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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ABEL RAMOS ALVARADO,

Defendant and Appellant.

A137205

(Alameda County
Super. Ct. No. CH50309)

Defendant Abel Alvarado was sentenced to two concurrent 15-years-to-life prison terms after a jury found him guilty of continuous sexual abuse of minors Jane Doe 1 and Jane Doe 2 in violation of Penal Code section 288.5, subdivision (a). Defendant asserts three errors on appeal: (1) the trial court abused its discretion in excluding evidence of a lie purportedly told by Jane Doe 2; (2) the prosecutor committed misconduct during her closing argument by telling the jury that it would have heard evidence that the two victims were liars if, in fact, they were; and (3) the trial court erred in failing to admonish the jury to disregard the prosecutor's improper closing argument. Defendant's arguments lack merit, and we affirm.

EVIDENCE AT TRIAL

In February 2007, three-year-old Jane Doe 1, four-year-old Jane Doe 2, their infant brother, and their parents lived next door to defendant, his wife Mercedes, and members of defendant's extended family. The girls' mother, Andrea, entered into an arrangement with Mercedes for her to babysit the three children while Andrea and her husband were at work. Generally, Mercedes would come over to pick up the children at

6:45 a.m. and take them back to her house, where she and defendant would care for them until one of the parents came home, usually around 4:30 p.m. Eventually, the two girls went off to school, but they would still return to defendant's house for babysitting after school and on school holidays.

Jane Doe 1, who was seven years old at the time of trial, testified that at some point defendant began touching her. He would sit in a chair in the living room and motion for her to come sit on his lap. While she was on his lap, he would reach under her underpants and touch her where she goes "[n]umber one." On a diagram, she indicated that defendant touched her on her vagina with his hand and kissed her on the mouth.

When these incidents took place, Jane Doe 1's brother and sister would be asleep on a nearby couch, and Mercedes would be upstairs or tending to her garden. According to Jane Doe 1, this happened a "lot of times."

Jane Doe 1 did not like it when defendant touched her, but she never said anything to either him or Mercedes. She finally told her mother because she wanted it to stop. She did not tell her mother before then because she was scared.

Jane Doe 2, who was nine years old at the time of trial, testified that almost every time she and her siblings were at defendant's house, defendant touched her in places that he was not supposed to touch her. He would be sitting in a chair in the living room and would pull her onto his lap. She would struggle to get away, but he would squeeze her tight and not let her go. She would tell him, "No," but he would still grab her and pull her to him. Defendant would put his hand inside her pants and touch her, although he never touched her underneath her underwear or on her bottom. He also kissed her on the mouth.

When defendant made Jane Doe 2 sit on his lap, her brother and sister would be sitting on the couch in the living room watching television, and Mercedes would be upstairs or outside watering her plants. Often times, Jane Doe 1 would look over and see defendant touching Jane Doe 2.

Like Jane Doe 1, Jane Doe 2 did not tell her mother or father what defendant was doing to her because she was scared they would not believe her.

By November 2010, the girls were no longer going to defendant's house on a regular basis because they were in school and attended a different afterschool program. One day that month, Andrea and the girls went to defendant's house to pick up Andrea's son. The girls would usually wait in the car, but on that day, they both went to the door with their mother, where they were greeted by defendant.

From defendant's house, they all went to a hair salon. As Jane Doe 1 was waiting to get her hair cut, she told her mother that she did not want to lie anymore and that defendant had touched her, pointing to her private area. After Jane Doe 2 was done getting her hair cut, she came over. Out of the presence of Jane Doe 1, Andrea asked Jane Doe 2 if defendant had ever touched her. She said he had. Andrea drove them straight to the Union City police station where the girls were interviewed by a police officer. Approximately a week later, they were interviewed at the CALICO center.

Andrea testified that over the years that the girls were in the care of defendant and Mercedes, she had seen defendant alone with her children in the living room. She would also find Mercedes out in front tending to her garden while the children were inside. Other times, Mercedes would be out running errands and another family member would be watching the children.

Defendant, who was 83 years old at the time of trial, took the stand in his own defense. He denied that he ever inappropriately touched Jane Doe 1 or 2, that either girl ever sat on his lap, or that he ever hugged or kissed either girl. He denied having ever taken care of the girls, claiming that only his wife, daughter, and daughter-in-law looked after them. According to defendant, he was never alone in any room, including the living room, with the girls in the three years they came to his house. He also denied that Mercedes watered her garden when the girls were over.

Defendant also presented testimony from his son, daughter-in-law, and wife. The gist of their testimony was that they never saw defendant inappropriately touch the girls and never saw him alone with them. Mercedes specifically testified that in the entire time the children came to her house for babysitting, defendant was never alone with the girls, and she never tended to her garden when the girls were over.

