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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ELIDIO GONZALES-BAUTISTA,

Defendant and Appellant.

A130972

(Contra Costa County  
Super. Ct. No. 5-100355-7)

Defendant Elidio Gonzales-Bautista appeals from a judgment of conviction entered upon a jury's verdict finding him guilty of eight counts of committing lewd acts upon three children under age 14, with the special circumstance that defendant committed an offense against more than one victim. The jury also found true three enhancement allegations that defendant engaged in substantial sexual conduct with the victims. Defendant challenges only his conviction under the two counts relating to the offenses against Jane Doe III, contending that the trial court erred in admitting the testimonial, out-of-court statements of Jane Doe III in violation of the Confrontation Clause of the Sixth Amendment. We shall affirm.

**Factual and Procedural History**

In December 2006, Antioch Police Officer Steven McElroy received a report that Jane Doe III, a five-year-old girl, had been molested by defendant. McElroy scheduled an

interview for Jane Doe III at the Children’s Interview Center (CIC) in Martinez.<sup>1</sup> At the interview Jane Doe III told the interviewer that she was there to talk about the “bad things” that occurred with defendant, who she referred to as “Pepe.” She said that when she was four defendant took her to the basement in their shared home and took off his pants. Jane Doe III saw his “personal spot” and defendant put his “personal spot” in her mouth five times. She further stated that something came out of his “personal spot.” Jane Doe III also said that Pepe removed her underwear and pants and put his mouth on her “personal spot” and put his hands on her butt. All of these events she said occurred on the same day, although she could not recall the exact date.

Defendant was charged with two counts of committing lewd acts upon Jane Doe III, a child under age 14 (Pen. Code § 288, subd. (a)).<sup>2</sup> It was alleged that defendant committed an offense against more than one victim (§§ 667.61, subds. (b) & (e), 12022.066, subd. (a)(7).) and that defendant engaged in substantial sexual conduct with the victim (§ 1203.066, subd. (a)(8)).

Prior to trial, the prosecution moved to introduce evidence of Jane Doe III’s CIC interview. Defendant opposed the motion, arguing that admitting evidence of the interview would violate his Sixth Amendment right to confront the witnesses against him.<sup>3</sup> The prosecution asserted that it expected Jane Doe III to testify at trial, so that there was no potential confrontation issue and the court agreed.

At trial, Jane Doe III testified and the prosecution played the video recording of her CIC interview. When testifying, Jane Doe III stated that Pepe did “bad stuff” to her in the basement. However, when asked what type of “bad stuff,” she answered that she didn’t remember. When questioned further she said that Pepe touched her in her “area”

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<sup>1</sup> The CIC is an interview center specially designed to interview children. Interviewers are trained to ask non-leading questions in an environment designed to make children feel comfortable. A goal is to minimize the number of times a child must discuss an incident.

<sup>2</sup> All statutory references are to the Penal Code unless otherwise noted.

<sup>3</sup> At trial, defendant also opposed the motion on the ground that the testimony does not come within the hearsay exception in Evidence Code section 1360. Defendant does not renew this objection on appeal.

though she could not remember if he touched her under or over clothing, if his hand moved or was still when he touched her, whether Pepe did anything else to her, whether she was in the basement with Pepe more than one time, what Pepe said to her, if anything, or how she reacted when Pepe touched her. She thought she remembered being interviewed at the CIC, but was not sure. She did remember speaking with a police officer who was nice to her. She denied ever making anything up about Pepe but admitted that when people asked her questions about what happened with Pepe she sometimes said she did not remember when, in reality, she did not want to talk about it.

On cross-examination, Jane Doe III said she did not remember saying “no” when her mother first asked her if anything happened with Pepe. She remembered telling her mother that Pepe did something to her in the backyard and acknowledged that she was now saying that it had occurred in the basement, but could not remember if her statement that something happened with Pepe in the backyard was not true. When asked if she remembered the CIC interview, she thought she did and recalled drawing pictures there, but she did not remember what she said at the interview.

At the conclusion of trial, defendant was found guilty on all counts and the jury found true the enhancements and the special allegation. The court sentenced defendant to state prison for a term of 75 years to life. Defendant filed a timely notice of appeal.

## **Discussion**

### *A. Forfeiture*

The Attorney General asserts that defendant forfeited his claim of evidentiary error because on appeal he is changing his theory of inadmissibility. This argument is meritless. “An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide.” (*People v. Scott* (1978) 21 Cal.3d 284, 290.) Here, the defendant clearly and consistently alerted the trial court that he was objecting to the admission of Jane Doe III’s CIC interview on the basis that its admission would violate his constitutional right to confrontation and “the record shows that the court understood the issue presented.” (*Ibid.*) Thus, defendant properly preserved the issue for appeal.

