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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DEANDRICK OPIC SWAUNCY,

Defendant and Appellant.

E053556

(Super.Ct.No. RIF130325)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Ronald L. Taylor (retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) and Bernard Schwartz, Judges.* Affirmed.

A. William Bartz, Jr. for Defendant and Appellant.

* Judge Taylor ruled on defendant’s motion to dismiss following the 2010 mistrial and Judge Schwartz presided at defendant’s second trial in 2011.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, and James D. Dutton, Sabrina Y. Lane-Erwin, and A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant Deandrick Opic Swauncy guilty of committing lewd acts and other sex offenses against his girlfriend's daughter, Jane Doe. The evidence showed that the crimes were committed between February 2005 and March 2006, when Jane was seven to eight years old. Defendant was sentenced to 31 years to life in prison.

On this appeal, defendant claims the trial court erroneously denied his motion to dismiss the charges on double jeopardy grounds after a prior trial ended in a mistrial. He also claims that insufficient evidence supports his convictions. We reject these claims and affirm the judgment.

Defendant has petitioned for a writ of habeas corpus in case No. E056336, claiming his trial counsel rendered ineffective assistance. We ordered the writ petition considered with this appeal. By separate order, we summarily deny the writ petition.

II. FACTS AND PROCEDURAL HISTORY¹

A. *Prosecution Evidence*

1. Background

In February 2005, defendant moved into an apartment with Jane's mother, Yvette I., Jane, and Jane's younger brother, X. In March 2006, when Jane was eight years old, Yvette went to Las Vegas on a Tuesday and returned home the following day. When Yvette returned home, she and defendant got into a "big argument." Yvette suspected that defendant had been cheating on her, in part because some of her clothing was not where she left it in her bedroom, and a vibrator she usually kept in her closet was in a drawer. Yvette also thought that something was wrong with Jane because Jane was unusually withdrawn.

Yvette asked Jane whether anyone had touched her inappropriately. Initially, Jane denied anyone had touched her, but Yvette kept asking her. Finally, Jane told Yvette about a "freeze game" defendant would play with her and X. Eventually, defendant would only play the freeze game with Jane, and during the game he would "rub" Jane "in sexual places."

Jane told Yvette that defendant would watch pornographic films with her and have her act out what they saw in the films. According to Jane, defendant had her engage in oral and anal sex, and give him "hand job[s]." He also used "dildos" on her, and digitally

¹ The facts are taken from the record in defendant's second trial in February 2011. Defendant's previous trial in January 2010 ended in a mistrial.

penetrated her after lubricating her with “K-Y [j]elly.” Jane also told her mother that defendant had semen on him, and “tricked” her into eating it by telling her it was medicine.

2. Jane’s RCAT Interview

On March 22, 2006, Jane had a videotaped interview with a county examiner from the Riverside Child Assessment Team (RCAT). The videotape of the interview was played for the jury.

During the interview, Jane said that approximately one month after defendant and her family moved into an apartment together in February 2005, and while her mother was at a Walmart store, Jane “accidentally” saw part of a pornographic movie that defendant was watching on his computer. Thereafter, defendant began showing Jane pornographic movies, asked her to “help him” because no woman was present, and showed Jane the sex acts he liked.

Jane first “helped” defendant by wearing her mother’s red skirt and bending over, like Jane saw a woman do in one of the pornographic movies. Jane described “white stuff” that came out of defendant, and defendant had her “taste it.” On one occasion, when Jane was ill, defendant told her his semen was medicine, but after she tasted it she continued to cough that night and concluded that defendant had tricked her.

Defendant “kept telling” Jane not to wear underwear under her skirt, and touched her vagina on at least one occasion. On three or four occasions, defendant lubricated Jane’s rectum with “K-Y” jelly, and inserted a “butt plug” into it. This “kind of hurt,”

but Jane did not tell defendant it hurt because she thought he would be “mad or something.”

On two or three occasions, defendant tried to insert his penis into Jane’s rectum, but it would not go inside. On one occasion, he tried to digitally penetrate her rectum with his finger, but it would not go inside so Jane “practice[d]” with the “butt plug.” On 10 to 11 occasions, defendant had Jane give him a “hand-job” by rubbing her hands on his penis and squeezing it. Defendant had Jane give him oral sex by putting her mouth “just on the top” of his penis.

