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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RAFAEL ANGEL PENA,

Defendant and Appellant.

2d Crim. No. B246480
(Super. Ct. No. 2011032257)
(Ventura County)

Rafael Angel Pena appeals after a jury convicted him of continuous sexual abuse of a child under the age of 14 (Pen. Code,¹ § 288.5, subd. (a)) and three counts of committing a lewd act upon a child under the age of 14 (§ 288, subd. (a)). The jury also found a multiple victim allegation (§ 667.71, subd. (a)(4)) to be true, and appellant admitted serving a prior prison term (§ 667.5, subd. (b)). The trial court sentenced him to 60 years to life plus one year. Appellant contends the court erred in denying his motions to dismiss the lewd act counts on the ground he was prejudiced by the prosecution's 10-year delay in bringing the charges. He also claims the court erred by excluding evidence that one of the victims was sexually abused by her grandfather around the same time appellant abused her. We affirm.

¹ All further undesignated statutory references are to the Penal Code.

STATEMENT OF FACTS

Victim C.M.

Appellant's niece C.M. was born in 1991. C.M.'s father died in 2000. Her mother Debra and appellant's wife Diane are sisters. Appellant and Diane are the parents of C.M.'s cousins Giovanni, Rafael, and victim G.P.

Appellant first molested C.M. during the summer of 2001, while she was spending a few weeks with appellant and his family in Apple Valley. C.M. was watching television in the living room with one of her cousins when appellant told her to come to his bedroom. Diane was not home. C.M. went to appellant's room and saw him lying on the bed shirtless with the lower half of his body covered with a sheet. Appellant told C.M. to lie down with him. C.M. sat next to appellant and saw the silhouette of his penis under the sheet. Appellant asked her to "squeeze it." Appellant then put C.M.'s hand on top of the sheet over his penis and moved her hand up and down. Appellant's penis became erect and he asked C.M. if she wanted to "suck it." She said no and asked if she could leave. Appellant released her hand and she went back to the living room.

The second incident occurred during the same summer while appellant was driving C.M. and Rafael home from a swap meet. C.M. was sitting in the front seat with appellant, and Rafael was in the back seat. C.M. was showing appellant some of the items he had bought for her at the swap meet when he reached over and began rubbing her vaginal area either over or under her clothing.

The third incident occurred later that year shortly after school began. Appellant drove his work van to C.M.'s house in Fontana and offered to take her and her siblings to the donut shop. C.M. sat in the front passenger seat, while the other children sat in the back of the van. When they arrived at the shop, appellant reached over and rubbed C.M.'s vaginal area on top of her clothing. He also put his hand down her shirt and touched her chest.

After the third incident, C.M. was in her bedroom with her older sister Elizabeth and her cousin Giovanni when Elizabeth asked C.M. why she looked so sad.

C.M. began crying and said appellant "was touching her the way grown-ups touch."

C.M. made Elizabeth promise not to tell anyone.

The following summer, Debra saw C.M. with a knife and asked her why she had it. C.M. said she wanted to kill herself "because my dad's gone" and "[n]obody's here to protect me" then added, "Uncle Ralph is touching me." C.M. started crying and Elizabeth "told [Debra] basically what happened."

Debra immediately called Diane. Debra recounted what C.M. had said and told Diane she would be reporting it to the police. Debra then took C.M. and Elizabeth to the Fontana Police Department and filed a report. The matter was referred to the San Bernardino Sheriff's Department. After C.M. and Diane were interviewed, the police told Debra they needed more evidence to prosecute appellant. The police wanted C.M. to call appellant and induce him to admit the molestations, but C.M. did not want to do so and Debra did not pressure her.

Victim G.P.

G.P. was born in July of 2000. When G.P. was seven years old, she regularly slept in bed with her parents in their home in Simi Valley. On more than one occasion, appellant digitally penetrated G.P.'s vagina and touched her chest and buttocks under her nightclothes. On one occasion appellant grabbed her hand and put it on his "hard" and "wet" penis.

On another occasion, appellant told G.P. he would buy her a doll she wanted if she gave him a "mommy and daddy kiss." Appellant put plastic wrap over his lips to induce her to kiss him. G.P. quickly kissed appellant on the lips with her lips touching the plastic wrap.

One night in 2009, G.P. was watching television with her friend Eduardo Flores when she asked him if he knew why she did not like her father. Flores asked G.P. why and she replied, "Because he touches me." Flores told Giovanni what G.P. had said, and both Flores and Giovanni told Diane. When Diane asked G.P. if what she had said was true, G.P. replied in the affirmative and said it was why she had insisted on sleeping on the edge of her parents' bed. Diane called the police and appellant was arrested.

