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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JESUS HUMBERTO KOBAYASHI, JR., Defendant and Appellant.	F064361 (Super. Ct. No. BF134831A) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Law Offices of John F. Schuck and John F. Schuck, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Leanne LeMon, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Gomes, J., and Kane, J.

Appellant Jesus Humberto Kobayashi, Jr. was charged with one count of committing a lewd or lascivious act on a child under the age of 14 (Pen. Code, § 288, subd. (a)/count 1)[1] and three counts of forcible lewd or lascivious acts on a child under the age of 14 (§ 288, subd. (b)(1)/counts 2, 3 & 4). The information also alleged two convictions in 1999 for violations of section 288, subdivision (b) within the meaning of section 667.61, subdivision (d)(1), two prior strike convictions (§ 667 subds. (c)-(j)), and two prior serious felony convictions (§ 667, subd. (a)). Under the charges, appellant faced a prison term of 25 years to life. On the day set for trial, appellant pled no contest to two counts and admitted one prior strike conviction for a stipulated prison term of 20 years. The remaining allegations were dismissed. Appellant subsequently hired new counsel and moved to withdraw his plea. The court denied his motion and imposed the 20-year term. Appellant appeals, contending the trial court erred and abused its discretion by denying his motion. We affirm.

FACTS

The preliminary hearing revealed that between August and September 2010, appellant molested his 11-year-old niece, S.M., four times. In mid-August, he squeezed her buttocks over her clothing and threatened to kill her if she told anyone. On a Monday in September, appellant visited the apartment where S.M. lived with her mother, appellant's sister. Appellant entered S.M.'s bedroom, shut the door, put his hand inside her pants and penetrated her vagina for a few seconds. S.M. did not report the incident because appellant threatened her and she was afraid. Later that month, S.M. was in the living room holding her aunt's baby, while her aunt cooked in another room. Appellant sat beside S.M. and grabbed her breast over her clothing. In the fourth incident on

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1 Further statutory references are to the Penal Code.

September 22, 2010, appellant spent the night at S.M.'s apartment. S.M. and her mother were asleep in the living room. S.M. awoke to appellant touching her vagina skin-to-skin. S.M. described it as, '"pulling on her from the area where she urinates."' She did not report the incident then because appellant threatened to use a taser on her, which frightened her.

Appellant admitted to the police that he had inappropriately touched S.M.

At the readiness hearing, the court granted a defense motion to evaluate appellant pursuant to section 1368. After reviewing the report by the psychologist, the court found appellant competent to stand trial.

On the day set for trial, counsel stipulated to continue the matter for a week, for a possible disposition. When the parties returned to court a week later, appellant agreed to enter a plea of no contest to counts 1 and 2, and to admit one prior strike conviction for a stipulated 20-year prison term. The remaining charges and enhancements would be dismissed. Appellant completed a "Felony Advisement of Rights, Waiver and Plea Form," in which he acknowledged and waived the pertinent constitutional rights and acknowledged the consequences of his plea. In open court, appellant affirmed that his attorney had gone over the form and explained his rights to him, he had initialed and signed the form, he had no questions before the court took his plea, and he understood and gave up his rights. He acknowledged he would be sentenced to 20 years in prison and would have two strikes on his record. He then entered his plea, which the court found to be knowingly, freely and intelligently entered.

Before sentencing, appellant substituted retained counsel for the public defender and moved to withdraw the plea. The motion was made on two grounds: (1) appellant was not properly informed of his right to, nor given the opportunity to, subpoena witnesses on his behalf, and (2) he was not given an opportunity to evaluate and investigate newly-acquired evidence that was disclosed to him a few days before he

entered his plea. According to appellant, shortly before trial counsel told him, "We can't go to trial because we have no witnesses." Appellant asserted that he had given counsel a list of witnesses he wanted called on his behalf and counsel had failed to subpoena a single witness for trial. Under the circumstances, appellant felt he had no choice but to enter the no contest pleas. Regarding the new evidence, during the trial continuance, defense counsel had shown appellant a recent district attorney investigation case report, which contained summaries of an interview with the victim, the victim in the prior case, and appellant's sister (the victim's mother). Appellant asserted that counsel did not investigate the statements or request a continuance to do so. Rather, he told appellant, "Your family said to take the deal." Appellant concluded by asserting that he was innocent of the charges and wished to withdraw his plea.

The People opposed the motion. They noted that appellant was properly advised of his right to subpoena witnesses on his behalf, and the investigator's report was not new evidence. Rather, the report contained the same damaging statements by the witnesses against appellant that had been disclosed to the defense earlier.

At the evidentiary hearing on the motion, appellant testified that he had asked counsel to call five witnesses—four family members and his brother's friend. Before he entered his plea, counsel visited him at Lerdo jail and told him things looked bad; he had no witnesses. From this, appellant concluded that counsel "wasn't doing his job," because he had provided names of witnesses to call on his behalf, including his mother and his sister, who would testify that the victim tried to seduce others and lied about things. He testified he had a learning disability, read at a third-grade level, and was unaware of the charges to which he was admitting. On cross-examination, he conceded he had made admissions to the police when they interviewed him, but said he was nervous and could not think right. On the stand, he acknowledged that, in the videotaped police interview, he admitted he had molested another niece and three others while he

was a juvenile and "did time for that." He had entered pleas in that case in juvenile court. In addition, he entered a plea to a possession of marijuana charge in 2006, a plea to giving false information to a police officer in 2007, and a plea to spousal battery in 2008. He testified he had not read the police report or watched the videotape of his police interview for his current case. And, although defense counsel had discussed his rights with him throughout the year he had represented him, counsel did not review his constitutional rights with him the day he entered his plea. Counsel had just told him, "sign here, sign here." Appellant conceded that when he gave his list of witnesses to counsel, he was aware of his right to subpoena witnesses.