All of the sex acts would occur when Yvette was away from home and X. was in another room. Defendant often told Jane not to tell Yvette about the molestations. According to Jane, Yvette found out about the molestations when she found something on Jane’s underwear, and Jane complained of pain in her rectal area. Defendant last molested Jane one week before the interview, when Yvette was in Las Vegas.

3. Jane’s Trial Testimony

Jane was 13 years old at the time of the second trial in February 2011. At the second trial, Jane denied that defendant had ever molested her or showed her pornography. She said she made up the molestation allegations because she was angry with defendant for hitting her and her brother with a belt, and because she wanted her mother to be with her biological father rather than defendant.

After defendant was arrested, Jane, X., and Yvette continued to see defendant, and they all spent the night in the same home, even though Yvette was not supposed to have

Jane or her brother with defendant. Jane knew that her mother still loved defendant and wanted to be with him, and this made Jane angry with her mother. Jane also knew her mother was avoiding having to take Jane to court when she took Jane and X. to Arizona to live with their aunt.

Jane and X. were ultimately removed from Yvette's custody, and this made Jane feel depressed. Jane thought that she and X. were removed from Yvette's custody because she, Jane, had accused defendant of molesting her. Jane recanted the allegations after she saw that "everyone was suffering," and she and X. were no longer in Yvette's custody.

4. Additional Prosecution Evidence

On March 20, 2006, the day after Jane told Yvette that defendant had molested her and two days before the RCAT interview, Yvette took Jane to the hospital for an initial medical examination in the emergency department. This initial examination showed there were no injuries to Jane's anal or genital areas. On March 30, 2006, Jane underwent a more thorough "magnification medical examination" which revealed she had a small "labial adhesion," or irritation to her genital area. According to the pediatrician who conducted both examinations, the labial adhesion could have been caused by a penis, a finger, another object, such as a vibrator, or by poor hygiene.

Because Jane's initial examination indicated that she was "completely intact" and "everything was fine," Yvette began to question the truth of Jane's molestation claims. Yvette also failed to take Jane to her originally-scheduled magnification medical

examination on March 22, 2006. According to Yvette, after she told Jane that the initial medical examination was inconsistent with her molestation claims, Jane began to cry and said she made up the story because she wanted defendant “gone.”

During a March 28, 2006, interview with child protective services at Jane’s school, Yvette said to Jane: “Why are you doing this to me? You know he wouldn’t do something like this to you. Tell them you made it up.” “Tell them you’re lying.” According to Jane’s teacher, who was present during the interview, Jane did not say she lied, but started to cry.

Yvette gave the police some notes, in defendant’s handwriting, that Yvette found in a notebook in her kitchen. One note said: “Would you like to get a library card today, yes or no? If, yes, I need two or three things from you.” Another said: “Clean. Let down the shade outside. Close the screen door and the blinds. Take the white clothes to my room. Get dressed, tops and bottoms. Bring me my K-Y so that I can start something to impress me. Watch TV, practice stretching, come up with something impressive. And I want to do it twice.”

A red skirt, which belonged to Yvette and which Yvette found under Jane’s bed after Yvette returned from Las Vegas, was “tape lifted” and screened for the presence of seminal fluid. The skirt had seminal fluid on its front exterior and rear interior. Jane had been trying to hide the skirt when Yvette was talking to her. The skirt did not appear to have any pinholes in it.

The police also recovered a vibrator and a butt plug in the apartment that Yvette shared with defendant and the children. The police also recovered a blue shirt, belonging to Jane, that had a pubic hair on it.

B. Defense Case

The defense did not present any affirmative evidence.

C. The Verdicts and Sentence

The jury found defendant guilty as charged in counts 1 through 5 of committing lewd acts against Jane, a child under age 14 (Pen. Code, §§ 288, subd. (a)), in count 6 of sexual penetration by force, fear, or duress (Pen. Code, § 289, subd. (a)(1)), and in count 7 of sexual penetration by force, fear, or duress on a child under 14 years of age and seven or more years younger than defendant (Pen. Code, § 269, subd. (a)(5)). Defendant was sentenced to 31 years to life, consisting of six years on count 6, consecutive two-year terms on counts 1 through 5 (16 years determinate), plus 15 years to life on count 7.

III. DISCUSSION

A. The Trial Court Properly Denied Defendant's Motion to Dismiss the Charges After a Mistrial Was Declared in Defendant's First Trial

Defendant claims the trial court erroneously denied his motion to dismiss the charges on federal and state double jeopardy grounds, after the court declared a mistrial in his first trial. We conclude that the motion was properly denied.

