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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

PEDRO EVARISTO LOPEZ,

Defendant and Appellant.

F060736

(Super. Ct. No. F08901480)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Carlos A. Cabrera, Judge.

Diane E. Berley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Tia M. Coronado, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Pedro Evaristo Lopez of numerous crimes related to the molestation of his minor daughter (the victim) that occurred over a period of years. He argues that the judgment must be overturned because there was insufficient evidence to support the verdicts on three of the counts and because trial counsel was ineffective for failing to object to evidence provided by the People's expert witness. We reject both arguments and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

The information

The first amended information charged Lopez with eight counts. Count 1 alleged that Lopez violated Penal Code section 288.7, subdivision (a),¹ sexual intercourse with a minor 10 years of age or younger. Count 2 alleged Lopez violated section 269, subdivision (a)(1), aggravated sexual assault of a child under 14 years of age by raping the victim. The timeframe alleged in this count was between December 1, 2004, and November 30, 2005. Count 3 also alleged that Lopez violated section 269, subdivision (a)(1). The timeframe alleged in this count was between December 1, 2005, and June 1, 2006. Count 4 alleged that Lopez violated section 288.5, continuous sexual abuse of a minor under the age of 14. Count 5 alleged that Lopez violated section 261, subdivision (a)(2), rape. Count 6 alleged that Lopez violated section 286, subdivision (b)(1), sodomy on a minor under 18 years of age. Count 7 alleged that Lopez violated section 273d, subdivision (a), infliction of corporal injury on a child, the victim. Count 8 alleged that that Lopez violated section 273d, subdivision (a), infliction of corporal injury on a child, the victim's brother.

¹All further statutory references are to the Penal Code.

The evidence

The victim was 17 at the time of trial and a senior in high school. She was born in Mexico in November 1992. She came to the United States when she was nine years old. She first lived with her cousin in a trailer park. In February 2003 she moved into a trailer with Lopez. She was 10 years old at the time. Initially, the victim slept in one bedroom, her brother in a second bedroom, and Lopez slept in the living room.

The victim, the victim's brother, and Lopez spoke mostly Spanish, although Mixteco was the victim's native tongue. Lopez did not want the victim or her brother to speak Mixteco, so he insisted they speak Spanish. Many of the residents in the trailer park where the victim lived with Lopez were from the same region as the victim.

The victim testified that the first time she had intercourse with Lopez was when she was eight years old before she lived with Lopez in the trailer. When the victim slept in her own bed in the trailer, Lopez would sneak into her bedroom and have intercourse with her. The victim resisted because she did not want to have intercourse, but Lopez forced her to do so despite her efforts. When the victim was about 10 or 11, she stopped resisting because she knew Lopez would force her to have sex anyway and, when she resisted, Lopez would punish her and her brother the next day.

Eventually, Lopez told the victim she should sleep with him so that she would not fall off the bed while sleeping. Lopez continued to force the victim to have intercourse. Lopez would initiate the rapes by touching her and taking off her clothes, while not saying anything.

The victim was 14 when she, her brother, and Lopez moved into a larger trailer in the same trailer park. She slept with her father in one of the bedrooms in this trailer while her brother slept in the bedroom at the other end of the trailer. The victim and Lopez would have intercourse two or three times per week.

During the summer the victim, the victim's brother, and Lopez would travel to Oregon and obtain work picking raspberries, strawberries, and blackberries. During this

time, the three of them slept in a large dormitory type of building. Lopez would not rape the victim while they were in Oregon, apparently because there was no privacy. Lopez again would force the victim to have intercourse when they returned to the trailer park for the start of the school year.

Lopez told the victim she should not tell anyone they were having intercourse because, while it would be embarrassing for him, no one would believe her or people would blame her. The last time Lopez forced the victim to have intercourse occurred the beginning of the week that the victim reported the crimes to the police. About two weeks before that date, Lopez put his penis in the victim's anus.

The victim related several instances where Lopez struck her for failing to complete chores around the house. She also related an instance that occurred on the Saturday before she reported the intercourse to the police. On that day she accidentally brought home from the laundromat a shirt that belonged to another family. When Lopez discovered the mistake, he became upset and struck her repeatedly with a belt. Pictures of the victim's injuries were shown to the jury. The victim also recalled an incident when Lopez struck her brother with an orange extension cord. This incident occurred the day after the laundromat incident.

