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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KAMAL AHMAD KHAN,

Defendant and Appellant.

G040069

(Super. Ct. No. 04NF4572)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Reversed.

Fay Arfa for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch, Donald W. Ostertag and Pamela Ratner Sobek, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Kamal Ahmad Khan of two counts of lewd acts on a child under the age of 14 (Pen. Code, § 288, subd. (a)), but failed to reach a verdict on a third count of the same offense (which the court subsequently dismissed on the People's motion).¹ The jury found true the special allegation defendant committed these offenses against more than one victim. (§ 1203.066, subd. (a)(7).) The court sentenced defendant to eight years in prison.

On appeal defendant contends, inter alia, the court erred by denying his pretrial motion for a continuance. Defendant sought the continuance after his counsel received confidential records from the juvenile court showing that D.M. (one of the two girls who accused defendant of lewd acts) had made several prior (and apparently unsubstantiated) allegations of sexual abuse by various, different persons. Defense counsel asked the court for time to investigate this newly acquired and potentially critical information. The court denied defendant's motion. As we shall explain, this denial was an abuse of discretion. Accordingly, we reverse the judgment.

FACTS

Defendant's daughter (daughter) was born in India and came to the United States when she was nine or 10 years old. She is the only child of defendant and his wife, and lived with them in their home.

D.M.'s Testimony

D. M. testified that in December 2004 (around 5 or 6 years after daughter's arrival in America), daughter was D.M.'s best friend. D.M. was 13 or 14 years old at the time, had been diagnosed with blood cancer several years earlier, and was the stronger

¹ All statutory references are to the Penal Code unless otherwise stated.

person in the relationship between the two girls. D.M. knew that daughter did *not* want to return to India, and that daughter feared defendant would send her back to that country if she did poorly in school or disobeyed his rules. D.M. also knew that if someone tells falsehoods about another person, they can succeed in getting that person out of the house.

In 2004, D.M. had spent the night at daughter's house frequently, about "once every couple weeks," each time for one night. On December 18, 2004, D.M. spent the night at daughter's house. The two girls slept in daughter's bed. The next morning, daughter got up, leaving D.M. lying on the bed alone in the room. D.M. was half asleep when defendant came in the room and started rubbing her back. He put his hands under her underwear and touched her vagina and grabbed her bottom for about three minutes. Defendant's eyes were "low and kind of rolled back[,] he was breathing really hard," and "his private was sticking up." D.M. "scooted up a little bit and looked back and said, 'What are you doing?'" Defendant walked out.

Daughter returned to the bedroom about five minutes later. D.M. told daughter that defendant had put his hands in her pajama pants and groped her. Daughter closed the bedroom door, then told D.M. what defendant had done to daughter (summarized below). D.M. asked why daughter had never told anyone about it. Daughter asked whether D.M. wanted her to phone the police. D.M. replied, "No, just forget about it." The girls worried if they told the truth, their friendship would be affected and daughter's parents would hate daughter.

D.M. phoned her brother-in-law and asked him to pick her up early. (She had been scheduled to stay at daughter's house a couple of nights.) Once at the home of her brother-in-law and sister, D.M. told her sister what had happened. The sister called the police.

Subsequently, while the case against defendant was pending, daughter asked D.M. to write a letter saying they had lied. D.M. did not do so, because she "knew it was wrong."

Daughter's Testimony

Daughter testified that when she was in the fourth grade (and around age 11), defendant touched her breasts and tummy. Defendant had never touched her vagina, however. Daughter then testified she could not recall if he ever touched her vagina. During a lengthy stretch of direct examination (12 reporters' transcript pages), daughter variously denied or could not recall whether defendant ever touched her vagina or whether she ever told investigators he had done so.

Daughter then changed her story and testified that when she was in the fourth or fifth grade, defendant touched her vagina with his hand under her clothes as she lay on her bed. This happened "more than two or three times." She told defendant to stop and said it was hurting her. He told her not to tell anyone. Daughter did not tell anyone about defendant's behavior because she did not want to get her father in trouble or impair her parents' marital relationship.

