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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KEVIN MICHAEL BLACK, Defendant and Appellant.	F042592 (Super. Ct. No. 79557) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Tulare County. William Silveira, Jr., Judge.

Eileen S. Kotler, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, J. Robert Jibson and Judy Kaida, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Kevin Michael Black was convicted by jury verdict of one count of continuous sexual abuse (Pen. Code, § 288.5)[1] against his stepdaughter (Victim) and two counts of lewd or lascivious acts on a child under 14 years of age (§ 288, subd. (a)) against two of Victim's friends, A. and T.

DISCUSSION

I.

A.

Appellant contends the prosecution committed misconduct and violated his constitutional and statutory rights to discovery by failing to provide, in derogation of a court order, certain police records relating to the investigation of Babysitter, a person who had played somewhat of a grandfatherly role in Victim's life.

Babysitter had known Victim's family, though he was unrelated to it, for years and had provided a form of childcare not only for Victim but also for Victim's mother (Mother) when she was young. Babysitter took Victim to school and picked her up from school. He saw her everyday and often spent hours with her. Mother explained that Babysitter did whatever Victim wanted him to do and brought her anything she wanted. He would always buy her gifts of candy, clothes, and jewelry. Victim sometimes stayed overnight at Babysitter's home. On occasion, Mother noticed Victim would come home wearing different clothes. Mother found children's clothing, including Victim's underwear, in the clothes dryer at Babysitter's house. When Victim stayed at her father's house, Victim's stepmother, not Babysitter, provided Victim's childcare. However, Babysitter would come by on occasion and take Victim somewhere. Victim's siblings usually went along.

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[1] All statutory references are to the Penal Code unless otherwise noted.

Mother testified that, when Victim was about two years old, she asked, "does pee pee come out of your pussy[?]" Mother asked her where she had learned that word. Victim told her that Babysitter had taught her that. She told Mother that Babysitter had touched her private area. Mother reported this information to the police and Mother kept Victim away from Babysitter for a while, but later allowed them to spend time together again.

Mother testified that, when she was living with her boyfriend, Victim accused the boyfriend of molesting her, recanted, and then later accused him again. It was hard for Mother to know if Victim was telling the truth about the boyfriend because nothing had come of Victim's earlier accusation against Babysitter. Mother did not report the accusation against the boyfriend to the police.

Victim testified Babysitter had never touched her in a bad way. She said she told the police officer that Babysitter had never molested her and she repeatedly told Mother that Babysitter had never molested her. Babysitter had merely washed her while she was in the shower when she was very little. Victim explained that Babysitter used to baby sit her after school. He would take her to school and pick her up almost every day. Babysitter loved her and was very nice to her. He would buy her a lot of presents and candy. He would get swimsuits and other outfits for Victim and would have her try them on. He kept a blanket in the car that he put over Victim's lap when she was eating ice cream to protect his new car. Victim usually sat in the back seat. Babysitter never let Victim sit on his lap and drive the car.

B.

Appellant points particularly to a police report about Babysitter's alleged molestation of nine-year-old J.W. some six months before trial. That report states that Babysitter would take J.W. for rides in his car. He would put his hand on her leg and touch her vaginal area. He would buy her candy and clothes. Once, he tried to get her to sit on his lap while he was talking to Victim on the telephone. J.W. told her father about

the touchings. The father, who had known Babysitter for many years, spoke to Babysitter alone and, when they returned, Babysitter was crying. Babysitter told J.W. it would not happen again.

