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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

NELSON ARANA,

Defendant and Appellant.

A139467

(Solano County
Super. Ct. No. FCR293650)

Defendant Nelson Arana was convicted of molesting three of his wife’s female relatives when they were minors. On appeal, his only claim is that the trial court erred by limiting his ability to impeach the testimony of one of the relatives with documents depicting posts to an Instagram account. In a separate matter, Arana filed a petition for writ of habeas corpus claiming that his trial counsel rendered ineffective assistance by failing to obtain once-deleted, but now recovered, digital evidence showing that the same relative gave false testimony.

In this appeal, we affirm the judgment. But by separate order in the habeas matter, No. A142845, we conclude the petition states a prima facie case for relief as to all three counts of which Arana was convicted and issue an order to show cause returnable before the superior court. (Pen. Code, § 1508, subd. (b).)¹

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

I.
FACTUAL AND PROCEDURAL
BACKGROUND

In 2012, three relatives of Arana's wife, P. Arana, accused Arana of committing sexual offenses against them several years earlier, when they were minors. E.C., who was born in October 1993, is P.'s adopted sister and was raised by P.'s mother. N.B., who was born in December 1990, is P.'s niece, and M.A., who was born in October 1995, is E.C.'s biological half sister. A detailed recitation of the facts is unnecessary to the resolution of this appeal, and we therefore recount only these relatives' descriptions of the alleged offenses and Arana's testimony without delving into other witnesses' testimony corroborating or contradicting aspects of both sides' cases.

E.C. testified that when she was in elementary school, she and her mother lived with N.B.'s family but often visited the Aranas' home in Vacaville so her mother could care for the Aranas' children.² Sometimes, E.C. would spend the night and sleep in the Aranas' older sons' room. She testified that beginning when she was eight or nine years old, Arana entered the room on many occasions while she was sleeping and touched her on various parts of her body, including her face, legs, buttocks, and vagina. Sometimes, he also touched her vagina with his penis. According to E.C., these kinds of incidents continued, although less frequently, after the Aranas moved to a different house in Vacaville some years later and E.C. and her mother moved in with them.

When E.C. was eight or nine years old, her mother left her in the Aranas' care while she traveled to Mexico. E.C. testified that on three occasions during this period, Arana took her into his room in the middle of the night when his wife was not there. Each time, he held her down, raped her, and covered her mouth as she screamed and resisted.

N.B. testified that Arana "touched [her] inappropriately" on several occasions from the time she was 10 or 11 years old until the time she was 14 years old. The first

² The Aranas have four children. At the time of trial in May 2013, their oldest son was 15 years old, their second-oldest son was 14 years old, their daughter was 10 years old, and their youngest son was 7 years old.

time occurred when the family had gathered at her house for Christmas, and she was lying on her bed with E.C. and another female cousin. Arana entered the room, licked N.B.'s ears and neck, rubbed her legs and buttocks, and tried to pull down her pants. N.B. began crying, and he left. Similar incidents occurred during at least two or three other Christmas celebrations at N.B.'s house as well as at another family event held at the Aranas' house. E.C. testified that Arana touched her inappropriately during at least one Christmas party as well.

N.B. also described other incidents that occurred when she was 12 or 13 years old. Once, around 6:00 a.m., after her parents had already left for work, N.B. heard a door downstairs open. Arana entered her room, where she was still in bed, and began rubbing her legs and buttocks. He also touched her breasts and vagina and licked her ears and neck. She testified there was at least one other occasion on which Arana entered her home after her parents had left for work and touched her.

The third relative, M.A., testified about two incidents in which Arana touched her inappropriately. First, in 2005, when she was nine or ten years old, she was sleeping in the Aranas' master bedroom with P.'s mother and E.C., who were on the bed, and her younger sister, who was with M.A. on the floor. P. had gone to the hospital because of medical complications with her and Arana's youngest son, who was then a newborn. In the middle of the night, M.A. woke up to find Arana kneeling next to her with his hand in her shorts, touching her thighs and buttocks. She immediately screamed and cried, and Arana told her to stop crying but then "ran" into his two older sons' room. She told P.'s mother what had happened, and when they entered his sons' room, they saw Arana lying on a bed, still wearing his shoes.