On February 29, 2008, the victim's cousin went to the vice-principal's office and wanted to take the victim out of school. The victim's cousin was not permitted to do so because she was not listed on the appropriate forms. The victim's cousin eventually told the vice-principal that Lopez had been having sex with the victim. The victim was called into the vice-principal's office while the victim's cousin was present. The victim became very upset and started crying when the vice-principal asked her if there was anything she needed to tell him, but she would not say anything. The victim's cousin suggested the vice-principal speak with the victim's brother. The victim's brother told the vice-principal that the victim had said Lopez was having sex with her. The vice-principal called the sheriff's department and reported a possible crime.

Fresno County Deputy Sheriff Chris Nelson responded to the high school and spoke with the victim. Nelson took the victim to a separate room and spoke with her in an attempt to build a rapport. During this time the victim was very outgoing and engaging. The victim's demeanor changed when Nelson asked her if anything had happened to her. The victim was very emotional and detached, but she did convey information to Nelson.

The victim described her injuries to Nelson, so he asked the school nurse to examine the victim. The nurse described to Nelson injuries that appeared to be consistent with those described by the victim.

Lopez testified he was from a small town in Mexico. He is a Mixteco Indian. He started coming to the United States to work when he was 20 or 21 because his town was poor and he needed to earn money. He lived in a trailer park at the time the accusations were made. The majority of the people in the trailer park were from the same hometown as Lopez.

Lopez admitted he struck the victim's brother with a belt, but only on two occasions. He also admitted striking the victim with a belt one time because she and her brother had lied to him. Lopez denied hitting either the victim or her brother with an extension cord. Lopez also denied that he confronted the victim because she brought home from the laundromat a shirt that belonged to another family.

Lopez denied that the victim did all of the housework. Initially, Lopez did the cooking and housework, but the three shared household duties as the victim and her brother grew up.

Lopez denied having intercourse with the victim at any time. He stated that the victim lied when she stated they had had intercourse. He also denied sodomizing the victim.

Lopez testified that he spoke with the victim and her brother about returning to his hometown in Mexico. The victim and her brother wanted to stay in the United States so they could continue their education, and Lopez agreed to do so.

The verdict and sentencing

The jury convicted Lopez of (1) both counts of aggravated sexual assault on a child under the age of 14 (§ 269, subd. (a)(1)), (2) continuous sexual abuse of a child under the age of 14 (§ 288.5), (3) rape (§ 261, subd. (a)(2)), and (4) sodomy on a minor under the age of 18 (§ 286, subd. (b)(1)). The jury found Lopez not guilty of both counts of felony infliction of corporal injury on a child (§ 273d, subd. (a)). However, the jury convicted Lopez of both counts of the lesser included offense of misdemeanor willful infliction of harm on a child (§ 273a, subd. (b)). Finally, the jury found Lopez not guilty of sexual intercourse with a minor 10 years of age or younger (§ 288.7, subd. (a)).

The trial court imposed consecutive aggravated terms for the continuous sexual abuse of a minor, rape, and sodomy counts, for a total determinate term of 27 years. The trial court imposed consecutive terms of 15 years to life for the aggravated sexual assault counts, for a total indeterminate term of 30 years to life. The misdemeanor counts were sentenced to time served.

DISCUSSION

I. Sufficiency of the Evidence

Lopez's argument

Count 2 of the information alleged that Lopez violated section 269, subdivision (a)(1) (aggravated sexual assault of a child) during the time period of December 1, 2004, through November 30, 2005. Count 3 of the information alleged Lopez committed the same crime but during a different time period -- December 1, 2005 through June 1, 2006. Pursuant to the terms of the statute, to violate section 269 the victim must be under the age of 14. Count 4 of the information alleged that Lopez violated section 288.5 (continuous sexual abuse of a child) during the time periods of June 2, 2006, through

November 27, 2006. Pursuant to the terms of the statute, to violate section 288.5, the victim must be under the age of 14. The victim in this case turned 14 on November 28, 2006.

The only evidence of substantial sexual conduct supported by the victim's testimony before she turned 14 was numerous rapes. Thus, to prove a violation of section 269, the prosecution was required to prove that Lopez raped the victim, in violation of section 261, subdivision (a). Similarly, to establish a violation of section 288.5, the prosecution was required to prove that Lopez committed three or more acts of substantial sexual conduct (rapes) against the victim over a period of not less than three months. (*Id.*, subd. (a).)

Therefore, combining the time constraints established in the information with the statutory requirements, the prosecution was required to prove (1) for count 2 that Lopez raped the victim at least once between December 1, 2004, and November 30, 2005, (2) for count 3 that Lopez raped the victim at least once between December 1, 2005, and June 1, 2006, and (3) for count 4 that Lopez raped the victim at least three times between December 1, 2004, and November 27, 2006. Lopez argues the prosecution failed to meet its burden because the dates to which the victim testified are unclear.

