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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Siskiyou)

THE PEOPLE,

Plaintiff and Respondent,

v.

KODY LEE KAPLON,

Defendant and Appellant.

C069497

(Super. Ct. No. MCYKCRBF09399)

On appeal from numerous convictions arising out of his kidnapping and sexual assault of a three-year-old girl, defendant Kody Lee Kaplon contends the trial court erred by: (1) denying his motion for change of venue, (2) destroying jury questionnaires, and (3) failing to instruct on the corpus delicti rule with respect to the sex crimes with which he was charged. We conclude that defendant failed to preserve the denial of his change of venue motion for appellate review by failing to renew that motion or otherwise object to the composition of the jury following a voir dire in which he did not exhaust his peremptory challenges. Because the venue issue is not properly before us, any error in the destruction of the jury questionnaires was necessarily harmless. Harmless, too, was the trial court's failure to instruct on the corpus delicti rule as to the sex crimes, because

the victim's statements provided the requisite quantum of evidence needed to satisfy that rule. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The facts may be briefly stated. On the night of March 1, 2009, defendant came to Carolyn Souza-Myers's apartment in Yreka; he was intoxicated. Defendant acted "weird," saying "kind of off-the-wall things about being in the secret service." He also said he had come by to say good-bye because he was "going to jail for a long, long time," although he did not know how long or how he was going to get there. Eventually, defendant was asked to leave.

After midnight on March 2, defendant arrived at P.S.'s apartment. At the time, P.S.'s great-niece -- the victim in this case (referred to as Jane Doe) -- who was three years old, was sleeping in the living room just off the kitchen. Defendant kept going back out to his car to get beer, but eventually, around 4:00 or 4:30 a.m., P.S. gave defendant some methamphetamine and told him to smoke it and sober up so P.S. could go to bed. P.S. then fell asleep without seeing defendant to the door as he usually did.

The victim's great-grandmother (P.S.'s mother), who was also living in the apartment at the time, awoke to hear the victim saying, "No, I don't want to go with you. I don't like you." She got up and left her bedroom and almost crashed into the victim's mother and father as they came out of their room in the apartment. Everyone began looking for the victim, who was not in her bed. The victim's mother ran out the door and saw defendant driving away with the victim on his lap.

James Ragsdale lives on Humbug Creek Road, about 20 to 30 minutes outside of Yreka. One morning in March 2009, around 10:30 or 11:00 a.m., defendant, who looked like he had rolled down a hill in the mud, knocked on Ragsdale's door and told Ragsdale he had rolled his pickup. Ragsdale gave defendant a ride home.

George Flippen found defendant's car later that day "high centered" over the side of a road in a remote area. He followed some footprints in the mud and found the victim down a hill off the road. She had mud all over her.

In an interview with a Child Protective Services worker the same day she was found, the victim said that "Jack" had taken her in his car, buried her, choked her, licked her vaginal area, touched her vaginal area with his fingers, put his penis in her mouth, and put his penis in her vagina. The victim ultimately said it was defendant who took her.

Defendant was ultimately charged with attempted murder, kidnapping, sexual intercourse with a child under the age of 10, two counts of oral copulation with a child under the age of 10, two counts of committing a lewd and lascivious act on a child under the age of 14, inflicting cruel and inhuman corporal punishment on a child, and child endangerment, along with various enhancement allegations.

Before trial,¹ defendant filed a motion to change venue, asserting that "due to the prejudicial publicity surrounding the case, there is a reasonable likelihood that Mr. Kaplon can not [*sic*] receive a fair and impartial trial in Siskiyou County." In their written opposition to the motion, the People argued that the motion should be denied "with the option of being renewed should voir dire indicate the impossibility of empaneling a jury without unfair prejudice." (Bolding and capitalization omitted.) At the hearing on the motion, the prosecutor reiterated the People's request that the court "deny the motion without prejudice," explaining that "[i]t is completely appropriate. We

¹ Defendant originally filed the motion in January 2010, and the People opposed it on the ground it was defective because it lacked a supporting declaration. In response, in February 2010 defendant withdrew the motion and refiled it with the required declaration.

can revisit this question at the time of jury voir dire based upon the responses that individual jurors, members of the community might have.”

In July 2010, Judge Langford denied the motion. (At that time, it had already been determined that Judge Masunaga would be the trial judge in the case.) Judge Langford explained his ruling as follows:

“[I]n ruling and announcing and explaining my ruling today, I want to start out by saying that this court is, at this point, going to be denying Mr. Kaplon’s motion for change of venue. Knowing that the issue of venue and the appropriateness of Siskiyou County as the venue in this case will need to be an issue that the court is mindful of, and an issue that certainly may need to be further addressed by the trial court during the jury selection process should it appear at that point appropriate to do so.