1. Defendant's First Trial²

Jury selection in defendant's first trial began on January 4, 2010. On January 5, while jury selection was still in progress, defendant moved to delay the trial and exclude evidence based on the prosecution's failure to timely provide certain discovery to the defense. This discovery consisted of audiotape interviews of Jane and Yvette, and the transcripts of these recorded interviews. The court found there was no good cause for the prosecution's failure to timely provide this discovery to the defense, ordered the immediate discovery of the tapes and transcripts, a brief delay of the trial, and a jury instruction on the late discovery.

On January 7, 2010, the jury in the first trial was sworn. On January 13, 2010, a mistrial was declared based on the prosecution's failure to timely discover and turn over additional discovery to the defense, specifically, a supplemental DNA report dated November 8, 2006. The report came to light during defense counsel's cross-examination of Riverside County Sheriff's Investigator Brian Mehlbrech. The report indicated there were no "pinholes" in the red skirt Jane claimed defendant had her pin on or pin up during some of the molestations, and that no fecal matter was found on the "butt plug" that Jane claimed defendant inserted into her anus.

² The record does not include a reporter's transcript of any part of the first trial, but the clerk's transcript includes the minute orders issued during the first trial, defendant's motion to dismiss the charges, and the People's opposition to the motion. The record also includes the reporter's transcript of the April 16, 2010, hearing on the motion to dismiss.

After the mistrial was declared in the first trial, the defense moved to dismiss the charges on federal due process grounds, specifically because the prosecution's failure to discover and turn over the report constituted a *Brady*³ violation. The People opposed the motion. In a declaration in opposition to the motion, the prosecutor denied having any knowledge of the report before it came to light during defense counsel's cross-examination of Investigator Mehlbrech.

In its opposition papers, the People conceded that the report should have been discovered and turned over to the defense before trial. Indeed, the parties and the court agreed that the report was favorable to the defense because it tended to impeach Jane's pretrial statements that the molestations occurred, and bolstered defendant's claim that the molestations did not occur.

Still, the People argued that dismissal of the charges was unwarranted because the report was not material—that is, there was no reasonable probability defendant would have realized a more favorable result had the report been discovered and turned over to the defense before the first trial.⁴ In sum, the People argued that the failure of the prosecution team to timely discover and turn over the report did not amount to a true

³ *Brady v. Maryland* (1963) 373 U.S. 83, 87 (*Brady*).

⁴ The People pointed out that, contrary to defendant's claim in its motion to dismiss, the supplemental DNA report *did not* indicate that no DNA was found on the butt plug. Instead, it indicated that no fecal matter was found on the butt plug and the butt plug was not tested for DNA. The People also pointed out that even though the report *did* indicate that no pinholes were found in the red skirt, the report indicated that the fabric of the skirt "may not retain holes well."

Brady violation because the report was immaterial, and no “other remedy,” in addition to declaring the first trial a mistrial—including the dismissal of the charges—was necessary or appropriate to remedy the late discovery of the report.

At the April 16, 2010, hearing on the motion, defense counsel said he “want[ed] to make it very clear” that he did not believe the prosecutor acted intentionally or in bad faith in failing to discover the supplemental DNA report before trial and turn it over to the defense. The trial court agreed that there was no “willful misconduct” on the part of the prosecutor in failing to discover and turn over the report. Thus, the court effectively found that the prosecutor did not act intentionally or in bad faith in failing to timely discover the report and turn it over to the defense.

The court denied the motion on the ground that the prosecution did not commit a *Brady* violation in failing to timely discover and turn over the supplemental DNA report. The court reasoned that the report was not material—that is, there was no reasonable probability that defendant would have realized a more favorable result, including acquittal on the charges, had the report been discovered and turned over to the defense before trial.

2. Analysis

Defendant claims his motion to dismiss was erroneously denied after the court declared a mistrial in the January 2010 trial. Though he argued in the trial court that the entire prosecution team, including Detective Mehlbrech, committed a *Brady* violation in failing to timely discover and turn over the supplemental DNA report to the defense and

for this reason the charges should have been dismissed, defendant now argues that his retrial on the charges in February 2011 was barred by the double jeopardy clause of the federal and state Constitutions. We reject this claim.