DISCUSSION

Motions to Dismiss - Delay in Prosecution

The acts of molestation involving victim C.M. were the basis for the three counts of committing a lewd act upon a child under the age of 14 (§ 288, subd. (a)). Prior to trial, appellant moved to dismiss these counts on the ground that the prosecution's 10-year delay in bringing the charges was unreasonable and amounted to a violation of his due process rights. The court denied the motion, and denied the renewed motion appellant brought after the verdicts were rendered. Appellant contends that these rulings were an abuse of discretion. He claims the delay in prosecution resulted in the possible loss of impeachment evidence due to the death of one investigating officer and the inability to locate two others. We are not persuaded.

"... "[T]he right of due process protects a criminal defendant's interest in fair adjudication by preventing unjustified delays 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.] Accordingly, "[d]elay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay." [Citation.] [Citation.]" (*People v. Cowan* (2010) 50 Cal.4th 401, 430 (*Cowan*).) A defendant can establish the requisite prejudice by showing that material witnesses are no longer available due to the delay or that evidence was lost as the result of fading memories. (*Ibid.*)

Because California law is at least as favorable as the federal constitutional standard for what constitutes sufficient justification for a delay in prosecution, we apply the state law standard. (*Cowan, supra*, 50 Cal.4th at pp. 430-431.) Under that standard, "negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process. This does not mean, however, that whether

the delay was purposeful or negligent is irrelevant.' [Citation.] Rather, 'whether the delay was purposeful or negligent is relevant to the balancing process. Purposeful delay to gain advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation.' [Citation.] The justification for the delay is strong when there is 'investigative delay, nothing else.' [Citation.]" (*Id.* at p. 431.)

We review the trial court's rulings on a motion to dismiss for prejudicial prosecutorial delay for an abuse of discretion and defer to the court's factual findings if supported by substantial evidence. (*Cowan, supra*, 50 Cal.4th at p. 431.) Appellant contends our review is de novo because "[i]n California, a defendant's constitutional right to due process against pre-accusation delay presents a mixed question of fact and law." We are bound, however, by our Supreme Court's ruling that such motions are reviewed for abuse of discretion. (*Ibid.*; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The court did not abuse its discretion in denying appellant's motions to dismiss the charges involving C.M. In denying the pretrial motion, the court found appellant's assertion of prejudice was "[a]t best . . . non-substantial and speculative" and that he had merely "alleged a showing [of prejudice] based on bare 'conclusory assertion[s]' of harm" The court also found appellant had failed to show the delay was intentional or deliberate and added "it is understandable why the charges pertaining to victim [C.]M. would not be filed until charges involving a second alleged victim ([G.]P.) arose. . . . Said development can explain the belated decision to file charges pertaining to [C.]M."

The record supports these findings. In purporting to demonstrate prejudice, appellant reiterates his claim that the delay in his prosecution prevented him from interviewing the officer who interviewed C.M. in 2002, because the officer died in August of 2011. Appellant asserts that the officer's death rendered appellant "unable to completely and thoroughly investigate possible areas of impeachment for both [C.M.]

and [Debra]." Appellant, however, was first charged with crimes against C.M. in an information filed on January 3, 2011. Appellant also asserts that the delay prevented him from interviewing the detective and sergeant to whom the case was later referred because neither of them could be located due to the passage of time. As the court found, however, appellant merely speculates that interviewing these individuals would have aided his defense.

Appellant further claims he was prejudiced by the fact that C.M.'s memories of the charged incidents had faded over time. As the People note, this fact aided appellant as much as it prejudiced him. Indeed, appellant exploited C.M.'s inconsistent statements and her inability to recall in urging the jury to acquit him on all three counts naming her as the victim.

The record also supports the court's finding that the delay in prosecuting appellant for his crimes against C.M. was not due to inexcusable negligence. In arguing otherwise, appellant faults the police for failing to conduct a more thorough investigation into C.M.'s claims of abuse, as evidenced among other things by the fact that appellant was never interviewed. Although appellant recalled being interviewed about the incident while he was incarcerated on unrelated charges in 2002, no documentary evidence of an interview was ever produced. C.M. and Debra also testified at trial regarding interviews for which no discovery was ever provided. Appellant merely speculates, however, that reports of these interviews would include inculpatory or exculpatory evidence, or that a more thorough investigation would have led to the discovery of such evidence.

When C.M. first reported the molestations, the police told Debra that C.M.'s uncorroborated reports of abuse were insufficient to convict appellant. In an effort to substantiate C.M.'s statements, the police sought to have her place a "cold call" to appellant to discuss his conduct. Both C.M. and her mother refused to participate. The record supports the trial court's conclusion that this was the reason for the delay and not negligent or deliberate conduct on the part of law enforcement. As the trial court recognized, "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. . . . [It should be equally obvious that p]rosecutors 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 (*Nelson*).)