“[¶] . . . [¶]

“Certainly, the defense motion and the matters in support of it shows [*sic*] that there is a logical and legitimate concern as to whether a fair and impartial trial in this matter can be had in Siskiyou County. But that concern does not at this point rise to the level of concern above that of a mere possibility of an unfair trial.

“Therefore, I have determined that there is not, at this point, a showing of the reasonable likelihood as required. . . . [T]he defense motion is therefore denied, and the issue of a possible change of venue may be taken up again if and when, in the course of the jury selection process, it appears to the court that this may be appropriate.

“I would note -- and it’s very, very clear, and I want to make it very clear to all in attendance, that under the law, young Mr. Kaplon, as he sits here today, is presumed innocent, and he retains that presumption of innocence. And unless and until he is proven guilty as part of a trial process that in all aspects complies with each and every requirement of the law, the trial in this matter will proceed in Siskiyou County only if the trial court is satisfied that the jury can fairly and impartially perform its duties related to the charges against this young man.

“At this point, however, I have not been persuaded by the defense argument that there is a reasonable likelihood that a fair and impartial trial cannot be held in Siskiyou County. Therefore, as I said and will reiterate, the defense motion at this point is denied.”

Jury selection began a year later, on July 12, 2011. Each side had 20 peremptory challenges. Defense counsel used only 10 peremptory challenges before accepting the jury panel. Defense counsel then used another four peremptory challenges before accepting the four alternate jurors. At no time during or after the jury selection process did defendant renew his motion for change of venue.

The jury found defendant guilty of all charges and found all enhancement allegations were true. The trial court sentenced him to a determinate term of 14 years and a consecutive indeterminate term of 87 years to life in prison.

DISCUSSION

I

Denial Of Motion For Change Of Venue

On appeal, defendant’s primary contention is that the trial court violated his constitutional rights to a fair and impartial jury and a fair trial by denying his motion for change of venue. The People contend defendant failed to preserve this issue for appeal by failing to renew the change of venue motion after jury voir dire. We agree.

“[W]hen a trial court initially denies a change of venue motion without prejudice, a defendant must renew the motion after voir dire of the jury to preserve the issue for appeal.” (*People v. Williams* (1997) 16 Cal.4th 634, 654-655.) As our Supreme Court explained in *People v. Staples* (1906) 149 Cal. 405, 412, “it is not error for the trial court to postpone the consideration of an application for a change of venue until an attempt is made to impanel the jury, where leave is granted to counsel to renew his application if the facts disclosed on the impanelment should further warrant it, and . . . where counsel fails thereafter to renew his motion, he cannot claim that error was committed by the court in

failing to order a change of venue. . . . [T]he failure to renew [the] motion, where it was denied temporarily only, [i]s an abandonment and waiver of the whole question, and fatal to any claim based upon the original application.”

Defendant acknowledges that his change of venue motion was denied without prejudice, as the trial court stated that the motion might “need to be further addressed by the trial court during the jury selection process” and that “the issue of a possible change of venue may be taken up again.” He contends, however, that the rule requiring renewal of the motion after voir dire to preserve the issue for appeal does not apply here because “the motions court said, three separate times, that the trial court -- not [defendant] -- would re-raise the change of venue issue if the trial court thought it was appropriate.” Defendant contends he “was entitled to rely on the motions court’s assurances that the venue issue would be re-raised by the trial court if the trial court thought it appropriate, and via those assurances [defendant] was relieved of the general obligation to renew his venue motion after the voir dire.” (Italics omitted.)

We disagree with defendant’s characterization of Judge Langford’s ruling. At no point did the court state that defendant was relieved of his obligation to renew the motion to preserve the change of venue issue for appeal, nor did Judge Langford clearly communicate that Judge Masunaga would reraise the issue sua sponte. Thus, there was no legitimate reason for defendant or his attorney to believe that the trial court’s preliminary denial of the motion for change of venue could be raised as an issue on appeal without first raising the issue again after voir dire.