Appellant maintains this information would have supported his defense theory that Babysitter was molesting Victim, that, to ensure the silence and cooperation of Victim and the other children, Babysitter showered them with gifts and money, and that Victim was sexualized by Babysitter's molestation and therefore possessed the sexual knowledge required to falsely accuse innocent men such as appellant. According to appellant, Victim chose to accuse appellant rather than Babysitter so she would not risk losing Babysitter's affection and gifts and so the other children would not ostracize her. Appellant asserts that the information in the police records was material third party culpability evidence because it demonstrated that Babysitter had recently molested a girl of Victim's age, that he was sexually interested in Victim, and that he admitted molesting J.W. Appellant also maintains the information was a "crucial link" to impeach Victim's credibility by showing she was lying when she testified Babysitter had not molested her. Appellant contends it is reasonably probable that disclosure and introduction of the evidence at trial would have led to a different outcome because, "[h]ad the jury learned that [Victim] was lying about [Babysitter], they would have been less likely to believe that she was truthful when she accused appellant of raping her." Appellant also argues the information "would have changed the dynamics of the trial" and thus the outcome. Finally, appellant contends the egregious misconduct by the prosecution requires reversal per se, or at least application of the *Chapman*[2] harmless-beyond-a-reasonable-doubt standard.

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2 *Chapman v. California* (1967) 386 U.S. 18.

C.

The prosecution's obligation to disclose information to the defense has both a constitutional and a statutory basis. (*People v. Bohannon* (2000) 82 Cal.App.4th 798, 804-805.) Under the due process clause of the United States Constitution, the prosecution has a sua sponte obligation to disclose to the defense information within its custody or control that is material to and exculpatory of the defendant. (*Brady v. Maryland* (1963) 373 U.S. 83, 87-88.) This constitutional duty is different than and independent of the statutory duty of the prosecution to disclose information to the defense. (*People v. Bohannon, supra,* at pp. 804-805.) The California statutory scheme, adopted by initiative in 1990, requires that the prosecution disclose specified information to the defense, as set out in section 1054.1.

To prevail on appeal, the defendant must establish "'"there is a reasonable probability that, had the evidence been disclosed ..., the result of the proceedings would have been different."' [Citation.]" (*People v. Bohannon*, *supra*, 82 Cal.App.4th at p. 805.) "'A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. [Citation.]'" (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1379-1380.) Speculation or only a mere possibility that undisclosed evidence might have aided the defense or affected the trial's outcome is not sufficient. (*People v. Fauber* (1992) 2 Cal.4th 792, 829.)

Even assuming the prosecution in this case violated its obligation to disclose information regarding the investigation of Babysitter and engaged in the egregious conduct appellant alleges,[3] appellant was not prejudiced under any standard of review because, on this record, there is no reasonable probability that, had the police report

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[3] "'In general, a prosecutor commits misconduct by the use of deceptive or reprehensible methods to persuade either the court or the jury.'" [Citation.] (*People v. Rowland* (1992) 4 Cal.4th 238, 274.)

evidence about J.W.'s accusations been disclosed, the result of the proceedings would have been different. (*People v. Kasim*, *supra*, 56 Cal.App.4th at pp. 1379-1380; *People v. Rowland, supra,* at pp. 274, 277 [prosecutorial misconduct is not reversible per se; prejudice must be shown]; *People v. Estorga* (1928) 206 Cal. 81, 86.)

First, the evidence against appellant was considerable. Victim testified to appellant's acts of molestation in realistic (but childlike) detail. She stated she had accused Boyfriend of molesting her because he had in fact molested her, but she denied accusing Babysitter and testified he had never molested her. Victim explained that appellant committed acts of intercourse against her, whereas Babysitter's victims described only acts of fondling. Also, appellant had previously molested his cousin.

Second, evidence that Babysitter recently molested J.W. (or other victims) would not have contributed to appellant's third party culpability theory in any material way. The trial court liberally permitted the defense to introduce, and argue in summation, third party culpability evidence to support the defense theory that Babysitter was a child molester, that Babysitter had molested Victim, that Victim was lying when she denied Babysitter had molested her, and that Victim had falsely accused the men in her mother's troubled relationships in order to remove them from her life. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 176 [defendant is entitled to present evidence of third party culpability if it is capable of raising a reasonable doubt about his own guilt].) There was abundant evidence Babysitter was a child molester who preferred girls about Victim's age and who had molested children for many years, including the past several years. The evidence showed that Babysitter's victims were three to nine years old and that he had molested a child as recently as one month before trial.[4]