Analysis

To resolve this dispute we must examine the testimony of the victim and the events to which she could assign specific dates. When the entirety of the victim's testimony is considered, it is clear that ample evidence supported the convictions.

The victim testified she came to the United States from Mexico when she was nine years old, or in September 2002. She initially lived with her cousin. The victim, the victim's brother and Lopez moved into a small trailer in the same trailer park in which her cousin lived in February 2003 when the victim was 10 years old. The three moved into a larger trailer in December 2006. The victim turned 14 on November 28, 2006, or

shortly before the move to the larger trailer. Accordingly, all of the events that could support counts 2, 3, and 4 must have occurred in the smaller trailer.

The victim testified that Lopez began having intercourse with her while they lived in the smaller trailer. The victim went on to testify that Lopez forced her to have intercourse two to three times per week. She also confirmed that Lopez forced her to have intercourse when they first lived together in the United States, or since February 2003.

The only times when Lopez would not force the victim to have intercourse was when they went to Oregon during the summer to work because they lived in a large dormitory and there was no privacy. When they returned to the trailer park, however, Lopez would again force the victim to have intercourse. The victim also confirmed that she slept in the same bed as Lopez when they lived in the smaller trailer, and that Lopez forced her to have intercourse before and after they shared the same bed.

Finally, the victim testified that initially she resisted when Lopez initiated intercourse, but when she was 10 or 11 years old, she stopped resisting because she felt it was futile. The victim was 10 when the rapes began and turned 11 in November 2003, nine months after the rapes began.

From this testimony the jury reasonably could have inferred that Lopez raped the victim repeatedly from February 2003 through her 14th birthday. The jury also reasonably could have inferred that Lopez raped the victim at least once in August or September 2005 and August or September 2006 because the victim testified that each summer Lopez took the victim to work in Oregon. During this time, according to the victim, Lopez did not rape her. Lopez recommenced raping the victim, however, when they returned to the trailer park in August or September each year. This evidence was more than adequate to establish that Lopez violated section 269, subdivision (a)(1) during the stated time periods.

The victim's testimony that she was raped two to three times per week every week from September to May for the entire time she lived with Lopez in the smaller trailer also provided more than sufficient evidence that Lopez violated section 288.5 during the stated time periods.

Lopez asserts the victim's testimony that she was raped two or three times per week was limited to the time period during which she and Lopez lived in the larger trailer. We do not read the record as so limiting. While this testimony was not tied directly to a specific time period, either before or after moving into the larger trailer, as we read the record the testimony was meant to encompass the entire time the victim lived with Lopez in the trailer park. The jury could have inferred from the testimony that the rapes occurred repeatedly for the entire time the victim lived with Lopez in the trailer park, and such an inference was reasonable.

We also note that not only did Lopez's trial counsel fail to clarify this testimony, but clarification was not essential to the defense presented to the jury. Lopez testified that he did not rape the victim or have any sexual contact with her. Instead, he argued the victim fabricated the charges because she wanted to free herself from the strict rules imposed by Lopez. Therefore, the time periods stated in the information were never challenged in the trial court.

We are not suggesting that the prosecution's burden of proof somehow was decreased because of Lopez's position at trial. Indeed, the prosecution was required to prove beyond a reasonable doubt that the charges were true. The victim's testimony, however, provided substantial evidence to support each charge and, once the jury determined she was being truthful, it logically and reasonably could have inferred that she was raped repeatedly during the time periods stated in the information.

II. DNA Evidence

The testimony

The prosecution presented expert testimony from Thomas Fedor on the analysis of DNA found on various items found in the Lopez residence and from Lopez and the victim. Generally, this testimony established that Lopez's sperm and the victim's DNA were found on the bedding from the bed the victim testified she shared with Lopez. Lopez challenges the DNA testimony, arguing the statistical probabilities testified to by Fedor did not take into consideration the ethnic population in the trailer park where Lopez and the victim resided and the ethnic population in Lopez's birthplace.

Fedor explained that he performed testing on several items of evidence in this case. He used the Polymerase Chain Reaction method to amplify the DNA and the Short Tandem Repeats to identify the DNA. He used a test kit that samples 15 different regions of the DNA strand, which is the state-of-the-art test. The population statistics used to calculate the probabilities to which he testified were provided by the company that manufactures the reagents used in the testing.

Once a genetic profile is obtained from a sample, it must be compared to another sample to be useful. If the two samples have the same profile, then one can determine the probability that the same person provided both samples. If the two samples have different genetic profiles, then they did not come from the same person.