PROCEDURAL BACKGROUND

Defendant was charged with two counts of continuous sexual abuse in violation of Penal Code section 288.5, subdivision (a). It was also alleged that he committed the offenses against more than one victim within the meaning of section 667.61, subdivisions (a), (b), (c), (e)(5), and (h).

Trial commenced with jury selection on August 22, 2012, and testimony began on September 4, with Jane Doe 1 the first witness to testify. After she testified but before Jane Doe 2 took the stand, the prosecutor advised the court that defense counsel intended to impeach Jane Doe 2 with a lie she purportedly told. This exchange ensued:

“THE PROSECUTOR: He intends to impeach Jane Doe 2 with, I guess at some point—and I don’t know. I don’t have any details at all from the defense. But he says at some point in her life, she has lied to one of the family members. And he wants to bring out the lie to the family member. [¶] And I have no discovery of this before five seconds before. I think that it is highly prejudicial to ask—everybody’s lied in their lives. And to ask this little girl about every lie she’s ever told or even one lie she told, you know, a hundred years ago, I think, serves to do nothing other than prejudice the jury. . . .”

“THE COURT: What’s it about? Does somebody want to tell me what it’s about? [¶] . . . [¶]

“DEFENSE COUNSEL: Jane Doe 2 is alleged by my client’s daughter-in-law who were one of the people in the house taking care of the girls that 2 had told her one day that her mother was pregnant. And the mother came and she was given congratulations or she was asked whether she was pregnant and it turns out she wasn’t pregnant.

“THE COURT: How old was the girl when this conduct was allegedly made?

“DEFENSE COUNSEL: I’m not sure about that. I’m not sure about that. [¶] . . . [¶] . . . I remember asking the family if the girls were truthful or not. And they—this morning, they indicated to me that they heard that particular incident.

“THE COURT: Well, a couple of things come to mind. One, not knowing how old she was when this occurred or didn’t occur, would be somewhat problematical. And

two, that kind of thing or that kind of idea in the mind of a young girl, I don't know if someone said something about that or how that got communicated to her or how she came to that belief, whether it would be a type of lie. I don't know enough, I don't think. [¶] So at this point, I would say I wouldn't allow that to come in without knowing more. If you come into possession of more information, I guess I would say—

“DEFENSE COUNSEL: Well, I'll be able to tell you hopefully when—when the little prevarication took place.

“THE COURT: Well, I guess what I'm saying—

“DEFENSE COUNSEL: But I won't know why she lied about it.

“THE COURT: Well, I guess what I'm saying that you're saying obviously you were able to prove that the mother was not pregnant. As far as the girl saying—Jane Doe 2 saying she believed her mother to be pregnant, for me to believe that that was a straight lie as opposed to a misunderstanding or some sort of confusion on her part . . . [¶] . . . [¶] that that could be the area sometimes in the mind of a young child, depending on her age, I could see how that could be sort of something that could arise from some confusion or some misunderstanding about what pregnant is or what pregnancy is. And without more, I'd be reluctant to let it in.

“DEFENSE COUNSEL: Well, I think the Court's correct in that, you know, it may well have been the fact that she was confused. Although getting confused about that—something like that is a lot like getting confused about, you know, an allegation that the—her little brother was touched inappropriately by Mercedes. So—and it's not—I don't think it's that far of a stretch to say that maybe these allegations were the source of confusion, too. [¶] So, you know, the bottom line is she's saying something that wasn't true. [¶] . . . [¶]

“THE COURT: Okay. What I think I'm going to do is without more being provided to me, I'm going to order and then rule at this point that it won't be the subject of questions. But if you, I guess, come into possession of more information that could give me a better handle on it, then I'll reconsider my ruling.”

Testimony then resumed with Jane Doe 2, and further evidence was heard on three more days.

On September 10, counsel gave their closing arguments. One brief passage in the prosecutor's rebuttal closing argument is relevant to the issues defendant raises on appeal. And that is when the prosecutor argued, "And also let's keep in mind, too, that I asked these family members and the defendant about those little girls. How were they? How were they behaved? Oh, they were polite. They behaved well. If they were little bratty liars, you would have heard that. That would have come out of their mouths. Oh, they lied all the time. They were—" At that point, defense counsel interjected an objection, which the court overruled, and the prosecutor continued: "They did not say that. They said they were polite. They were well-behaved girls. His own family said that."

After closing arguments concluded and the jury had left the courtroom, counsel for defendant expressed his concern about the prosecutor's closing argument. This lengthy discussion followed:

"DEFENSE COUNSEL: I sought admission of testimony of a lie that was told by one of the girls and the Court excluded that pretrial. The district attorney then asked on cross-examination my client's wife if the girls were well behaved. She—I had instructed her, because of your pretrial ruling, that she was not to mention the lie that you had excluded. [¶] And so for the district attorney to then argue that when I asked her if they were well behaved, if they would have been bratty liars, you would have heard about it, I think that's improper. And I think the Court should instruct the jury that that was improper argument and to disregard the argument.

