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CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY DONALD HERTZIG, Defendant and Appellant.	C053674 (Super. Ct. No. 05F08338)

APPEAL from a judgment of the Superior Court of Sacramento County, Troy L. Nunley, J. Reversed in part and affirmed in part.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, David A. Rhodes and Clayton S. Tanaka, Deputy Attorneys General, for Plaintiff and Respondent.

While representing himself against charges he committed lewd and lascivious acts with his 6-year-old daughter and had sexual intercourse with his 15-year-old sister, defendant

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I.A, II, III.A, and III.B.

Timothy Donald Hertzig attempted to sever 10 counts of possessing child pornography. A jury convicted him on all charges. We agree with defendant that possession of multiple video images on his computer constituted a single count of possession, but in the unpublished portions of this opinion, we reject his contentions that the trial court abused its discretion by denying his request for severance, refusing to allow him to withdraw his waiver of the right to counsel, and by admitting evidence of prior acts of molestation.

FACTS

The prosecution presented a chronology portraying a disturbing pattern of defendant's sexual exploitation of young girls. It began in 1996 when defendant, then 18, put his hand in the shirt of his friend's 14-year-old sister and then down her pants. She reported the incident to the police.

In 1998 defendant's sister, Kelly,[1] told his then girlfriend, Debbie, that defendant had touched her breasts and genitals. Debbie also reported the incident. When interviewed, 10-year-old Kelly told the detective that defendant had licked her private area, placed his finger in her rectum, and "[got] her wet." She told a nurse practitioner that defendant had ejaculated on her stomach. A physical examination revealed a healed injury to Kelly's hymen. Not long thereafter Kelly told an interviewer at the Multi-Disciplinary Interview Center that

[1] The names of the victims have been changed to protect their privacy.

defendant had undressed her, “kissed me down there,” touched her “private” with “his hand and his thing,” and “made himself pee,” and that “white” pee got on her body. She also reported that on other occasions he used his tongue on her private and put his finger in her bottom.

Defendant denied Kelly’s accusations. Two days after Kelly disclosed the molestations to Debbie, defendant married Debbie in an impromptu exchange of vows in Lake Tahoe. Defendant and Debbie’s first-born daughter, Laura,[2] was born late that year.

The marriage was tumultuous. By 2002 Debbie suspected defendant was having a sexual relationship with Kelly. When confronted, defendant told Debbie she was crazy and that he would never do anything like that.

In July 2005 Laura told her mother’s friend that her father had touched her vagina and rectum. Later the same day, she told a police officer that defendant had touched her “pee-pee” and bottom; she described three separate attacks involving the touching of her rectum and vagina, and vaginal intercourse in the bedroom, shower, and on the couch. An examination revealed a healed hymenal cleft and granulation tissue consistent with a penetrating injury.

In early August 2005 police seized a computer from defendant’s residence. Videos containing images of children engaged in sexual acts were found on the computer.

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[2] See footnote 1, *ante*.

Kelly gave birth to premature twins in January 2006. Through DNA testing, the prosecution ascertained that defendant was the father of the twins, one of whom died during defendant's trial.

On February 16, 2006, an amended information was filed charging defendant with five counts of committing a lewd and lascivious act with a child under the age of 14 (Pen. Code, § 288, subd. (a)[3] -- counts one, two, three, five & six) and alleging that the offenses involved two or more victims (§ 667.61, subd. (e)(5)); unlawful sexual intercourse (§ 261.5, subd. (c) -- count four); and 10 counts of possession of child pornography (§ 311.11, subd. (a) -- counts seven through sixteen).

Defendant represented himself at trial but did not testify. After vigorous cross-examination of the prosecution's witnesses, including Debbie and Laura, defendant argued to the jury that Debbie, with the wrath of a "woman scorned," coached their six-year-old daughter to fabricate the allegations of molestation and loaded pornographic videos onto her laptop computer to deprive him of custody of their four children. He attacked her credibility, veracity, motives, capacity, and intentions. Faced with DNA evidence of paternity, he admitted having a sexual relationship with Kelly but denied molesting her when she was nine or his daughter when she was six.

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[3] All further statutory references are to the Penal Code unless otherwise indicated.

Convicted by a jury on all counts, defendant appeals.

DISCUSSION

I. CHILD PORNOGRAPHY

A. Severance

Although defendant did not make a formal pretrial motion to sever the pornography counts from the counts involving Laura and Kelly, the Attorney General appears to concede he adequately raised the issue in a pretrial colloquy with the trial court. Defendant argued that showing the video clips found on the computer to the jury would be prejudicial because the victims themselves were not depicted in the videos. We review the trial court's ruling for an abuse of discretion based on the showing made and facts known to the court at the time the motion is heard. (*People v. Ochoa* (1998) 19 Cal.4th 353, 409 (*Ochoa*); *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1244.)