Fedor received three pieces of evidence in this case. The first was a pair of men's briefs. The vast majority of the DNA obtained from the briefs belonged to Lopez. There was a minor DNA contributor in one sample in addition to Lopez's DNA. The victim was included in a group that possibly could have been the contributor, as was one in every 70 people. In a different sample from the briefs, there again were two contributors, with the main contributor being Lopez. The victim was a possible contributor to this sample, along with one in every 37 billion people. In a third sample from the briefs,

Lopez was the major contributor of DNA, and the victim was a possible minor contributor, along with one in every seven billion people.

The second piece of evidence tested by Fedor was a blanket from the bed on which Lopez slept. Sperm and other bodily fluids were found on the first sample from the blanket. The sperm was separated from the nonsperm fluids. Both samples were from Lopez and one person in one quintillion from the general population. Another section of the blanket also was tested. Bodily fluids from this sample were separated into sperm fraction and nonsperm fraction. The major contributor to the nonsperm fraction was the victim and one person in every 84 quintillion. The minor contributor to this sample included Lopez and one in every 94 million people.

The third item of evidence tested by Fedor was the sheets from the bed on which Lopez slept. Samples from the sheets were separated into a sperm fraction and a nonsperm fraction. The sperm fraction had the same DNA profile as Lopez. The nonsperm fraction showed two contributors. The major portion of the mixture could have been from the victim. The minor portion of the mixture could have been from Lopez or one person in every 130,000. Another sample from the sheet showed similar results. The sperm fraction contained the same DNA as Lopez. The nonsperm fraction contained a mixture of DNA, and the victim and Lopez could have been contributors to that fraction. A third sheet sample was tested and contained a sperm fraction and a nonsperm fraction. Both fractions contained Lopez's DNA. A fourth sheet sample also contained a sperm fraction and a nonsperm fraction. The major portion of the sperm fraction contained the same DNA as Lopez. The nonsperm fraction contained DNA from at least two people. The major portion of this fraction had the same DNA as Lopez, and the minor portion of the fraction could have come from the victim and one person in every 13 billion people.

On cross examination, Fedor explained that he calculated the probabilities, he had special training in the process, and he had been calculating probabilities for a number of years. He also explained that the probabilities given were for unrelated individuals, and

if two individuals were related, they inherited the same limited set of genetic traits from their ancestors, which means the statistical calculation would be different. People who are related are more likely to have the same DNA test results as opposed to people who are unrelated.

A different set of statistics are used when calculating probabilities for people who are related. For example, if it was suspected that a brother or nephew of Lopez may have contributed the sperm samples found on the sheets or bedding, then the statistical probability would be different than the statistical probabilities Fedor testified to in his direct examination. Similarly, statistics for a heterogeneous population may be calculated differently than statistics for a homogeneous population. Therefore, if Lopez were from an ethnic subpopulation, such as a tribal community of Indian origin, then statistical probabilities would be calculated differently because such individuals would share a common ancestry that most individuals do not share. Fedor's statistical probabilities were based on the assumption that if the semen in the samples did not come from Lopez, then they would have come from an unrelated individual.

Lopez's argument

Lopez contends Fedor erred when he calculated the statistical probabilities because he failed to take into account that both Lopez and the victim were from a small, remote Mexican village. Lopez frames his argument as a challenge to the scientific validity of the calculations under the *Kelly-Frye*² rule. Lopez's argument is difficult to follow, lacks support in the record, and is inconsistent with Lopez's defense at trial.

²*People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.

Analysis

We begin by noting that while trial counsel questioned Fedor about his calculations and what effect there would be if the various samples were from related individuals, there was no objection to the statistical probabilities to which Fedor testified. Therefore, the issue has been forfeited. (*People v. Lindberg* (2008) 45 Cal.4th 1, 48.)

Second, there was no testimony to support the foundation of Lopez's argument. Lopez testified he was from a small town in Mexico and is Mixteco Indian. There was no testimony, however, to suggest that this village was so isolated that every individual, or even most individuals, in the village were related. Nor was there any explanation to establish the significance, if any, of Lopez being a Mixteco Indian. Therefore, the main premise of Lopez's argument, that Lopez's hometown was a homogeneous society, lacks evidentiary support.