"THE COURT: All right. Ms. Lowe [the prosecutor], do you want to comment?

"THE PROSECUTOR: Well, I didn't think that he ever brought forth any information that the girls actually lied about anything.

THE COURT: Well, he's saying he tried to and I'm going—he's making—I think he's saying that in our pretrial motion or pretrial discussions, that that subject was raised and I made a ruling. I'll have to go back and look at my notes.

“DEFENSE COUNSEL: My recollection is that the Court said that, ‘I’m not going to allow it. I mean if you’d like to come up with some more fleshing out of the lie or provide some context of the time, then it might be admissible.’ [¶] . . . [¶] And I was unable to do that to my satisfaction. And I—in other words, the—my witnesses remember the lie, but they didn’t remember exactly when it took place and I didn’t think I would be successful. [¶] . . . [¶] Because you said it was inadmissible.

“THE COURT: Well, I think that given that, that if—I mean the ruling that I made and then your subsequent efforts to try and flesh it out or investigate it further, had it resulted in something tangible—tangible might be the wrong word—or if it was something that could have been presented, might put us in a different context. But given that it didn’t result in that—I mean what you’re kind of saying is that perhaps you had some information about something that might or might not have led to evidence that could have been presented that might have called into question the credibility of the girls, but it never got to that point.

“So then to say that it would be improper to argue to the contrary would—wouldn’t you have to assume that what you’re saying—what you were trying to argue perhaps is true or would have been true? Do you see what I’m saying? I mean you’re saying I think I had this information out there that I could have used to cast doubt on the girls’ credibility. However, I never got to the point where I felt that it was sufficiently definite or sufficiently presentable.

“DEFENSE COUNSEL: Well, I would say that it was. I wouldn’t have asked for it to be admissible if I didn’t think—

“THE COURT: Well, based on what I heard at the time. Based on the offer of proof that was made, I made the ruling that I made obviously. [¶] And then, I guess, I don’t know what efforts you made subsequent to that to see if you could make it more solidified or make it a more feasible argument.

“DEFENSE COUNSEL: Well, part of that was strategic also, right? Because I knew that that—I thought that that—I mean we didn’t have a hearing where this was—where I don’t think the Court ever ruled that this didn’t happen, that the lie didn’t happen.

[¶] . . . [¶] And so I thought I put the district attorney in a position where she would probably not elicit information that the kids were truthful because I could potentially elicit the lie. So at any rate, I instructed my witnesses not to mention it. They didn't mention it. [¶] . . . And for the district attorney to say if they would have been bratty liars, you would have heard about it, well, she knew, Ms. Lowe knew that, you know, that the jury wasn't going to hear about it because you had ruled that it was inadmissible.

“THE COURT: Right. But isn't that saying that—I mean if someone decides later on at some point that my ruling was incorrect, but what I—then I guess that's a whole other matter. But at this point, if a ruling is made that a particular piece of evidence isn't relevant, let's say, or it's not—the foundation hasn't been met or some issue hasn't gotten it to the point where in the Court's opinion it's admissible, then it doesn't—legally it doesn't—I don't want to say that it doesn't exist, but it doesn't come into play. Right? I mean, it doesn't enter into the equation. [¶] . . . [¶] Let's say you want to come up with an offer of proof and want to get a particular piece of evidence in front of the jury and the Court says no, you can't, because the foundation is not there or it's not relevant. I mean, then from that perspective, our perspective legally it doesn't exist in a sense. It's not a matter that can be an issue, that can be commented on or presented to the jury.

“So if you had an allegation—not an allegation. If you had a suspicion that there's a fact or a series of events that you think are relevant that you want to present to the jury but the Court says no, and then the opposing party, the district attorney in this case, then goes on to say, well, you didn't hear anything about these girls being liars or their credibility being called into question, and you're saying, no, wait a minute, I had this information, but that information didn't get to the level, at least in the Court's opinion, that it needed to be considered, it's as if it didn't—like I said, exist might be wrong word, but it did not rise to the level where it would not be considered.” The court then invited defense counsel to put anything else he felt necessary on the record, which he declined to do, and the session concluded for the day.

The following morning, the court instructed the jury, and deliberations began. After deliberating for less than a day, the jury returned a guilty verdict on both counts.

On October 29, defendant was sentenced to 15 years to life on both counts, with the terms to be served concurrently.

Defendant filed a timely notice of appeal.