There is no doubt a statutory and judicial preference for joint trials. (§ 954; *Ochoa*, *supra*, 19 Cal.4th at pp. 408-409.) But section 954 also provides that "the court in which a case is triable, in the interest of justice and for good cause shown, may, in its discretion order that the different offenses . . . be tried separately . . . ." Defendant must make a clear showing of prejudice to establish that the court abused its discretion by denying his request for severance or that "'joinder actually resulted in "gross unfairness" amounting to a denial of due process.'" (*People v. Mendoza* (2000) 24 Cal.4th 130, 162 (*Mendoza*).) Defendant has done neither.

In determining whether there was an abuse of discretion at the time of the trial court's ruling, we consider the following factors: 1) the cross-admissibility of the evidence in separate trials; 2) whether certain charges are more likely to inflame the jury against the defendant; 3) whether a relatively weaker case is to be joined with a stronger case so that the "spillover" effect of the aggregate evidence might alter the outcome on some of the charges; and 4) whether joinder converts the matter into a capital case. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120.)

This remained a noncapital case with or without a severance. We agree with the Attorney General that this is not an instance where a weaker case is appended to a strong case so that the cumulative evidence secures a conviction the prosecution might otherwise be unable to prove. While the evidence in the child molestation trial may have been a credibility contest as defendant contends, the interviews of the child victims, the pattern of deviant conduct, the physical evidence, and the testimony at trial provided by the three victims, defendant's ex-wife, and medical experts provided compelling evidence of guilt. Nor was the child pornography on the videos more likely to inflame the jury than the evidence of defendant's sexual exploitation of his vulnerable young relatives.

But most significantly, the trial court found, in essence, that the evidence would be cross-admissible in separate trials. While "cross-admissibility is not the sine qua non of joint

trials" (*Frank v. Superior Court* (1989) 48 Cal.3d 632, 641), cross-admissibility "ordinarily dispels any inference of prejudice" (*Mendoza*, *supra*, 24 Cal.4th at p. 161).

Defendant argued that his scorned ex-wife downloaded the pornographic videos onto the laptop computer. In a separate trial on the possession of child pornography, therefore, evidence of his proclivity for young girls would be relevant to rebut his suggestion that his ex-wife possessed the pornography. Moreover, in a separate trial on the molestation charges, the possession of the child pornography would establish a pattern of conduct, defendant's recurrent fascination with sex and children. Thus, the evidence was not, as defendant argues, merely propensity evidence. It helped to establish a pattern of deviant behavior with the distinctive exploitation of children. Accordingly, defendant suffered no prejudice from the trial court's denial of the severance motion and has not sustained his burden of proving an abuse of discretion.

"Having concluded that defendant suffered no prejudice from the joint trial . . . , we also reject his contention that the joint trial violated his due process rights. [Citation ['Improper joinder does not, in itself, violate the Constitution' but rather 'rise[s] to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial']; citation.]" (*People v. Sapp* (2003) 31 Cal.4th 240, 259-260.)

B. Multiple Counts of Possession

Analogizing to the possession of several baggies of marijuana, defendant persuasively argues that his possession of 30 video images on the laptop computer constituted but a single violation of section 311.11. He was charged with and convicted of 10 separate counts. The Attorney General justifies the multiple counts based on the separate existence of each pornographic video and the fact that different child victims appeared in the videos. The Attorney General concludes that "because of the nature of the child pornography, and the 30 separate images involved, the charging of ten violations of Penal Code section 311.11, subdivision (a) did not constitute an impermissible splitting of charges." We disagree.

Section 311.11, subdivision (a) provides: "Every person who knowingly possesses or controls any matter, representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip, the production of which involves the use of a person under the age of 18 years, knowing that the matter depicts a person under the age of 18 years personally engaging in or simulating sexual conduct, as defined in subdivision (d) of Section 311.4, is guilty of a public offense . . . ."

Unsupported by citation to any authority, the Attorney General insists that section 311.11 "was unquestionably promulgated to provide additional protection for children who are subjected to continuing sexual abuse and to provide a penalty for those individuals who partake in viewing child pornography." Nor does he offer any authority for his assertion that each of the videos of child pornography was a "separate entity" constituting multiple violations of the statute. In the absence of any authority to support either rationale, we reject the notion that possession of multiple images on one computer under the present circumstances can result in multiple violations of the possession statute.