When, as here, a mistrial is granted on the defendant's motion, the double jeopardy clause of the Fifth Amendment to the federal Constitution bars retrial only if the prosecutor intended to provoke the defendant into moving for the mistrial. (*Oregon v. Kennedy* (1982) 456 U.S. 667, 675-679; *People v. Batts* (2003) 30 Cal.4th 660, 680-682.) This rule is based on the defendant's right to complete his trial before the first jury is empaneled to try him—one of the “principal threads” embodied in the Fifth Amendment double jeopardy clause. (*Oregon v. Kennedy, supra*, at p. 673.) This court is bound by the trial court's factual findings concerning the prosecutor's intent if substantial evidence supports them. (*People v. Batts, supra*, at pp. 684-685.)

At the April 16, 2010, hearing on the motion to dismiss, defense counsel conceded and the trial court found that the prosecutor did not act intentionally or in bad faith in failing to discover the supplemental DNA report before the first trial commenced in January 2010. The record supports this determination. The prosecutor denied having any knowledge of the report before its existence was revealed during defense counsel's cross-examination of Inspector Mehlbrech during the first trial, and defense counsel and the court accepted the prosecutor's representation. Accordingly, the retrial in February 2011 was not barred by the Fifth Amendment double jeopardy clause.

At oral argument, defendant urged this court to consider not only whether the prosecutor intended to provoke the mistrial, but also whether anyone on the prosecution team, including Investigator Mehlbrech, intended to provoke the mistrial by intentionally withholding the report. He claims any other rule gives free “reign” to law enforcement officers and other members of the prosecution team to provoke a mistrial by intentionally withholding evidence, as long as the prosecutor is unaware they are doing so. Not so.

As the trial court determined, there was no *Brady* violation in the prosecution team’s failure to discover and turn over the report, regardless of whether the nondisclosure was intentional or inadvertent, because the report was not material—that is, it was not reasonably probable that the report would have affected the outcome of the trial. (*People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 51-52 [“there is never a real ‘*Brady* violation’ unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.”].) Defendant does not challenge this determination. And because there was no *Brady* violation in the failure to discover and turn over the report, dismissal of the charges was unauthorized under both the discovery statutes and the due process clause of the federal Constitution. (*People v. Superior Court (Meraz)*, *supra*, at pp. 48-49 [court erroneously dismissed special circumstance allegation as discovery sanction under Pen. Code, § 1054.5, subd. (c), when dismissal not required under *Brady*, that is, under the Fourteenth Amendment’s due process clause].)

There is no authority for deeming a retrial barred under the double jeopardy clause of the federal Constitution when, as here, the first trial was declared a mistrial at the behest of the defendant, and *the prosecutor* did not intentionally provoke the defendant into moving for the mistrial. (See *Oregon v. Kennedy*, *supra*, 456 U.S. at pp. 673-679.) And as indicated, the remedy for the intentional suppression of evidence by members of *the prosecution team*, as opposed to the prosecutor, is limited by *Brady*. And under *Brady*, dismissal of the charges is unwarranted unless the suppressed evidence was material—regardless of whether the suppression was intentional or inadvertent. (See *Strickler v. Greene* (1999) 527 U.S. 263, 280-281; *People v. Superior Court (Meraz)*, *supra*, 163 Cal.App.4th at pp. 51-53.)

We now turn to defendant’s state constitutional claim. The test for determining whether retrial is barred under the double jeopardy clause of article I, section 15 of the California Constitution is broader than the “intent-to-cause-mistrial-test” of the Fifth Amendment to the federal Constitution. (*People v. Batts*, *supra*, 30 Cal.4th at pp. 666, 692-695.) Under the state Constitution, retrial is barred when the prosecutor intentionally commits misconduct for the purpose of triggering a mistrial (as it is under the federal Constitution), *or* “when the prosecution, believing in view of events that unfold during an ongoing trial that the defendant is likely to secure an acquittal at that trial in the absence of misconduct, intentionally and knowingly commits misconduct in order to thwart such an acquittal—and a court, reviewing the circumstances as of the time of the misconduct, determines that from an objective perspective, the prosecutor’s misconduct in fact

deprived the defendant of a reasonable prospect of an acquittal.” (*Id.* at p. 695; see also *Sons v. Superior Court* (2004) 125 Cal.App.4th 110, 116.)