We, like the trial court, will not second-guess the decision to refrain from charging appellant earlier. The determination that there was insufficient evidence to prosecute him for sexually abusing C.M. did not change until the allegations regarding G.P. came to light. This new evidence was relevant and admissible to prove appellant has a propensity to commit sexual offenses and was thus guilty of sexually abusing C.M. (Evid. Code, § 1108.) The prosecuting agency only learned of the allegations involving C.M. after appellant had been charged with sexually abusing G.P. Thereafter it promptly initiated charges against appellant for his crimes against C.M.

The trial court did not abuse its discretion in concluding that the delay in prosecuting appellant for sexually abusing C.M. was reasonable and that "the justification for the delay was strong." (*Nelson, supra*, 43 Cal.4th at p. 1256.) Appellant's showing of prejudice, by contrast, was weak. When the justification for the delay and appellant's showing of prejudice are balanced against each other, it cannot be said the delay resulted in a violation of appellant's due process rights. (*Cowan, supra*, 50 Cal.4th at p. 436; *Nelson*, at p. 1257.) Appellant's motions to dismiss the counts charging him with committing lewd acts on C.M. were thus properly denied.

Exclusion of Evidence

Appellant contends the court abused its discretion in precluding him from cross-examining C.M. regarding her allegations that her grandfather also molested her around the same time as appellant. Prior to trial, the prosecution moved in limine to exclude the evidence as more prejudicial than probative. (Evid. Code, § 352.) At an Evidence Code section 402 hearing, C.M. testified that her grandfather once grabbed her buttocks and put his hand down her shirt while she and her mother were visiting him in Tijuana. She was unable to recall exactly when the incident took place, although she knew it was sometime after 2000. During cross-examination, it was revealed that C.M.

had reported to the police in 2002 that her grandfather molested her in Tijuana on Halloween 2001, and at her house in Fontana in April of 2001. This report refreshed C.M.'s recollection of both incidents.

At the conclusion of the hearing, the court excluded the evidence as more prejudicial than probative. The court reasoned: "[C.M.] testified it was one specific time that she remembers and only one time with regard to her grandfather, and that she was very clear that it happened in Mexico and after her father died. [¶] *Had it been a different scenario or more than once, I think the prejudice would probably weigh towards admitting the evidence.* But since it's just one very specific time in a distant location, not to be confused with at her home or here, at least in the United States where the allegations against her uncle would be different." (Italics added.)

As appellant correctly notes, C.M. *did* allege more than one incident of molestation by her grandfather, and claimed that one of those incidents took place at her home in California. Even if we assume the court would have admitted the evidence but for this mistake of fact, the error is harmless. In general, "the application of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution, and thus we review allegations of error under the 'reasonable probability' standard of [*People v.*] *Watson* [(1956) 46 Cal.2d 818, 836]." (*People v. Marks* (2003) 31 Cal.4th 197, 226-227.) Although the complete exclusion of evidence of an accused's defense might rise to the level of a constitutional violation, "' . . . excluding defense evidence on a minor or subsidiary point does not impair an accused' due process right to present a defense. [Citation.] If the trial court misstepped, "[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense." [Citation.] . . .'" (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.) Here the excluded evidence was not appellant's complete defense, but rather some evidence of that defense. Accordingly, any error in exclusion does not compel reversal unless appellant can show it is reasonably probable he would have achieved a more favorable result had the evidence been admitted. (*Id.* at p. 428; *Watson*, *supra*, at p. 836.)

Appellant fails to make this showing. The court's ruling did not deprive appellant of the opportunity to challenge C.M.'s credibility and her ability to recall his crimes, and appellant vigorously exploited that opportunity. Moreover, appellant merely speculates that C.M. had confused appellant with her grandfather in accusing him of molestation. As the People note, "Appellant's brief is silent as to how [C.M.'s] statements would reasonably suggest that she was confusing assault by one offender with conduct by another, must less how the jury could have determined that [C.M.] was confusing appellant for her grandfather given that the latter was not on trial and evidence of his guilt was not being presented." Aside from taking place during the same time frame, C.M.'s detailed reports of appellant's acts of molestation bore no factual resemblance to her reports of molestation by her grandfather. Because the excluded evidence was at most marginally relevant and the court's ruling did not prevent appellant from otherwise challenging C.M.'s credibility and ability to recall, it is not reasonably probable he would have achieved a more favorable result had the evidence been admitted.

The judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Patricia M. Murphy, Judge
Superior Court County of Ventura

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