Second, on New Year's Eve in 2011, when M.A. was 16 years old, she was at a cousin's house where several relatives had gathered for a party. M.A. was initially sleeping in P.'s mother's room but moved to another room so that she could sleep in a bed. She woke up to find Arana sitting on the bed next to her and touching her on her face, chest, and arms. He told her she was "pretty," he was there for her if she needed

him, and he “wouldn’t want anything bad to happen to [her].” When he tried to remove the blanket covering her, she got up, told him to stop, and left.

Arana denied having any sexual contact with the three women when they were children. He testified that in November 2011, soon after E.C. turned 18 years old, she contacted him and told him that in exchange for financial help he “could go ahead and have sex with her whenever [he] wanted to.” They began having sex one to three times a week, and each time he would give her \$100. This persisted until the following April, when he went to see her and gave her a final payment of \$1,000. Recalled as a defense witness, E.C. repeatedly denied having a sexual relationship with Arana during this period.³ She agreed that Arana gave her \$1,000 in April 2012, but she implied that he did so out of a concern she would report that he molested her when she was a child.

The operative information charged Arana with felony counts of aggravated sexual assault of a child involving rape, or in the alternative continuous sexual abuse of a child, as to E.C.; continuous sexual abuse as to N.B.; and lewd conduct against a child as to M.A.⁴ The jury found him guilty of the rape count involving E.C. and the counts involving N.B. and M.A. and made no finding as to the sexual-abuse count involving E.C. The trial court sentenced him to a total term of 39 years to life, comprised of terms of 15 years to life for the count involving E.C., 16 years for the count involving N.B., and 8 years for the count involving M.A.

³ If the digital evidence submitted with the habeas petition depicts what Arana claims it does, it shows that the two *did* have a sexual relationship during this time and that E.C.’s testimony to the contrary was false.

⁴ The counts as to E.C. were brought under section 269, subdivision (a)(1) (rape) and 288.5, subdivision (a) (sexual abuse), the count as to N.B. was brought under section 288.5, subdivision (a), and the count as to M.A. was brought under section 288, subdivision (a).

II. DISCUSSION

A. *Additional Facts.*

During E.C.'s cross-examination, Arana's trial counsel had marked for identification two screenshots of photographs posted to what appeared to be E.C.'s Instagram account. The first showed E.C. wearing sunglasses and smiling and included the caption, "I cover my eyes so you can't see past my lies. ;)" The second showed E.C. smiling and included the caption, "this is what i do when my manager is not watching. Take pictures & go in instagram :D."

The prosecutor requested "an offer of proof as to the purpose for [the Instagram] exhibits," and the issue was discussed at sidebar. Arana's trial counsel stated, "They're being offered for the purpose of impeaching [E.C.'s] credibility. One, she specifically mentions being a liar, and the other indicates that while she's at work she's doing other things, cheating her employer." As to the first exhibit referring to E.C.'s "lies," the trial court told Arana's counsel, "You can ask her if she's acknowledged in the past that she's a liar. . . . Then if she says no, you can show her this." As to the second exhibit, the court stated, "This other one[,] I don't think that has anything to do with anything. This looks like what a kid would do. I don't see the relevance. [¶] . . . [¶] . . . I think this is very collateral to what we're doing here. This is simply, you know, using her Instagram." After the parties discussed the difference between "lie[s] regarding moral turpitude" and "[s]ocial lies," the court told Arana's counsel, "I'll allow you to ask her about [lying], not the pictures. [¶] . . . [¶] In fact, I don't want the jury seeing these pictures at all. [¶] . . . [¶] . . . But you can ask her about this. If she denies it, you can show her [the first exhibit]. Then ask her what she means."