Once, when daughter told defendant he was hurting her, her mother overheard, took daughter to the restroom, and asked her to lie about what had happened. The mother said defendant would be deported to India if daughter told the police about the abuse. The mother subsequently left daughter alone with defendant for six to eight months while the mother went to India and "a lot of places."

After the December 18, 2004 incident, daughter was removed from her parents' home and taken to a group home; later she moved to a foster home.

In August 2005, daughter wrote a letter to the district attorney saying all her statements on December 19, 2004 had been lies and that the girls lied because daughter was not studying well at that time and defendant had threatened to send her back to India. No one asked daughter to write the letter; she did it because she "felt sad for [her] parents." Daughter later told the district attorney's investigator that she "lied in the letter."

Defendant's Testimony

Defendant testified in his own defense and denied daughter's and D.M.'s allegations. He testified he is diabetic and unable to have an erection. He testified daughter had "a lot of problems" at school, he was called into school meetings with the principal and teachers, and he told daughter many times she needed to do well in school.

DISCUSSION

Prior to trial, defense counsel twice moved for continuances based on her Welfare and Institutions Code section 827 petition to the juvenile court for confidential records on daughter and D.M.² The court denied both motions.

Defense counsel filed her first motion on February 4, 2008, the scheduled trial date. At an in-camera hearing, defense counsel told the trial court she had petitioned the juvenile court in December for the release of confidential juvenile records regarding daughter and D.M. A juvenile court employee had advised defense counsel that the juvenile court would rule on her petition "any day now." Defense counsel told the trial court that the information in the juvenile records could be relevant to her cross-examination of daughter and D.M. The trial court denied defendant's continuance motion because it was speculative whether the juvenile court would release the juvenile records and whether the records would contain any "impeachable" information and because the motion was "untimely" since defense counsel had had the case for over a year. The court, then engaged in another trial, trailed the case.

² Under Welfare and Institutions Code section 827, subdivision (a)(1)(P), a person may seek to inspect a juvenile case file by petitioning the juvenile court. The "receiving agenc[y]" of such a file may not disseminate any information therefrom. (*Id.*, subd. (4).)

On February 11, 2008, defendant filed under seal a second continuance motion. Defense counsel declared she believed good cause existed to continue the case because her Welfare and Institutions Code section 827 petition had been granted and she had received records from the Orange County Social Services Agency (SSA) showing that D.M. had “made four prior allegations of sexual abuse by various, different offenders.” Defense counsel declared she needed “more time to interview these individuals as D.M.’s credibility is at issue [in] this case.” Attached to the declaration were, inter alia, the following confidential documents certified by SSA’s Custodian of Records:

(1) Referral dated June 12, 2003. When D.M. was 12, she alleged that she and a boy at a daycare program “were in the daycare restroom together 2 years ago and he put his penis into her. She said that she was not forced.” D.M. and the boy were age 10 at the time. SSA reported the accusation to law enforcement.

(2) Referral dated March 25, 1999. D.M. wrote her mother a note saying she was being sexually molested. The molester’s identity is blacked out in the sealed copy. He may have been a relative D.M. thought of as a brother or an uncle. D.M. alleged the molester “got on top of her, did worse things to her [and] touched her in places.” D.M. was age seven at the time. “The allegation of sexual abuse [was] inconclusive.”

(3) Undated report. [Minor] disclosed “that approx[imately seven] years ago, her ‘godfather’ took her on a camping trip. Minor was inside the camper” when the godfather “put his hands up her blouse while she was attempting to get on top bunk.” In a second incident in the same year, the godfather “pulled her panties down and put his hands on [her] vagina.” (Although it is unclear, this report may concern one of D.M.’s sisters since there is a reference to “infant D.” in the report.) SSA reported the accusation to the Anaheim Police Department.