Third, Lopez's defense to the charges was based on the assertion that the victim fabricated the charges because she no longer wanted to live with him because he was too strict. He denied that he ever had any sexual contact with the victim. There was no claim that someone other than Lopez abused the victim. Lopez attempted to explain the DNA matches found on the various items by eliciting Fedor's testimony that the victim's DNA could have been transferred to the sheets when the sheets were washed together with items containing the victim's DNA, e.g., her clothes. Lopez inferred that since the victim lived with Lopez and their clothing was washed together, it was not surprising that the victim's DNA was present on Lopez's bedding. There was never any dispute about whose DNA was on the items; thus, whether Fedor used the proper statistical database simply was not relevant to Lopez's defense.

Moreover, this was not a case where a crime undisputedly occurred and the only issue was who committed the crime. In a case where the identity of the perpetrator is the only issue, the type of statistical evidence Lopez argues should have been admitted might be crucial. But this is not that case. The issue in this case was whether a crime was

committed, and to resolve that issue the jury had to decide who was being truthful -- the victim or Lopez. While the DNA found on the various items supported the victim's testimony, Lopez provided an equally plausible explanation for its existence on his bedding. Since no one disputed whose DNA was involved, the statistical probabilities to which Fedor testified were of limited probative value.

III. Ineffective Assistance of Counsel

Standard of review

Lopez has couched his challenge to the DNA testimony in terms of ineffective assistance of counsel to overcome the failure to object. A claim of ineffective assistance of counsel requires Lopez to “demonstrate (1) counsel’s performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation prejudiced the defendant, i.e., there is a ‘reasonable probability’ that, but for counsel’s failings, defendant would have obtained a more favorable result. [Citations.] A ‘reasonable probability’ is one that is enough to undermine confidence in the outcome. [Citations.]” (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541.)

Analysis

Lopez cannot establish either prong necessary to prove ineffective assistance of counsel. His argument is that trial counsel’s failure to object to the statistical probabilities testified to by Fedor constituted ineffective assistance. As explained above, however, there was no dispute, nor was it surprising, that both the victim’s DNA and Lopez’s DNA were found on the sheets since they lived together. Moreover, there is no evidence in the record to support Lopez’s theory that the probabilities should have been much lower.

Lopez’s sperm being found on his bedding did not establish that a crime had been committed. Innocent explanations for the presence of sperm existed. Instead, this case was one of believability -- would the jury believe Lopez or the victim. The statistical

probabilities testified to by Fedor were probative, but certainly not the evidence on which Lopez was convicted.

Also, nothing in the record suggests that had Fedor included in his calculations the assumptions asserted by Lopez—that he was from a small village in Mexico where families frequently intermarried—it would have significantly altered the statistical probabilities to the point the jury would have disregarded the DNA evidence completely. On this record, it is impossible to know the answer to this question.

Finally, we note that Fedor’s testimony also supported Lopez’s defense. Fedor testified that he tested the vaginal swabs obtained from the victim, and there was no evidence of Lopez’s DNA in these swabs. Thus, this portion of Fedor’s testimony supported Lopez’s testimony that no abuse occurred. Trial counsel may have decided that the importance of this testimony outweighed any advantage that could have been gained by questioning Fedor’s statistical probability calculations.

Each of these reasons would explain the decision not to object to this portion of Fedor’s testimony. Since there is a rational explanation for trial counsel’s decision, we must reject the claim of ineffective assistance of counsel. (*People v. Cudjo* (1993) 6 Cal.4th 585, 623 [in the absence of an explanation for the tactic, or a request for one, appellate court will reject claim of ineffective assistance of counsel unless there simply could be no satisfactory explanation for trial counsel’s decision].) Our conclusion is consistent with the general rule that the “failure to make objections is a matter of trial tactics as to which we will not exercise judicial hindsight. [Citation.] ‘[C]ounsel’s conduct should not be judged by appellate courts in the harsh light of hindsight ... and except in rare cases, an appellate court should not attempt to second-guess trial counsel.’ [Citation.]” (*People v. Lanphear* (1980) 26 Cal.3d 814, 828, overruled on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 643.) This is not that rare case where we should second-guess trial counsel.

Even if we were to conclude trial counsel was ineffective for failing to object, Lopez cannot establish that he suffered any prejudice by this failure. As stated above, there is no evidence in the record to support his assertion that had Fedor calculated the statistical probabilities in the manner he suggests, the probabilities would have lost any probative value. Even substantially lower probabilities would have retained the same probative value as those to which Fedor testified. Once again, we emphasize that this was not an identity case where such testimony would have been crucial. Therefore, on this record, there is not a reasonable probability that had trial counsel successfully objected to Fedor's testimony, Lopez would have obtained a better result at trial.

DISPOSITION

The judgment is affirmed.

CORNELL, J.

WE CONCUR:

WISEMAN, Acting P.J.

FRANSON, J.