People v. Luera (2001) 86 Cal.App.4th 513 (*Luera*), cited by the Attorney General, does not suggest otherwise. In *Luera*, the police confiscated several computers and found multiple images of child pornography on two hard drives. (*Id.* at p. 517.) The opinion recounts that Luera was convicted of "felony possession of child pornography" and was sentenced to three years' probation. (*Id.* at p. 516.) While the issue before us was not addressed in *Luera*, there is nothing in the opinion or the sentence to suggest that Luera was charged with and convicted of multiple counts of violating section 311.11 despite the fact, as here, that multiple images were downloaded onto his computer.

Two recent cases of this court also involved but one count of possessing child pornography despite the possession of multiple computers or multiple images. (*People v. Harrisson* (2005) 134 Cal.App.4th 637; *People v. Woodward* (2004)

116 Cal.App.4th 821.) Again, neither case addresses the issue presented here -- whether multiple images constitute multiple violations of the possession statute. Cases involving other crimes of possession, however, provide guidance.

First, we point out that the problem we confront is multiple convictions, not multiple punishments. (*People v. Schroeder* (1968) 264 Cal.App.2d 217, 228.) Turning then to the issue of multiple convictions for possession offenses, several principles emerge. In *People v. Harris* (1977) 71 Cal.App.3d 959 (*Harris*), the defendants were convicted of nine counts of possessing property with altered serial numbers. The property included four television sets, two pairs of wood speakers, a stereo component system, a tape deck, and a clock radio. The court held that the simultaneous possession of only one classification of contraband constituted but a single violation of the statute. The court concluded, "[I]t would be unreasonable to fragment the simultaneous possession of the various articles described in Penal Code section 537e into separate acts of possession by category of the items enumerated." (*Harris*, at p. 971.)

Similarly, in *People v. Bowie* (1977) 72 Cal.App.3d 143 (*Bowie*), the defendant was charged with and convicted of 11 counts of violating section 475 for possessing 11 identical blank checks. His motion to consolidate the 11 counts into a single count based on the single act that constituted but one violation of the statute was denied. (*Bowie*, at p. 156.) Again, the multiple convictions were reversed. The court

analogized to a statute prohibiting an unnaturalized, foreign-born person from possessing a weapon. Relying on *People v. Puppilo* (1929) 100 Cal.App. 559, wherein the court held that the possession of two pistols in the defendant's home on a certain date could be only one crime, not two, the court in *Bowie* concluded the defendant's possession of 11 checks on the same date could be only one crime, not 11. (*Bowie*, *supra*, 72 Cal.App.3d at pp. 156-157.)

Justice Puglia utilized the same rationale in holding "that contemporaneous possession in a state prison of two or more discrete controlled substances (here methamphetamines and heroin) at the same location constitutes but one offense under Penal Code section 4573.6." (*People v. Rouser* (1997) 59 Cal.App.4th 1065, 1067.) Although two different controlled substances were involved, the court applied the general principle that a "single crime cannot be fragmented into more than one offense." (*Id.* at p. 1073.) The court therefore dismissed one count for the possession of heroin.

People v. Rowland (1999) 75 Cal.App.4th 61 (*Rowland*) reached the same result for weapons possession. We held that the defendant could not be properly convicted of more than one count of section 4502, subdivision (a) where he possessed three weapons of the same type at the same time. (*Rowland*, at p. 64.)

We apply the logic of these various possession cases to the possession of child pornography. Here defendant was in possession of the laptop computer with 30 different pornographic videos involving children. The act proscribed by section 311.11

is the act of possessing child pornography, not the act of abusing or exploiting children. Like the 11 blank checks, the 9 different pieces of property with defaced or obliterated serial numbers, the 2 different kinds of controlled substances, or the 3 weapons of the same type, defendant violated a provision of the Penal Code by the solitary act of possessing the proscribed property. And like the courts in these varied types of possession cases, we are not at liberty to fragment a single crime into more than one offense. As a result, we too must reverse the multiple convictions for 9 of the 10 counts of violating section 311.11 and remand the case for resentencing.

II. RIGHT TO COUNSEL

It is well established that the Sixth Amendment to the United States Constitution gives a criminal defendant the right to counsel as well as the right to represent himself if he knowingly and voluntarily waives his right to counsel. (*Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562].) It does not, however, provide a constitutional right to change his mind and switch back and forth during trial. (*People v. Boulware* (1993) 20 Cal.App.4th 1753, 1756.) "[O]nce defendant ha[s] proceeded to trial on a basis of his constitutional right of self-representation, it is thereafter within the sound discretion of the trial court to determine whether such defendant may give up his right of self-representation and have counsel appointed for him." (*People v. Elliott* (1977) 70 Cal.App.3d 984, 993 (*Elliott*).)

