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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. VLADIMIR LUNA, Defendant and Appellant.	A172014 (Solano County Super. Ct. No. FCR359151)

Vladimir Luna (appellant) appeals from his convictions, following a jury trial, of multiple counts relating to his sexual abuse of his stepdaughter, V. Appellant argues the trial court erred in denying his motion for a new trial and that one of the convictions is not supported by substantial evidence. We affirm.

BACKGROUND[1]

Prosecution Case

V. was 11 years old at the time of trial. She testified that, starting when she was seven or eight years old, appellant sexually abused her multiple times.

[1] We recite only those background facts relevant to our resolution of this appeal.

A police investigator interviewed V. when she was eight years old, after V. told her mother about the abuse. A video recording of the interview was admitted into evidence and played for the jury. In the interview, V. said appellant had sexually abused her, but the details varied in some respects from her trial testimony; for example, she told the investigator that appellant had kissed V. while he was having sex with her mother, but testified at trial that she was never in the room when appellant and her mother had sex. V. testified at trial that she did not remember the interview or the investigator, and that she did not know whether she lied in the interview.

A psychologist testified about child sexual abuse accommodation syndrome, including that abused children may be inconsistent when providing information about the abuse and may repress memories of abuse.

Defense Case

Two character witnesses testified on appellant's behalf. In addition, a defense psychologist testified that children were more likely to remember traumatic experiences than nontraumatic experiences, and were consistent over time in relating the core details of a traumatic event.

Verdict and Sentence

The jury convicted appellant as charged of two counts of oral copulation with a child under 10 years old (Pen. Code, § 288.7, subd. (b)),[2] attempted sodomy with a child under 10 years old (§§ 664, 288.7, subd. (a)), and lewd act upon a child under 14 years old (§ 288, subd. (a)). The trial court sentenced appellant to an indeterminate term of 30 years to life imprisonment, plus a determinate term of 9 years.

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[2] All undesignated statutory references are to the Penal Code.

DISCUSSION

I. *New Trial Motion*

Appellant argues the trial court abused its discretion in denying his motion for a new trial. (See *People v. Verdugo* (2010) 50 Cal.4th 263, 308 [" '[T]he trial court has broad discretion in ruling on a new trial motion . . . ,' and its 'ruling will be disturbed only for clear abuse of that discretion' "].) We reject the challenge.

A. *Additional Background*

During jury deliberations, defense counsel informed the court that the prosecutor had just given her what appeared to be a victim impact statement written by V. The written statement repeated accusations against appellant that V. had made in the interview and/or at trial, but it also included new accusations that V. had not previously made.[3] Defense counsel stated, "I'm not sure what I'm going to ask for at this time, but I just wanted to make it part of the court record." The court declined to lodge the written statement as defense counsel requested, but subsequently marked it as a court exhibit.

After the jury verdicts and before sentencing, appellant filed a motion for a new trial based in part on this written statement. Appellant's argument on this issue began, "Non-statutory grounds for granting a motion for a new trial includes the Prosecution's failure to disclose exculpatory evidence," contended that the prosecutor's failure to earlier disclose the written statement was a *Brady*[4] violation, and asserted that appellant was deprived "of the opportunity to reopen evidence, cross-examine the witness, potentially

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[3] The prosecutor read the written statement into the record at the sentencing hearing.

[4] (*Brady v. Maryland* (1963) 373 U.S. 83.)

call other witnesses, or present arguments that could have influenced the outcome."

The trial court denied the motion, finding "the defense had this [written statement] before the verdicts were rendered. The defense therefore had the opportunity prior to the end of trial to ask the Court for the opportunity to reopen evidence for cross-examination or to make additional argument, however the defense failed to do so." The court further found, "The victim impact statement is arguably potentially impeachment evidence. But it's arguably prejudicial to the defense as well, because . . . everything in it casts the defendant and his actions in a poor light, and in fact implies that he may have committed additional crimes that were not otherwise alleged. [¶] . . . [I]t could be a reasonable tactical decision to try to rely on the state of the evidence without using that impeachment evidence because that impeachment evidence could cut both ways."

B. *Analysis*

On appeal, appellant argues he was entitled to a new trial pursuant to section 1181, subdivision 8, which authorizes a new trial when "new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial."

We agree with the People that appellant's new trial motion based on nonstatutory prosecutorial misconduct grounds did not preserve his appellate claim based on statutory newly discovered evidence grounds. "A motion for new trial may be granted only upon a ground raised in the motion. [Citations.] '[A] defendant waives his right to a new trial upon all grounds included within the provisions of [section 1181] unless he specifies the grounds upon which he relies in his application therefor.' " (*People v. Masotti* (2008) 163 Cal.App.4th 504, 508.)

Appellant contends his appellate argument is preserved because there is no material difference between the two grounds for a new trial. We disagree. While there may be some overlap, the elements are distinct and the trial court did not have the opportunity to make findings of fact on the issue appellant raises for the first time on appeal. (Compare *People v. Howard* (2010) 51 Cal.4th 15, 43 (*Howard*) [" 'In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: " '1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.' " ' "] with *People v. Mayorga* (1985) 171 Cal.App.3d 929, 940 (*Mayorga*) ["new trials may be ordered for nonstatutory reasons when an error has occurred resulting in the denial of defendant's right to a fair trial, and the defendant has had no earlier opportunity to raise the issue"].)