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[4] The evidence showed that Babysitter molested L. about 27 years before trial when she was about 7 years old, C. about 21 years before trial when she was about 8 years old, Mother some 20 years before trial when she was about 9 years old, T. about 6 years before trial when she was about 3 years old, and Boyfriend's son about 1 month before

There was also plentiful evidence from which the jurors, if they were so inclined, could infer that Babysitter molested Victim, and thus that Victim was lying when she denied it. The defense presented evidence that Victim, like Babysitter's victims, spent a lot of time with Babysitter, received a form of childcare from him -- which he represented as paternal or grandfatherly -- and had an abnormal relationship with him. Evidence of Babysitter's molestation of J.W. (or other victims) would not have affected the evidence regarding Babysitter's relationship with Victim. Nor would it have provided the "crucial link" to impeach Victim's credibility. Appellant is incorrect when he argues the evidence would have demonstrated that Victim was lying when she stated Babysitter had not molested her. It would only have emphasized the fact that Babysitter molested many children; it would not have established that Babysitter molested Victim. Indeed, an endless parade of Babysitter's victims, testifying that their circumstances were similar to Victim's and that Babysitter in fact molested them when they were Victim's age, would not have amounted to proof that Babysitter molested Victim. That conclusion relied on an inference, which, as we have pointed out, was already sufficiently supported by a wealth of evidence. Furthermore, evidence that Babysitter tried to get J.W. to sit on his lap while he spoke to Victim on the telephone would not have demonstrated that Babysitter was sexually interested in Victim rather than J.W. And, most importantly, even evidence proving Babysitter molested Victim would not have established that appellant did *not* molest Victim.[5]

Moreover, there was evidence from which the jurors could infer Victim falsely accused appellant of molesting her. There was evidence Victim told her mother

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trial when he was about 4 years old. J.W.'s alleged molestation occurred only about 6 months before trial when she was 9 years old.

[5] As the trial court noted, and appellant concedes, Victim could have been molested by more than one man.

Babysitter touched her when she was two years old, but later realized he was only washing her. (This, of course, does not help appellant's theory that Babysitter was Victim's molester.) And there was evidence Victim twice accused Boyfriend when she was five or six years old, but later said it was just a dream or a lie. There was evidence that Victim was prematurely sexualized, that she witnessed Mother's volatile relationship with the boyfriend, and that the relationship ended sometime after Victim's accusations. From this evidence, the jury could have rationally inferred that Victim had the tendency to accuse men of molesting her, had the sexual knowledge required to falsely accuse men of committing acts of intercourse against her, and was motivated to falsely accuse the men in her mother's troubled relationships. Evidence that Babysitter molested J.W. or other victims would have been irrelevant to Victim's tendency to fabricate accusations.

In sum, after reviewing the entire record, we conclude the trial court diligently ensured the defense was permitted to present evidence and argument to support its theory that Babysitter molested Victim and that Victim falsely accused innocent men, including appellant, of molesting her. On the other hand, there also was more than enough evidence to support the verdict against appellant. For these reasons, we are satisfied beyond a reasonable doubt that, had evidence of Babysitter's molestation of J.W. (or other victims) been disclosed and introduced at trial, appellant would not have been acquitted. (*People v. Kasim, supra,* 56 Cal.App.4th at pp. 1379-1380.) Appellant's speculation that the evidence would have helped his defense is not enough. (*People v. Fauber, supra,* 2 Cal.4th at p. 829.) In view of the record, the guesswork possibilities suggested by appellant are not sufficient to undermine confidence in the verdict.[6]

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[6] Having concluded that disclosure and introduction of the evidence of Babysitter's molestation of J.W. would not have affected the outcome, we need not address appellant's contention that his defense representation (including the defense investigation) was deficient for failing to disclose such evidence. (*People v. Frye* (1998) 18 Cal.4th 894, 979 [to succeed on a claim of ineffective assistance of counsel, appellant must show he was prejudiced by counsel's deficient representation].)