Until a week before trial, defendant was represented by the public defender. He then invoked his right to represent himself. The trial court warned him of the pitfalls and dangers of self-representation, counseled him against forsaking his lawyer, and instructed him he would be held to the same standard as any attorney, would not be given special treatment, and would be presumed to know the law necessary to defend himself. Well admonished, defendant knowingly waived his right to counsel and the court had no choice but to grant his request to represent himself. (*People v. Smith* (1980) 112 Cal.App.3d 37, 48 (*Smith*).)

The trial court then heard pretrial motions and conducted three days of voir dire. A jury was impaneled. Before opening statements, defendant asked to have counsel appointed, but he was unwilling to waive his right to a speedy trial and would not accept reappointment of the same public defender. Perplexed, the court remarked that defendant had put both himself and the court "between a hard place and a rock. [¶] On the one hand, you're saying you want your trial within the statutory time period. That means no time waivers. No continuances in this matter. [¶] And on the other hand, you're saying well, I need these things to adequately prepare so I want another attorney."

Defendant explained that he had not been provided access to the law library or to the telephone to contact an investigator. The court expressed considerable concern that he had not been accorded his in pro. per. privileges, even following a call from the court. The court ordered that defendant be allowed to

telephone the investigator and assured him the court would follow up and see if the "investigator can come over and see you." Defendant does not assert that he had any further difficulty in securing his in pro. per. privileges throughout the trial. He contends, nonetheless, that the court abused its discretion by denying his request to allow him to withdraw his waiver of counsel and to appoint him another lawyer.

In evaluating whether the trial court abused its discretion by denying a defendant's request for a lawyer after he invoked his right of self-representation, California courts consider the following relevant factors: "(1) defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney." (*Elliott*, *supra*, 70 Cal.App.3d at pp. 993-994.) Yet these factors must yield to a more holistic review of the totality of the facts and circumstances as the Supreme Court instructs in *People v. Gallego* (1990) 52 Cal.3d 115: "'While the consideration of these criteria is obviously relevant and helpful to a trial court in resolving the issue, they are not absolutes, and in the final analysis it is the totality of the facts and circumstances which the trial court must consider in exercising its discretion as to whether or not to permit a

defendant to again change his mind regarding representation in midtrial.'" (*Id.* at p. 164, quoting *People v. Smith* (1980) 109 Cal.App.3d 476, 484.)

We agree with the trial court that defendant put it between a rock and a hard place. As the court well understood, several factors favored granting defendant's request. There is no indication in this record that defendant had abused his privilege during the course of the proceedings or, as in other cases, changed his mind on multiple occasions. Rather, he asked for counsel when he had difficulty accessing legal materials and the investigator. While the pretrial motions had been litigated and the jury impaneled, the trial itself had not yet begun.

Defendant, however, would not waive time and did not want the same public defender reappointed even if she were available. Thus defendant had an irreconcilable dilemma of his own making. No competent lawyer, as the trial court emphasized, would be willing or able to try such a serious and complex case without adequate time for preparation. Yet because defendant remained unwilling to request or accept a continuance, he deprived himself of a competent replacement.

It was indeed very likely that he could effectively defend against the charges by continuing to act as his own attorney, and the record of the ensuing proceedings attests to his effectiveness. His cross-examination of witnesses was appropriately gentle when confronting his young daughter and appropriately searing when confronting his ex-wife, who he asserted was the mastermind behind the false charges. His

argument was cogent. He highlighted the weaknesses in the prosecution's case, challenged the veracity of the prosecution's witnesses, and offered a viable alternative to the prosecution's theory. Even before trial began and he had the opportunity to demonstrate his legal prowess, the court had absolutely no reason to doubt his ability to defend himself.

In sum, the court was presented with a bright, articulate, and competent defendant insisting on his right to a speedy trial and unwilling to either waive time or consider reappointment of the same public defender and yet also insisting on the appointment of another lawyer. The court took reasonable measures to assure that defendant was provided his in pro. per. privileges, and as we pointed out above, defendant does not assert there were any continuing obstacles to his self-representation. We conclude, therefore, that under "'the totality of the facts and circumstances'" the court did not abuse its discretion by denying defendant's request to withdraw his waiver of his right to counsel and to appoint a new lawyer after the jury was impaneled and the trial about to begin. (*Smith*, *supra*, 112 Cal.App.3d at p. 51.)