Even if the issue was preserved, we would reject it. The trial court denied the new trial motion on the ground that appellant could have moved to reopen evidence during jury deliberations but did not do so. (See *Howard*, *supra*, 51 Cal.4th at p. 43 [section 1181, subdivision 8 elements include " ' " '[t]hat the party could not with reasonable diligence have discovered and produced it at the trial' " ' "]; *Mayorga*, *supra*, 171 Cal.App.3d at p. 940 [nonstatutory claim elements include that "the defendant has had no earlier opportunity to raise the issue"].) Appellant argues that when his counsel informed the court of the written statement, "the court made it clear that appellant would have to file a written motion in order for the court to consider the letter and what to do about it," and appellant lacked the time to

do so. The court's refusal to lodge the written statement, and its initial suggestion that appellant could attach the statement as an exhibit to a motion if he wanted it in the record, do not indicate the court would have refused to entertain an oral motion to reopen evidence. In any event, as jury deliberations proceeded into the following day, counsel could have prepared a brief written motion.

Appellant also relies on a case affirming a trial court's order *granting* a new trial motion where counsel learned about new evidence during jury deliberations but did not move to reopen. (*Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 728–730 (*Santillan*).) In that case, a new witness contacted the plaintiff's counsel during deliberations with highly relevant accusations against the defendant. (*Id.* at p. 716.) In granting the plaintiff's new trial motion filed after the jury verdict, "the trial court found that the new trial motion was proper both because [the new witness] was not available as a witness because he lived in Arizona and could not be subpoenaed, and because his status as a material witness 'was discovered so late.' " (*Id.* at p. 730.) On appeal, the defendant argued the trial court should have denied the motion because the plaintiff did not move to reopen evidence during deliberations. (*Id.* at p. 728.) The Court of Appeal found, "As far as we can tell, no reported decisions have directly addressed the issue whether a motion for new trial based on newly discovered evidence should be denied where the moving party discovered the evidence during jury deliberations and did not bring a motion to reopen the case at that time." (*Id.* at p. 729.) The court emphasized the standard of review—"We will affirm an order granting a new trial so long as there is a 'reasonable or even fairly debatable justification under the law' to support it"—and concluded, "Given this unique set of facts, combined with the absence of any on-point case

authority to guide [the plaintiff's] counsel when [the new witness] contacted him, we conclude that the trial court stayed within its broad range of discretion in determining that [the plaintiff's] new trial motion was timely." (*Id*. at pp. 728, 730.)

Santillan, *supra*, 202 Cal.App.4th 708 does not establish error in this case. First, the newly discovered evidence was a written statement and defense counsel could have promptly submitted it into evidence, in contrast to the out-of-state witness at issue in *Santillan*. Second, and more significantly, the *Santillan* court was reviewing an order *granting* a new trial motion. The court's holding that the trial court did not abuse its "broad" discretion in finding the plaintiff exercised due diligence under that case's "unique set of facts" does not compel us to find that the trial court abused its discretion here in finding otherwise under different facts. Appellant's reliance on *Fitzgerald v. Fishburn* (1963) 219 Cal.App.2d 152, 156, which found "no California authority supporting defendant's view that due diligence requires an attempt to reopen the case when new evidence is discovered before verdict but after argument, instructions, and some period of jury deliberation," but declined to reach the issue, also does not establish that the trial court abused its discretion here.

II. *Substantial Evidence*

Appellant argues the sodomy conviction is not supported by substantial evidence. We disagree.

"To assess the evidence's sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such

that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] . . . A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 (*Zamudio*).)

In the video of V.'s interview played for the jury, V. told the investigator that appellant had asked her to "sit on" his erect penis, which he tried to insert into her anus, but V. told him it hurt and left the room. At trial, the prosecutor asked V. if there had been a time when appellant asked her to "sit on it." V. testified there had been, she did not know what appellant meant by "it," and she did not do so. V. testified generally that she did not know whether she lied to the investigator but she was telling the truth at the trial.

Appellant first argues that V. testified at trial that she did not comply when appellant asked her to "sit on" something, and further testified that she may have lied to the investigator about other incidents. Defense counsel highlighted this inconsistency with respect to the sodomy count in her closing argument, but the jury credited V.'s statement to the investigator. Appellant does not contend that V.'s interview statements were admitted for a limited purpose or otherwise could not alone constitute evidence of the charged crimes. As such, the conflict between V.'s interview statements and trial testimony was for the jury to resolve. " 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility

of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.' " (*Zamudio*, *supra*, 43 Cal.4th at p. 357.) V.'s interview statements are substantial evidence supporting the sodomy conviction.[5]

Appellant also argues V.'s interview statements are impossible or improbable because she told the interviewer she was wearing underwear at the time of the incident. "Any sexual penetration, however slight, is sufficient to complete the crime of sodomy." (§ 286, subd. (a).) It is neither impossible nor improbable for appellant to have attempted slight penetration even though V. was wearing underwear.

DISPOSITION

The judgment is affirmed.

SIMONS, Acting P. J.

We concur.

BURNS, J.
CHOU, J.

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[5] Appellant's reliance on dicta in a case from more than 50 years ago querying whether the contradictory testimony of a 14-year-old attempted rape victim could alone constitute substantial evidence (*People v. McGaughran* (1961) 197 Cal.App.2d 6, 14) does not compel a different conclusion.