As the People argue, the trial court’s express finding that the prosecutor did not intentionally fail to timely discover and turn over the supplemental DNA report to the defense precludes any conclusion that the retrial of the charges was barred under the state Constitution. Because the prosecutor did not intentionally suppress the report, it follows that he did not commit intentional misconduct in failing to timely discover the report; did not intentionally provoke defense counsel into moving for a mistrial based on the report; and did not intentionally suppress the report for the purpose of thwarting a likely acquittal of defendant on the charges. (See *People v. Batts, supra*, 30 Cal.4th at pp. 692-695.)

Nor is there any indication that defendant had any realistic prospect of acquittal in the first trial. By the time Investigator Mehlbrech testified and the supplemental DNA report came to light, both Jane and her mother Yvette had testified, and Jane’s RCAT interview and Yvette’s initial statements to the police had also been presented to the jury. Jane’s statements to the RCAT interviewer and Yvette’s initial statements to the police—together with the red skirt with semen stains and the other physical evidence found in the family’s apartment—constituted compelling evidence that the molestations occurred as Jane described them in the RCAT interview.

Here again, defendant argues that the People and the trial court failed to address “the real issue surrounding the mistrial motion,” which was whether a member of the “prosecution team,” namely, Investigator Mehlbrech, “committed misconduct

intentionally or negligently that forced [defendant's] trial counsel to request a mistrial.” Defendant argues: “What the trial court and [the People] fail to recognize is that the real culprit here is Detective Mehlbrech.”

This argument is unavailing. As discussed, the record supports the trial court's finding that the prosecutor did not intentionally suppress the report, and there is no indication that defendant had a realistic prospect of acquittal during the first trial. For these reasons, retrial is not precluded under the double jeopardy provisions of the federal or state Constitutions—even if Investigator Melbrech intentionally attempted to suppress the report.

Finally, defendant complains he was effectively denied his counsel of choice after the attorney he retained to represent him in the first trial, Rajan R. Maline, was forced to move for and obtain a mistrial in the first trial. Defendant argues that he was “forced to use court appointed counsel for the second trial.” Defendant's failure to retain Attorney Maline to represent him in the second trial simply cannot be attributed to the prosecutor's inadvertent failure to timely discover and turn over the supplemental DNA report to the defense before the first trial, the mistrial in the first trial, or the trial court's refusal to dismiss the charges.

B. Substantial Evidence Supports Defendant's Convictions

Defendant next claims that the judgment must be reversed because insufficient evidence supports each of the convictions in counts 1 through 7. He argues that the prosecution's case rested entirely on Jane's extrajudicial statements—principally to the

RCAT interviewer and to her mother, Yvette—that defendant molested her, and that all of Jane’s extrajudicial statements were “inherently improbable” based on the entire record.

In considering a claim that insufficient evidence supports a criminal conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Snow* (2003) 30 Cal.4th 43, 66.)

Defendant was convicted in counts 1 through 5 of committing lewd acts on Jane, a child under age 14 (Pen. Code, §§ 288, subd. (a)), in count 6 of sexual penetration by force, fear, or duress (Pen. Code, § 289, subd. (a)(1)), and in count 7 of sexual penetration by force, fear, or duress on a child under 14 years of age and seven or more years younger than defendant (Pen. Code, § 269, subd. (a)(5)). Defendant only challenges the sufficiency of the evidence that the crimes occurred.

As the People argue, Jane’s statements to the RCAT interviewer and to her mother Yvette several days before the RCAT interview constitute substantial evidence that the crimes occurred. Both to Yvette and to the RCAT interviewer, Jane described in significant and vivid detail the circumstances under which the molestations began, when and under what circumstances the molestations occurred, and the things defendant did to Jane and would have Jane do during the molestations.

Contrary to defendant’s claim, Jane’s extrajudicial statements are not “inherently improbable” simply because she denied that the molestations occurred when she testified at trial. Jane’s denial was credibly impeached. The jury could have reasonably inferred that Yvette pressured Jane into denying that the molestations occurred, given that Yvette came to believe that Jane was lying about the molestations after her initial medical examination showed she had no injuries to her genital or anal areas.

The details that Jane provided to the RCAT interviewer, coupled with the physical evidence in the family’s apartment, including the sex toys, the red skirt with semen stains on it, and defendant’s handwritten notes to Jane, were more than sufficient to allow a jury comprised of reasonable persons to conclude beyond a reasonable doubt that defendant committed the charged crimes.

IV. DISPOSITION

The judgment is affirmed.

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KING
J.

We concur:

RAMIREZ
P. J.

MILLER
J.