This conclusion makes eminent sense when understood in light of the reason for the renewal requirement. The reason a failure to renew a change of venue motion denied without prejudice is deemed “an abandonment and waiver of the whole question” (*People v. Staples, supra*, 149 Cal. at p. 412) is because that is the only logical conclusion to be drawn when a defendant who moved unsuccessfully to change venue before jury selection chooses not to contest venue anew once a jury has been chosen. Absent a

renewal of the change of venue motion or some other kind of objection to the jury panel, the People, the trial court, and ultimately the reviewing court are entitled to assume that the defendant came to believe he *could* receive a fair and impartial trial from the jury that was actually empanelled, despite his belief to the contrary before jury selection began. That is particularly true where, as here, the defendant agrees to a jury without having exhausted his peremptory challenges. (See *People v. Daniels* (1991) 52 Cal.3d 815, 854 [“In the absence of some explanation for counsel’s failure to utilize his remaining peremptory challenges, or any objection to the jury as finally composed, . . . counsel’s inaction signifies his recognition that the jury as selected was fair and impartial”].) A defendant is not entitled to agree to a jury without using all of his peremptory challenges and without objecting to the jury’s composition in any manner, and then, dissatisfied with the result of the trial, assert on appeal that the trial court erred in denying the motion to change venue that he filed before jury selection had even begun. Renewal of the motion following voir dire or, at the very least, some kind of objection to the jury finally selected is necessary to preserve the venue issue for review on appeal. Because defendant did not do either of those things here, his challenge to the trial court’s ruling on his change of venue motion is not properly before us.

This conclusion resolves defendant’s second claim of error also, which is that the trial court violated his constitutional rights by failing to preserve the jury questionnaires completed by all of the potential jurors who remained after hardship excuses were granted but who were not ultimately selected to serve on the panel or as alternates. The only prejudice defendant claims from the destruction of the questionnaires is that it “impeded . . . his ability to present [the change of venue] issue to this Court” because “he was precluded . . . from including important information about pretrial exposure to the facts of this case.” However, inasmuch as we have declined to reach the merits of the change of venue issue because it was not preserved for appeal, any error in the destruction of the jury questionnaires was necessarily harmless to defendant.

II

Failure To Instruct On Corpus Delicti

With respect to the sex crimes, defendant contends the trial court erred “by failing to charge with a pattern instruction . . . that the corpus of the crime has to be proven independently of any admissions by [defendant].” The People appear to concede the error but contend it was harmless. We agree.

“In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself--i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant.” (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169.) “This rule is intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened.” (*Id.* at p. 1169.) “The independent proof [of the crime] may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. [Citations.] There is no requirement of independent evidence ‘of every physical act constituting an element of an offense,’ so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency.” (*Id.* at p. 1171.)

“Whenever an accused’s extrajudicial statements form part of the prosecution’s evidence, the cases have additionally required the trial court to instruct sua sponte that a finding of guilt cannot be predicated on the statements alone.” (*People v. Alvarez, supra*, 27 Cal.4th at p. 1170, italics omitted.) But “[e]rror in omitting a corpus delicti instruction is considered harmless, and thus no basis for reversal, if there appears no reasonable probability the jury would have reached a result more favorable to the defendant had the instruction been given. [Citations.] [¶] Of course, as we have seen, the modicum of necessary independent evidence of the corpus delicti, and thus the jury’s duty to find such

independent proof, is not great. The independent evidence may be circumstantial, and need only be ‘a slight or prima facie showing’ permitting an inference of injury, loss, or harm from a criminal agency, after which the defendant’s statements may be considered to strengthen the case on all issues. [Citations.] If, as a matter of law, this ‘slight or prima facie’ showing was made, a rational jury, properly instructed, could not have found otherwise, and the omission of an independent-proof instruction is necessarily harmless.” (*Id.* at p. 1181.)

Here, defendant complains that a corpus delicti instruction was necessary as to the sex crimes because of the evidence that he stated at Souza-Myers’s house that he was “ ‘going to go to jail for a long, long time,’ ” although he did not know how he was going to get there. Defendant contends the failure to instruct with a corpus delicti instruction was prejudicial because “there was no additional evidence connecting [him] to [the sex crimes] apart from his out-of-court statement at Souza-Myers’s house.”

Defendant’s argument lacks merit. Contrary to defendant’s suggestion, the evidence did not have to “connect[.]” him to the sex crimes to satisfy the corpus delicti rule. Rather, the evidence only had to “permit[.] an inference of injury, loss, or harm from a criminal agency” (*People v. Alvarez, supra*, 27 Cal.4th at p. 1181, italics added) -- that is, the evidence had to permit an inference that a crime actually occurred, whoever may have committed it. As the People point out, the evidence -- specifically, that victim’s statements -- certainly did that. In fact, the victim’s statements not only permitted an inference that she had been subjected to lewd and lascivious acts, sexual intercourse, and oral copulation, her statements also directly implicated defendant as the perpetrator of those acts. Thus, even if defendant’s misunderstanding of the corpus delicti rule were correct, his argument would still lack merit. Because there was, as a matter of law, the requisite quantum of evidence as to the sex crimes to satisfy the corpus delicti rule, the trial court’s failure to instruct the jury on that rule was necessarily harmless.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

DUARTE, J.