On February 13, 2008, the court and defense counsel discussed defendant's second continuance motion in chambers with the court reporter and the clerk present. The court reviewed the confidential records and stated it did "not appear any of the incidents were filed on." The court denied the second continuance motion because the public defender had not demonstrated due diligence (having had the case for 15 months), there had been 18 appearances in that time, and defense counsel filed its Welfare and Institutions Code section 827 petition over a year after being appointed as counsel. The court found it speculative whether defense counsel could locate the "alleged perpetrators," and whether finding them would result in "potential exculpatory evidence for the defense" to impeach D.M. and that would be admissible under Evidence Code section 352. The court also noted it appeared D.M.'s "credibility is already subject to attack by the existence of a known witness regarding a subsequent reporting of sexual molestation" (apparently referring to D.M.'s allegations against her stepbrother discussed below). The court concluded defendant had not shown good cause for a continuance.

Defense counsel (a deputy public defender) explained to the court that the public defender's office had had the case for a "little over a year" and that when she "received the case from private counsel," no documents had been subpoenaed. She subpoenaed the documents in June 2007, but did not receive a ruling from the juvenile court until December 2007. She "was optimistic [she] would receive records at that time," but when she did not, she then filed a Welfare and Institutions Code section 827 petition. She did not receive a ruling from the juvenile court on her petition until early February 2008. Defense counsel reiterated that it was "critical" to the defense to try to find and interview the witnesses identified in the confidential records.

In open court, immediately after the February 13 in-camera hearing, defense counsel and the prosecutor discussed with the court D.M.'s sexual abuse allegations against her stepbrother. D.M. had accused her stepbrother five months after making allegations against defendant.

Trial commenced on February 14, 2008. During the trial, defendant asked the court for a continuance to try to secure the stepbrother's presence, but the court denied the motion, stating it had no reasonable expectation that the stepbrother could be brought to court and, even if he were, would testify for the defense.

On appeal, defendant contends the court's denial of his continuance motion deprived him "of due process, a fair trial, the right to prepare and present a defense, and the effective assistance of counsel" and denied him his constitutional rights under the Fifth and Sixth Amendments. Defendant contends his trial counsel "needed to investigate [D.M.'s] prior allegations to prove that [she] made false sexual allegations in the past and that her accusations against [him] were also false." He argues the question of his guilt "depended solely on the jury's determination of the credibility of" D.M. and daughter.

The People counter that the confidential juvenile records do not show D.M.'s prior allegations were false. They further argue defendant's trial counsel failed to demonstrate due diligence by requesting a continuance on the first day of trial and again on day 7 of the 10-day trailing period.

We review the relevant statutory and case law. Section 1050 governs continuances in criminal cases and mandates that criminal cases "be set for trial and heard and determined at the earliest possible time." (§ 1050, subd. (a).) Therefore, in a criminal case, a continuance may "be granted only upon a showing of good cause." (§ 1050, subd. (e).) "A showing of good cause requires a demonstration that counsel and the defendant have prepared for trial with due diligence." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.)

Whether to grant a continuance rests within the trial court's discretion. (*People v. Beames* (2007) 40 Cal.4th 907, 920.) But the court may not exercise its discretion "in such a manner as to deprive the defendant of a reasonable opportunity to prepare his defense." (*People v. Maddox* (1967) 67 Cal.2d 647, 652; *People v. Snow*

(2003) 30 Cal.4th 43, 70.) A defendant has a “general constitutional right to adequate time for the preparation of his defense” (*Maddox*, at p. 655), an entitlement as fundamental as the right to counsel, because “a counsel who has been denied the opportunity to prepare is the equivalent of no counsel at all” (*id.* at p. 652). A defendant is “entitled to effective assistance of counsel, one aspect of which is the investigation and presentation of crucial defenses.” (*Hughes v. Superior Court* (1980) 106 Cal.App.3d 1, 4.) “[I]t is a denial of the accused’s constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel.” (*Ibid.*) Denial of the right of effective cross-examination is “‘constitutional error of the first magnitude.’” (*Davis v. Alaska* (1974) 415 U.S. 308, 316.) Moreover, the “State’s policy interest in protecting the confidentiality of a juvenile offender’s record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.” (*Id.* at p. 319.)