III. EVIDENTIARY AND INSTRUCTIONAL ERROR

A. Propensity Evidence

Defendant complains that evidence he fondled his friend's younger sister and possessed child pornography was erroneously admitted to show his propensity to molest children. His challenge to the constitutionality of Evidence Code section 1108 has been soundly rebuffed. (*People v. Falsetta* (1999)

21 Cal.4th 903, 917.) He further contends that the trial court abused its discretion by finding its probative value was not substantially outweighed by the possibility that it would consume an undue amount of time, create a substantial danger of undue prejudice or confusion of issues, or mislead the jury. (Evid. Code, § 352; *People v. Fitch* (1997) 55 Cal.App.4th 172, 183.)

Defendant insists that his fondling of Joanne S.,[4] the 14-year-old sister of his friend, bore no similarity to the type of lewd and lascivious conduct with which he was charged. Not so. While his aggression toward this young girl might appear tame compared to his abuse of his nine-year-old sister two years later and six-year-old daughter nine years later, it begins a pattern of forcing himself on young girls and using them for his sexual gratification. Joanne testified that defendant's advances were unwelcome and she immediately reported his forced attempt at "copping a feel" to the police. While it is true that defendant was only 18 years old at the time of this first reported incident, just two years passed before he began his exploitation of his sister and therefore the incident was not too remote in time to diminish its probative value. Because there was sufficient similarity between the uncharged misconduct and the present offenses, and the chance for confusing the jury or consuming an inordinate amount of time was remote, we

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[4] See footnote 1, *ante*.

conclude the court did not abuse its discretion by admitting Joanne's testimony.

Nor did the admission of the evidence that defendant possessed child pornography constitute an abuse of discretion. Since, as we concluded above, the molestation and possession charges were properly joined, the pornographic video images were admissible to prove a violation of section 311.11. Thus they were not, as defendant seems to suggest, merely admitted to prove a propensity to molest children. If he desired a limiting instruction, he should have requested one.

B. Access to Criminal Jury Instructions

Apparently defendant had access to CALJIC at the prison library, but not to the revised instructions now available in CALCRIM. He contends he was thereby deprived of his right to due process, self-representation, meaningful access to the courts, and the opportunity to prepare a defense. The record belies his assertion.

It appears that at the conclusion of the evidence, the court went over the jury instructions with the prosecutor and defendant. The following morning they put the relevant portions of their discussion on the record. The prosecutor withdrew several instructions, and defendant requested various instructions. The court pointed out that defendant was using the old CALJIC because the library did not have CALCRIM. He recounted what he had told defendant as follows: "And what I told you is just present the CALJIC to the Court and I'll indicate what the comparable CALCRIM section was. [¶] I

indicated to you that that instruction under CALJIC is now obsolete because that language has been subsumed within the general expert testimony instruction given in CALCRIM . . . .” Defendant assented. The court expressly inquired of defendant: “And I think I read it to you. So you were satisfied with that language was -- was incorporated into CALCRIM, correct?” Defendant replied, “Yes, your Honor.”

Defendant insists that this colloquy pertained to a single instruction and did not represent a stipulation to a wholesale adoption of the procedure. But the record reflects that the court carefully repeated the same procedure with the other instructions defendant requested. For example, defendant requested the court to instruct the jury not to take a cue from the judge, to which the court stated: “And I also indicated that that is -- that language has also been subsumed within another instruction that tells the jurors how they go about their deliberations. And I do tell them that they’re not to take the cue from the Judge. [¶] In fact, that actually is in the opening instructions as well that deal with how the jurors are to conduct their duties. And I think that -- read that language to you as well, correct?” Defendant agreed and stated expressly on the record that he was satisfied.

Again the court recorded that defendant had requested an instruction that touched upon the possibility of third party liability as to the possession counts and that “we actually doctored up the child pornography instruction to tell the jurors that the defense position is that someone else committed those

offenses . . . ." The court further stated that the instruction requires the prosecution to prove all the elements beyond a reasonable doubt. The court concluded once again, "And I believe during our informal discussions you did indicate you were satisfied with that, correct?" And, for at least the third time, defendant agreed on the record.

The record substantiates the Attorney General's position that defendant stipulated to the procedure the court employed to assure he had adequate access to the jury instructions; he had the opportunity to request, challenge, and revise those instructions; he fully understood each of the instructions as they would be delivered; and he acquiesced in the process in which he fully and intelligently participated. His claim on appeal that this procedure violated his right to due process, etc., rings hollow on this very express and candid record.

DISPOSITION

Nine of the ten counts for possessing child pornography in violation of section 311.11 are reversed and dismissed, and the case is remanded to the trial court for resentencing. In all other respects, the judgment is affirmed.

RAYE, J.

We concur:

DAVIS, Acting P.J.

ROBIE, J.