Defense counsel Benjamin Nkwonta testified he had been with the Kern County Public Defender's Office for 18 years. He had handled hundreds of child molestation cases and had worked on appellant's defense for about a year. He had visited appellant at Lerdo jail at least six times and had several additional video-conferences. He was very aware of appellant's learning disability and had requested a competency exam to be certain of appellant's abilities. He had met with all of appellant's family members multiple times. He had reviewed all of the reports with appellant, and he and appellant had watched the videotape of appellant's police interview on counsel's laptop at the jail. Nkwonta acknowledged that appellant confessed to touching his niece inappropriately during the interview with the police.

Nkwonta met with all of appellant's witnesses personally and had his investigator speak with them, including appellant's mother, his sister (whose daughter he molested), and his niece who was the victim of the previous molestation. Counsel did not tell appellant he had no witnesses. Those witnesses had been subpoenaed by the prosecution and ordered by the court to appear for trial. In addition, they were family members who were cooperating with the defense. He had discussed possible defenses with appellant several times. He had reviewed the evidence and discussed appellant's chances at trial

and what would happen if they lost. He never told a client they were going to lose at trial because "you don't know what will happen in trial." Nkwonta told appellant the prosecution had strong evidence based on appellant's statements to the police and the statements of witnesses that appellant wanted called at trial. Before appellant agreed to the plea, counsel discussed the case and the pros and cons of accepting the prosecution's offer. Counsel asked for a one-week continuance because appellant wanted additional time to consider the offer, which the court granted. Ultimately, appellant accepted the plea deal.

Nkwonta testified he discussed appellant's rights the day he entered his plea and "lots of times" prior to that. He shared the district attorney report of October 3, 2011, with appellant. He had already interviewed those witnesses and saw nothing new to investigate.

The court denied the motion. There was no evidence in the record as to what appellant's witnesses would have testified to. Appellant's belief that his mother and others would testify that the victim seduced him or other men, "certainly doesn't help him out," nor would calling the niece that he admitted he had molested in the past. Further, defense counsel had spoken with appellant "many, many times" and gone through the evidence with him. The court concluded that appellant "hasn't even come close" to meeting his burden of showing good cause to withdraw his plea.

The court imposed the agreed-upon term: the upper term doubled to 16 years on count 1 and four years (one-third the middle term) on count 2 for a total prison term of 20 years.

DISCUSSION

Appellant contends the trial court erred and violated his constitutional rights in denying his motion to withdraw his plea. The People disagree.

Motion to Withdraw Plea

A defendant will be permitted to withdraw his guilty plea for good cause. (§ 1018.) "Good cause" includes mistake, ignorance, fraud, duress or any other factor that overcomes the exercise of free judgment. It must be shown by clear and convincing evidence. (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 917-918.) On appeal, we accept all factual findings of the trial court that are supported by substantial evidence and review the denial of a motion to withdraw a guilty plea for abuse of discretion. (*Id.* at p. 918.) Here, there is substantial evidence to support the trial court's determination that appellant's plea was voluntarily and intelligently entered. Therefore, the trial court did not abuse its discretion in finding no good cause and denying appellant's motion to withdraw his plea.

Appellant argues the trial court erred because he "was pressured into taking the deal," and the trial court did not address this aspect of his motion. The pressure was due to the fact that counsel had failed to subpoena the three witnesses the prosecution had subpoenaed, and had failed to subpoena appellant's brother and the brother's friend, whom appellant wanted called for his defense. From this, appellant argues that defense counsel failed to properly investigate the case and, thus, was unable to properly advise appellant regarding the entry of a plea.

The record does not support appellant's claims. While appellant testified to the same version of events he argues on appeal, there was ample evidence to the contrary. Defense counsel's testimony indicated he had thoroughly investigated and prepared the case, and had adequately advised appellant in relation to the plea agreement. In addition, counsel had ascertained that appellant was competent for the proceedings and had secured a one-week trial continuance so appellant had ample time to consider the plea offer in light of his learning disability. Moreover, the trial court was not required to

expressly reject appellant's claim that he was pressured into taking the deal in finding he had failed to meet his burden of showing good cause to withdraw his plea.

Appellant next argues, based on his own testimony, that he was not aware of his constitutional right to subpoena witnesses when he entered his plea. Again, there was ample evidence in the record for the court to reject appellant's testimony and find to the contrary. Appellant was no stranger to the criminal justice system. He testified that he had entered four previous pleas to criminal charges and conceded he had waived his rights in those cases. (*Parke v. Raley* (1992) 506 U.S. 20, 37 [defendant's prior experience with the criminal justice system is relevant to whether he knowingly waived constitutional rights].) Further, the plea form advised appellant explicitly of each of his constitutional rights, including the right to subpoena witnesses, and required that appellant acknowledge and waive each right by initialing the adjacent line. Appellant initialed each right and he answered affirmatively to the court's queries whether he had had enough time to discuss his rights with counsel and whether he understood and gave up his rights. A validly executed plea form is sufficient to satisfy the dictates of *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122. (*In re Ibarra* (1983) 34 Cal.3d 277, 285-286.) Finally, Nkwonta testified he had discussed appellant's constitutional rights—including the right to subpoena witnesses—with him throughout the proceedings "lots of times" and when appellant signed the plea waiver form. And appellant conceded he was aware of his right to subpoena witnesses when he gave his list of witnesses to Nkwonta. As such, the record does not support appellant's claim that he entered his plea unaware of the rights he was waiving.

Appellant has not shown that the trial court abused its discretion in denying his motion to withdraw his guilty plea because his plea was involuntary or uninformed.

DISPOSITION

The judgment is affirmed.