Arana's trial counsel then questioned E.C. as follows:

Q. BY [DEFENSE COUNSEL]: . . . [A]t any time in the past, have you ever admitted or acknowledged being a liar?

A. Um, yes, I have lied. Everybody has. So I guess if you're talking about my Instagram picture—

- Q. And on these occasions when you have lied, is that a frequent occurrence?
- A. Um, I don't know. I mean, uh, I just lied to my boyfriend this morning about what I ate for breakfast because I didn't want to feel fat, so I don't know[,] a little maybe.
- Q. All right. I don't think anyone is concerned about you lying to your boyfriend about what you had for breakfast?
- A. Right. Exactly.
- Q. That's kind of what we might call a social lie?
- A. Okay.
- Q. Which is no big deal. . . . What I'm concerned about is if you have ever lied to people about things of significance or of importance?
- A. Um, I don't know. I mean, maybe. I don't know.
- Q. In particular, other than what you've already admitted here in court this morning, have you lied to anyone about any of these events related to Mr. Arana?
- A. No.

Neither Instagram exhibit was ever shown to E.C. or admitted into evidence.

B. The Trial Court Did Not Abuse Its Discretion by Limiting Arana's Ability to Impeach E.C.'s Testimony with the Instagram Exhibits.

To be relevant, evidence must have a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action," which includes "evidence relevant to the credibility of a witness." (Evid. Code, § 210.) Not all evidence "bear[ing] on the credibility of a witness" is relevant, however, and impeachment evidence is subject to exclusion if it is "collateral to the case" in that it "has no logical bearing on any material, disputed issue." (*People v. Contreras* (2013) 58 Cal.4th 123, 152.) A "trial court has wide latitude under state law to exclude [such collateral impeachment] evidence," and the court's "exercise of discretion necessarily encompasses a determination that the probative value of such evidence is 'substantially outweighed' by its prejudicial, 'confusing,' or time-consuming nature." (*Ibid.*, quoting Evid. Code,

§ 352.) We do not disturb a ruling excluding or otherwise limiting the use of evidence offered for impeachment “except on a showing the . . . court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Initially, the Attorney General implies the issue was forfeited, contending that Arana’s trial counsel “did not actually move to have the photos admitted in evidence . . . and . . . was allowed to do what he sought to do—i.e., to obtain an acknowledgment from E.C. that there were occasions on which she had lied.” We disagree. Arana’s counsel wished to question E.C. about the Instagram exhibits, and the trial court’s ruling prevented him from doing so unless she denied ever lying, which did not happen. Seeking to have them admitted without her testimony about them would have been futile, and counsel was not required to do so to preserve this issue.

Arana argues that E.C.’s credibility was a crucial issue and that the Instagram exhibits demonstrated her not just acknowledging being dishonest but “*boasting* about being dishonest - and getting away with it.” (Italics in original.) He claims the trial court was therefore wrong to suggest the exhibits depicted common behavior, and there was no other reason to exclude the evidence because it “was not time[-]consuming, confusing, prejudicial[,], or inflammatory.” He contends that because the evidence was relevant and was not subject to exclusion on any other ground, the court’s ruling violated the California Constitution’s right to truth-in-evidence provision. (Cal. Const. art. 1, § 28, subd. (f)(2).)

Although we agree with Arana about the importance of E.C.’s credibility, neither Instagram exhibit bore on that issue in any meaningful way. The first exhibit’s general reference to “my lies” gave no hint of what the lies might be about, and the rhyming and the winking emoticon that followed further undercut the possibility that a claim about serious dishonesty was being made. And the second exhibit showed, at best, that E.C. misled her employer on one occasion by using social media when she was supposed to be working. As the trial court

suggested, however, such behavior is extremely common and has no real bearing on whether a person will give truthful testimony. In any case, the court permitted Arana to question E.C. about whether she had ever lied before, and she acknowledged doing so. We conclude the court did not abuse its discretion by limiting Arana's ability to impeach E.C.'s testimony with the Instagram exhibits.

III.
DISPOSITION

The judgment is affirmed.

Humes, P.J.

We concur:

Margulies, J.

Banke, J.