. 489; *People v. Alexander* (2010) 49 Cal.4th 846, 877-879.) We are not persuaded by appellant's argument that the missing tapes of interviews with M. and her parents are "a fortiori . . . potentially exculpatory" where "the prosecution could not find sufficient evidence" to file charges in 1997 due to lack of sufficient evidence."[3]

[3] The reporter's transcript does not indicate whether appellant's counsel asked the court to instruct the jury that it must determine whether to draw an adverse inference from the absence of the 1997 and 1998 interview tapes. The trial court did not so instruct the jury, impliedly finding that appellant failed to show that the sheriff acted in bad faith by failing to preserve the tapes. Substantial evidence supports that finding. (*People v. Memro* (1995) 11 Cal.4th 786, 831.)

Direct Victim Restitution

Appellant contends that he was deprived of his Sixth Amendment right to have a jury determine the facts underlying the direct victim restitution ordered by the trial court. We disagree.

This contention concerns the court's order to pay $35,255.23 restitution to M.'s parents for counseling expenses (§1202.4, subd. (f)(3)(C)), and its order to pay M. $50,000 restitution for her psychological (noneconomic) loss (§1202.4, subd. (f)(3)(F)). Appellant arguably waived this contention by failing to pursue his right to a hearing concerning the amount of the awards.[4] Waiver aside, the contention lacks merit.

In challenging the direct victim restitution orders, appellant relies primarily upon *Southern Union Co. v. U. S.* (2012) __ U.S. __, 132 S.Ct. 2344; *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Blakely v. Washington* (2004) 542 U.S. 296. Under *Apprendi*, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond a prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at p. 490.) In *Southern Union*, the Court held that the rule applied equally to the imposition of criminal fines. (*Southern Union*, at p. 2357.)

The Fourth District recently rejected the application of *Southern Union*, *Apprendi* and *Blakely* to direct victim restitution in *People v. Pangan* (2013) 213

[4] Before it awarded restitution of $50,000 and $35,255.23, the court said it would conduct a hearing at a later time regarding "the amount of any additional restitution that will be ordered by this Court for the victim and her parents[.]" Counsel replied, "[W]e reserve the right to have a restitution hearing." Counsel then stated, "Your Honor, what we've done in the past is we'll select a date, but then we usually try to get together with the restitution specialist for the District Attorney's Office to try to work out the evidentiary numbers. That way if we can come to some accord, there will be no need for the hearing itself." Counsel thus agreed to a possible restitution hearing at a later date. The record does not show that appellant later demanded a restitution hearing. (See *People v. McCullough* (2013) 56 Cal.4th 589, 591, 597 [where a court's imposition of booking fee is confined to factual determinations, defendant who fails to challenge the sufficiency of the evidence at the proceeding when the fee is imposed may not raise the challenge on appeal].)

Cal.App.4th 574, 585: "[N]either *Southern Union, Apprendi* nor *Blakely* have any application to direct victim restitution, because direct victim restitution is not a criminal penalty. As explained in *U.S. v. Behrman* (7th Cir. 2000) 235 F.3d 1049, 1054, direct victim restitution is a substitute for a civil remedy so that victims of crime do not need to file separate civil suits. It is not increased 'punishment.' The *Millard* decision makes the same point in regard to California law. ([*People v.*] *Millard* [2009] 175 Cal.App.4th [7], 35; accord *People v. Harvest* (2000) 84 Cal.App.4th 641, 645, 650.) [N]umerous federal cases also hold[] [that] victim restitution does not constitute increased punishment for crime. [Citation.] [T]he restitution statute itself characterizes victim restitution awards as civil. (See [] § 1202.4, subd. (a)(3)(B) [victim restitution 'shall be enforceable as if the order were a civil judgment']"; see also *People v. Kramis* (2012) 209 Cal.App.4th 346, 351 [*Apprendi* & *Southern Union* do not apply to restitution fines, where a trial court exercises its discretion *within* a statutory range, as it does when selecting a restitution fine pursuant to § 1202.4, subdivision (b)].)

Appellant argues that "even if *Pangan* is correct that economic damages under Penal Code section 1202.4, subdivision (f)(3)[C], are within a statutory maximum, the $50,000 for noneconomic damages awarded to M. does not fall within a prescribed '"statutory maximum" for *Apprendi* purposes' as a 'maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict . . . .' (*Blakely v. Washington, supra,* 542 U.S. at p. 303.)" However, the absence of a statutory maximum for noneconomic victim restitution does mean that its imposition requires a jury finding concerning the underlying losses. "Federal courts have also rejected *Apprendi* challenges to victim restitution statutes because those statutes . . . carry no prescribed statutory maximum. (*U. S. v. Wooten* (10th Cir.2004) 377 F.3d 1134, 1144, fn. 1 . . . .)" (*Pangan, supra*, 213 Cal.App.4th at pp. 585-586.) Similarly, the noneconomic loss restitution statute does not have a statutory maximum. (§1202.4, subd. (f)(3)(F).) Direct victim restitution, including that for noneconomic loss, is not punishment. (See *Pangan,* at pp. 585-586.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Fred H. Byyshe, Judge

Superior Court County of Ventura

Susan Pochter Stone, 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, Victoria B. Wilson, Supervising Deputy Attorney General, Carl C. Henry, Deputy Attorney General, for Plaintiff and Respondent.