### *B. Confrontation Clause*

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” In *Crawford v. Washington* (2004) 541 U.S. 36, the high court explained that when the prosecution seeks to introduce a witness’s prior testimonial statement, the right of confrontation requires that the defendant have an opportunity to cross-examine the declarant at trial or that the defendant previously have had an opportunity to cross-examine the declarant. (*Id.* at pp. 53-54.) The *Crawford* court specifically stated that “when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” (*Id.* at p. 59, fn. 9.) Since Jane Doe III appeared for cross-examination at trial, there are “no constraints at all on the use of [her] prior testimonial statements” made at the CIC interview.

While acknowledging “that the mere fact Jane Doe III appeared to testify has generally been held to satisfy the confrontation clause in prior cases,” defendant asserts that this generality should not apply here because the prosecutor chose “to rely entirely on hearsay rather than question the witness about conduct she disavowed at trial”<sup>4</sup> and “Jane Doe III could neither explain nor defend the statement she gave at the CIC interview.” However, neither the prosecutor’s reliance on the statements made by Jane Doe III at the CIC interview nor the young girl’s inability to remember her prior statements violates the defendant’s right to confrontation.

“The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion,

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<sup>4</sup> In her closing argument, the prosecutor said, “And, yes, there were inconsistencies when (Jane Doe 3) talked about what happened. But what she was consistent about is that something happened, that Pepe did something to her. And what she could remember was that he touched her in a private area. Did she remember the oral sex? No. And by that point in time, I didn’t really feel like asking her if a grown man had put a penis in her mouth. And I left it at that because you have the [CIC] interview to look at about what she remembered back then.”

or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 21-22.) Defendant was given an opportunity to inquire into the inconsistencies in Jane Doe III's testimony and the discrepancies between her trial testimony and the statement she gave at the CIC. Defendant took full advantage of this opportunity, questioning Jane Doe III regarding the CIC interview<sup>5</sup> and arguing in closing that Jane Doe III's forgetfulness and inconsistency made her an unreliable witness.<sup>6</sup> Simply because defendant's

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<sup>5</sup> The following colloquy took place between defendant's counsel and Jane Doe III:

"Q: And do you remember going into a place – after the officer came to your house, maybe a few weeks later, going to a room and – with a little table and then a lady that you've never seen before asking you questions about Pepe; do you remember that?

"A: I think.

"Q: Okay. And you were drawing pictures and stuff; do you remember that?

"A: Yeah.

"Q: Okay. But right now, you don't really remember what you said back then; right?

"A: No."

<sup>6</sup> In her closing argument, defendant's counsel argued:

"Let me talk about (Jane Doe 3). What been presented to you on (Jane Doe 3) involves extremes. At the CIC she says that oral sex happened and some touching. Today she's telling you that it was only touching. There are many inconsistencies and too many inconsistencies in her statements. And you are really left not knowing what to believe. And so I tell you believe none of it. [¶] . . . [¶] Now, she admitted on the stand that she told her mother the touching had happened in the back yard while playing tea party, but there was no evidence presented that she had told her mother that his private parts were in her mouth. Yet at CIC – at that CIC interview years ago, there was no mention of a back yard, and the interviewer kept asking her about the back yard, and she said nothing had happened in the back yard. [¶] . . . [¶] She told the interviewer she was aware of what her cousins were saying. She said she knew what her cousins were saying. And when asked how, she stated, 'My mother told me' . . . [¶] And kids follow what other people say. They want approval. They want to do just, like – when they do that and they act like any other human being, stories will change when things

questioning was not “cross-examination that [was] effective in whatever way, and to whatever extent, [he] might wish” does not mean that defendant was denied his right to confront the witnesses against him. (*Id.* at p. 20.)

**Disposition**

The judgment is affirmed.

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Pollak, J.

We concur:

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McGuinness, P. J.

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Jenkins, J.

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aren't true. They change because they are based on what other people tell them. [¶] . . . [¶] . . . Her testimony now? Well, she forgot. She can't remember. Again, one of the things you can consider is how well is the witness able to remember and describe what happened. [¶] She also – one of the other changes I just showed you too is, did the witness make a statement in the past that is inconsistent with her testimony now? Yes, she did. She basically testified now that Bautista only touched her with his hands. You can't go from a description of oral sex to only touching with hands. It's a drastic change. No way anyone can forget, a child even, something so traumatic if in fact it happened. [¶] . . . [¶] What is the truth? The stories keep changing. You cannot compromise on these – on this. These serious allegations require proof beyond a reasonable doubt, any criminal charge. Mr. Bautista is not guilty of count 6, 7 and 8.”