DISCUSSION

In his first argument, defendant contends that the trial court abused its discretion in precluding him from introducing evidence that Jane Doe 2 once lied when she told a member of his family that her mother was pregnant. This, he claims, “prevented [him] from having a meaningful opportunity to present a defense” in violation of his state and federal constitutional rights. We review the trial court’s evidentiary ruling for abuse of discretion (*People v. Waidla* (2000) 22 Cal.4th 690, 717), and we will not disturb an exercise of discretion unless it is “arbitrary, capricious or patently absurd” (*People v. Jordan* (1986) 42 Cal.3d 308, 316), or “falls outside the bounds of reason.” (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.) There was no abuse of discretion here for one simple reason: defense counsel was unable to offer any support for his claim that Jane Doe 2 had once told a lie.

As detailed above, defense counsel intended to introduce evidence that Jane Doe 2 told a member of defendant’s family that her mother was pregnant when, in fact, she was not. This, counsel submitted, would demonstrate that she was prone to telling lies, which was consistent with the defense in this case—that the girls were lying when they said defendant had molested them. But counsel was unable to offer any background concerning this misstatement. He was “not sure” how old Jane Doe 2 was when she made this statement, meaning she could have been anywhere from four to seven years old. And he was unable to provide any further context—either at the time the court was considering the admissibility of the statement or at a later date—to establish that the misstatement was a lie.

As the trial court was rightly concerned, there are many possible explanations for Jane Doe 2’s comment, especially considering she could have been as young as four

years old when she supposedly made it. Did someone else tell her her mother was pregnant, and she was merely repeating what she heard? Did she mishear something someone else said, thinking he or she said her mother was pregnant, when in fact that was not what was said? Did she think her mother remained pregnant after her younger brother was born? Did she even know, for that matter, what pregnant meant? Under any of these, and many more, scenarios, the statement would have reflected nothing more than a child's misunderstanding or confusion. And such a statement would have no bearing on the child's credibility, particularly at a trial that took place up to five years after the statement was made.

Defendant argues that the evidence was "plainly relevant, in that the girls' credibility was central to the case. If one had been caught in a lie before, that would certainly help the jury to decide if they were telling the truth." This begs the question, however: defense counsel did not offer sufficient evidence demonstrating that Jane Doe 2 had been caught in a lie.

In light of the foregoing, we conclude that the trial court's exclusion of Jane Doe 2's statement that her mother was pregnant was not arbitrary, capricious, or patently absurd, nor did it fall outside the bounds of reasons. As such, there was no abuse of discretion.

But even if we were to assume the trial court erred in precluding defense counsel from introducing evidence of what he claimed was a lie by Jane Doe 2, we would still not reverse. In order to obtain a reversal based on the erroneous exclusion of evidence, defendant must show that the error resulted in a miscarriage of justice in that it is reasonably probable he would have obtained a more favorable result in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Fudge* (1994) 7 Cal.4th 1075, 1103 [harmless error standard applies where court rejected "some evidence" regarding a defense].) Defendant has made no such showing here. Thus, any error was harmless.

The disputed statement was not, as defendant would have it, "a major instance of lying by Jane Doe 2." This was one trivial, inaccurate statement made by one of the girls

at some point during the three years they were babysat by defendant and his wife. It simply cannot be said that evidence of the statement would have so severely undermined Jane Doe 2's credibility that the jury probably would have acquitted defendant of molesting her.

In light of our conclusion, we can readily dispose of defendant's two remaining arguments. In the prosecutor's rebuttal closing argument, she argued, "[L]et's keep in mind, too, that I asked [defendant's] family members and the defendant about those little girls. How were they? How were they behaved? Oh, they were polite. They behaved well. If they were little bratty liars, you would have heard that. That would have come out of their mouths. Oh, they lied all the time." This, defendant contends, constituted prosecutorial misconduct because the prosecutor "deliberately and unfairly took advantage of the court's earlier ruling to unfairly and improperly attack [defendant's] case." But, again, the court did not exclude evidence of a lie. It excluded evidence of simple misstatement by Jane Doe 2—a statement about which nothing else was known. And the prosecutor's argument was true: if there was evidence that either of the girls had told a lie, defendant would have introduced it. No such evidence was ever brought before the court.

Defendant's reliance on *People v. Ochoa* (1998) 19 Cal.4th 353 to demonstrate prosecutorial misconduct is misplaced. There, the Supreme Court held that the prosecutor committed misconduct during closing argument when he commented on an omission in the testimony of defendant's expert witness, an omission that was necessitated by a statute prohibiting the expert from offering an opinion on a particular issue. (*Id.* at pp. 430–431.) The situation here was different: defendant was not prohibited from presenting evidence of lies told by either of the victims; he simply did not have any such evidence.

For the same reasons, there is no merit to defendant's third argument—that the trial court erred in refusing to admonish the jury to disregard the prosecutor's arguments.

DISPOSITION

The judgment of conviction is affirmed.

Richman, J.

We concur:

Haerle, Acting P.J.

Brick, J.*

* Judge of the Alameda County Superior Court, assigned by Chief Justice pursuant to article VI, section 6 of the California Constitution.