II.

Appellant contends the trial court abused its discretion when it denied appellant's motion to disqualify the district attorney's office. He argues the trial court failed to apply the proper analysis under *People v. Eubanks* (1997) 14 Cal.4th 580 and the prosecutor's continuing discovery violations deprived appellant of a fair trial. He says the trial court failed to consider whether a conflict existed, failed to hold an evidentiary hearing to determine the truthfulness of the defense allegation that the grand jury was investigating the prosecutor and the district attorney's office for misconduct (impeding the Babysitter investigation until appellant's case was over), and failed to hold a hearing to determine whether the prosecutor had hindered the defense investigation by inducing the defense investigator to withhold evidence from the defense.

On October 22, 2002, appellant filed a motion to dismiss the information based on prosecutorial misconduct or, in the alternative, to disqualify the prosecutor for conflict of interest. The motion asserted that the district attorney's office was withholding exculpatory *Brady* evidence regarding the police investigation of Babysitter. Appellant argued that the district attorney's office had an actual conflict because it was being investigated by the grand jury for misconduct affecting the case. He stated: "As such, the prosecution has a conflict; it cannot prosecute this case while under investigation for the manner in which it has prosecuted this case. The pending grand jury investigation presents an actual conflict. The complex facts demonstrates [*sic*] that the prosecution's conflict of interest makes it unlikely that Defendant will receive a fair trial." The prosecution argued in its opposing papers that appellant's claims had no factual basis because they were not supported by affidavits, that the prosecution had not withheld *Brady* material, and that a grand jury investigation would not amount to a conflict.

On November 12, 2002, the trial court heard appellant's motion. Defense counsel stated he would address "the disqualification issue based on a Grand Jury investigation that's ongoing." The court said it had been informed the grand jury had suspended

inquiry into all matters referred to it by the defense investigator until the conclusion of appellant's case. Defense counsel asked the trial court to continue the case until the grand jury completed its work to determine whether Babysitter would admit that he had prodded the children to falsely accuse appellant of molesting them. The court stated: "That would be an issue. But I'm not going to continue this trial on that speculation. And that's all that amounts to." The court also expressly found that the material in question did not contain any *Brady* evidence. Accordingly, the court denied appellant's motion to dismiss for prosecutorial misconduct or to disqualify the prosecutor and the district attorney's office.

The Supreme Court has summarized the rules controlling disqualification of a prosecutor, as follows:

> "The standard for a motion to disqualify the prosecutor is set forth in Penal Code section 1424: 'The motion may not be granted unless the *evidence* shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial.' We detailed the history of this statute and the associated legal principles in [*People v. Eubanks* (1996) 14 Cal.4th 580], where we explained that a 'conflict,' for purposes of section 1424, '"exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner."' [Citation.] However, 'the conflict is disabling only if it is "so grave as to render it unlikely that defendant will receive fair treatment"' during all portions of the criminal proceedings. [Citation.] The statute thus articulates a two-part test: '(i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting?' [Citation.]" (*Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 833, fn. omitted, emphasis added.)

On appeal, we determine whether substantial evidence supports the trial court's factual findings, and then, based on those factual findings, we determine whether the trial court abused its discretion in denying the motion. (*People v. Breaux* (1991) 1 Cal.4th 281, 293-294.)

Here, the record discloses that appellant had no right to an evidentiary hearing to determine whether there was any factual basis to his own unsupported assertions about a

prosecutorial conflict. It was appellant's burden to present a factual basis, by affidavits, to his claims. (§ 1424 [as part of its motion for disqualification, a defendant must include a statement of facts supported by affidavits of witnesses who can testify to the facts in the affidavits].)[7] Having reviewed appellant's moving papers, which do not include a single evidentiary declaration or affidavit, and the prosecution's opposing papers, which do include declarations and affidavits, we conclude the trial court did not err by failing to hold an evidentiary hearing. Appellant did not produce an evidentiary basis to justify such a hearing. (§ 1424 [judge reviews the affidavits to determine whether or not an evidentiary hearing is necessary].)