The party challenging the court’s ruling on a continuance bears the burden of establishing an abuse of discretion. (*Beames, supra*, at p. 920.) “[D]iscretion is abused only when the court exceeds the bounds of reason, all circumstances being considered.” (*Ibid.*) “Although ‘a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality[,] . . . [t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process.’ [Citation.] Instead, ‘[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.’” (*Id.* at p. 921.)

In ruling on a continuance motion, a trial court may consider “‘not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.’” (*People v. Zapien* (1993) 4 Cal.4th 929, 972.) We apply these factors, along with the

precepts summarized above, to the court's denial of defendant's second (February 11, 2008) continuance motion.

The first factor, i.e., defendant's anticipated benefit from a continuance, weighed strongly in favor of granting his motion. The anticipated evidence was of great consequence to his defense. D.M.'s prior sexual abuse accusations, if false, unquestionably cast doubt on the veracity of her allegations against defendant. A "prior false accusation of sexual molestation is . . . relevant on the issue of the molest victim's credibility." (*People v. Franklin* (1994) 25 Cal.App.4th 328, 335.) Although the People argue the juvenile records did not show D.M.'s prior allegations were false, neither did the records reflect any charges were ever filed on the accusations or that they were ever substantiated. Defense counsel sought a continuance to try to obtain evidence D.M.'s prior accusations were false.

As to the second factor, i.e., the likelihood defendant could gather evidence showing D.M.'s accusations were false, the court found it speculative whether defendant could successfully obtain any admissible evidence. But given the critical nature of the anticipated evidence to defendant's defense and his constitutional rights, the court should have granted defendant a reasonable time to investigate. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003 [defendant must show anticipated evidence can be obtained in reasonable time].)

Regarding the third factor, i.e., the burden on other witnesses, jurors and the court, the court never mentioned these considerations. Trial, however, did not actually begin until three days after defense counsel made her second continuance motion.

We reach the fourth factor — whether substantial justice would be served by granting the motion. The anticipated evidence was critical to defendant's ability to prepare a defense, to be adequately represented by counsel, and to effectively cross-examine one of the two major witnesses against him. Defense counsel explained to the

trial court the reasons for her delay — she had sought to subpoena the records from the juvenile court, but this avenue was unsuccessful; she then filed a Welfare and Institutions Code section 827 petition. (The People, too, contributed to the delay in this case, waiting two years before filing charges against him.)³ The court, in denying defendant’s second continuance motion, noted D.M.’s credibility was already subject to attack, apparently alluding to D.M.’s allegation (made subsequent to her accusation against defendant) that her stepbrother molested her. But, during the trial, when defense counsel sought a continuance to obtain the stepbrother’s presence, the court denied her motion.

The policy favoring the “prompt disposition of criminal cases . . . cannot transcend any of the basic elements of due process of law.” (*People v. Mendez* (1968) 260 Cal.App.2d 302, 306.) The court’s denial of defendant’s February 11, 2008 continuance motion denied defendant “the right of effective cross-examination which ‘would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.’” (*Davis v. Alaska, supra*, 415 U.S. at p. 318.) The jury did not reach its verdict easily, deliberating for three days and requesting many read backs of testimony and the judge’s instructions, as well as the judge’s clarification of the term “lewd act.” The error was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.)

³ In December 2006, two years after the alleged incident involving D.M., the People filed charges against defendant for lewd acts on daughter and D.M.

DISPOSITION

The judgment is reversed.

IKOLA, J.

WE CONCUR:

O'LEARY, ACTING P. J.

ARONSON, J.