Moreover, substantial evidence supports the trial court's implied finding that there was no conflict requiring disqualification.[8] Appellant's motion was based on an asserted, but factually unproved, conflict created by the simultaneous prosecution of the case and the alleged investigation for misconduct in prosecuting the case. According to the motion, the prosecution was impeding the arrest and prosecution of Babysitter, first, by failing to act on evidence gathered on Babysitter and, second, by failing to disclose *Brady* evidence to the defense in the present case. As for the first claim, there was no evidence

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[7] Section 1424, subdivision (a)(1) states in part: "Notice of a motion to disqualify a district attorney from performing an authorized duty shall be served on the district attorney and the Attorney General at least 10 court days before the motion is heard. The notice of motion shall contain a statement of the facts setting forth the grounds for the claimed disqualification and the legal authorities relied upon by the moving party and shall be supported by affidavits of witnesses who are competent to testify to the facts set forth in the affidavit. The district attorney or the Attorney General, or both, may file affidavits in opposition to the motion and may appear at the hearing on the motion and may file with the court hearing the motion a written opinion on the disqualification issue. The judge shall review the affidavits and determine whether or not an evidentiary hearing is necessary."

[8] Although the trial court did not state the basis of its reasoning, "'[i]n the absence of contrary evidence, we assume a trial court applied the correct legal standard.' [Citation.]" (*People v. Eubanks, supra*, 14 Cal.4th at p. 598.)

that the prosecutor in this case was involved in the investigation of Babysitter or that any failure to proceed on the case against Babysitter was attributable to her. The mere fact that a grand jury proceeding was pending did not in itself amount to a conflict that would require disqualification. Appellant's claims of what might be revealed in the grand jury proceedings were mere speculation, as the trial court noted. Had the trial court ordered a hearing, it would have functioned as nothing more than a fishing expedition -- a means by which appellant might attempt to determine whether there was in fact any proof to support his suppositions. As for the second claim, the trial court expressly determined the materials contained no *Brady* evidence, a ruling appellant does not challenge, and therefore the court impliedly found the prosecution did not commit misconduct by withholding *Brady* evidence.

Thus, there was no evidence of a conflict before the trial court. And, even assuming there was a conflict, the defense failed to show such a conflict would render it unlikely that appellant would receive a fair trial. (*Hambarian v. Superior Court, supra,* 27 Cal.4th at p. 833.)[9] The trial court did not abuse its discretion by denying appellant's motion.

We deny appellant's footnote motion in his brief that we judicially notice certain records of the State Bar and of Tulare County. The records were not before the trial court (*People v. Welch* (1999) 20 Cal.4th 701, 739 [an appellate court will consider only matters that were part of the record at the time the judgment was entered]; *Reserve*

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9 We note that appellant has not pointed out any specific instance where the prosecutor's discretionary powers were exercised unfairly to appellant or resulted in an unfair trial (other than the alleged discovery violations addressed in section I. of this opinion). (*People v. Eubanks, supra,* 14 Cal.4th at p. 593.) We do glean from the tenor of his briefs that appellant takes the position the unfairness consisted of the decision to prosecute him rather than Babysitter for the crimes against Victim. Given the testimony of Victim, the decision to charge appellant cannot be deemed unfair to appellant as a matter of law, regardless of the outcome of the investigation of Babysitter.

Insurance Co. v. Pisciotta (1982) 30 Cal.3d 800, 813 [Same]) and, in any event, are irrelevant given the basic evidentiary defects in appellant's moving papers.

DISPOSITION

The judgment is affirmed.

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Dibiaso, Acting P.J.

WE CONCUR:

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Vartabedian, J.

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Dawson, J.