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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO JAVIER SANCHEZ,

Defendant and Appellant.

B232846

(Los Angeles County
Super. Ct. No. KA091455)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Horan, Judge. Affirmed.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General for Plaintiff and Respondent.

Defendant and appellant Francisco Javier Sanchez appeals from his conviction of the rape, molestation, and continuous sexual abuse of his daughter “Jane Doe” (Doe). He asserts constitutional error in the exclusion of photographs of Doe taken at a family birthday party and the limitation of cross-examination of Doe’s sister regarding her possible molestation by persons other than defendant. Finding no merit in defendant’s contentions, we affirm the judgment.

1. Procedural Background

Defendant was charged by amended information with eight counts of sex crimes committed against Doe between 2005 and 2009: counts 1, 3, 5 and 6 alleged forcible lewd acts upon a child in violation of Penal Code section 288, subdivision (b)(1);¹ count 2 alleged continuous sexual abuse of a child under the age of 14 years in violation of section 288.5, subdivision (a); counts 4, 7, and 8 alleged forcible rape in violation of section 261, subdivision (a)(2). A jury found defendant guilty of all counts as charged. On May 6, 2011, the trial court sentenced defendant to a total of 72 years in prison, and defendant filed a timely notice of appeal.

2. Prosecution Evidence

Doe was 16 years old at the time of trial. She testified that defendant and Maggie S. (Maggie) were her parents and that they were separated at the time of trial. Doe had an older brother and four sisters. There were also half sisters and stepsisters, defendant’s other daughters, and stepdaughters. Doe testified that defendant touched her inappropriately for the first time when she was 10 years old and still living with her parents and siblings. Defendant entered her room at night four or five times per week and lay next to her. Over her clothing, he would rub her breasts and touch her vagina. When Doe resisted by pushing his hands away and crossing her legs, defendant would tickle her and pry her legs apart.

When Doe was 11 years old, defendant began placing his hands under her clothing to touch her breasts and vagina. By the time she was 12, defendant would place himself

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

on top of Doe and rub his penis against her “private area.” He also tried to kiss her breasts, but stopped when she told him to stop. This behavior continued multiple times per week, each episode lasting a minute or two.

When Doe’s parents separated, Doe remained with defendant because her relationship with her mother was “horrible,” and defendant promised to stop his sexual behavior. When Doe was 14, defendant penetrated her with his penis three times. She attempted to resist him, but he physically overcame her resistance. After the third such incident, Doe went to live with her mother, but did not tell Maggie about the abuse for approximately a year.

Once notified, Maggie called the police, who assisted Doe in recording a telephone conversation with defendant. The recording was played for the jury. Among other things, Doe asked defendant to apologize for having raped her. At first defendant apologized for hurting her and was evasive about rape, but after some prodding, he said, “I’m sorry for raping you. What can I do?”

On cross-examination Doe admitted she did not tell her mother that defendant had raped her and did not tell her best friend, sister, coach, or school counselor about the abuse. Doe told the police that she had moved in with her mother because she did not like the way defendant disciplined her, and that she feared him because he had beat her brother with his hands. Doe acknowledged that she hated her father.

Maggie testified that at the time Doe asked to come live with her Doe was upset, often crying and unable to eat. Doe told Maggie that she left because her father made her do chores. When Maggie picked her up from defendant’s home, defendant said to Doe, “Don’t be a rat,” or “Don’t be telling on me,” or something liked that. Maggie thought that defendant had been hitting Doe, and encouraged Doe to tell her about it. When Doe told her mother what defendant had done, Maggie telephoned defendant, spoke to him for an hour, and asked him how he could do such things. Defendant said nothing in response. Maggie testified that Doe’s grades had been bad while Doe lived with defendant but had since improved.

3. Defense evidence

Doe's brother Francisco testified that he lived with his father after his parents' separation. Francisco claimed that although his father disciplined him, he was never beaten. When he was younger, however, defendant had given him a "whooping" with a belt when Francisco was disrespectful. The authorities investigated their home for child abuse, but found no bruises on Francisco. Francisco denied that defendant had ever beaten his sisters, and that he had ever noticed defendant behaving inappropriately toward Doe.

Defendant's adult daughter Maribel S. (Maribel) testified that she had lived with defendant on and off until she was 19 or 20 years old. Maribel was rebellious and often ran away with her stepsister Susana M. (Susana). Susana complained that defendant tried to be her dad and was "mean," but never mentioned any inappropriate contact. Maribel denied that defendant had ever struck her, or that she had ever told her other sister Angelica S. (Angelica) that she had been fondled by defendant in her room at night. Maribel denied that she had ever refused to leave her children alone with defendant.

Another of defendant's daughters, Selene S. (Selene), testified that she lived with her mother but spent every other weekend with defendant. Doe was often there visiting on weekends, even after Doe had moved back to Maggie's home. Selene and Doe were on the same soccer team and defendant would take Doe to practice. Doe attended Selene's birthday party in 2010. Defendant was there as well.

Angelica testified that she had shared a room with Doe but never saw their father come into the room at night. Doe never complained to Angelica about defendant's behavior or indicated that she was frightened of defendant. Angelica described Doe as a "whiner" who would cry if she did not get what she wanted. Angelica denied that defendant had ever engaged in "inappropriate conduct" with her.

Angelica recalled an incident that occurred a few years before trial when she was intoxicated and had argued with defendant. The police were called and Angelica told them that defendant had hit her in the eye. Although she acknowledged that she developed a black eye in that incident she denied that defendant had "put hands on [her]."

Police Officer Christine Soderstrom interviewed Doe and Maggie in June 2010. Officer Soderstrom testified that among other things, Doe told her that defendant had kicked Doe out of his home, and that Doe had not communicated with defendant since then, despite his efforts to contact her.

Defendant testified that after the Department of Children and Family Services investigated Maribel's report of abuse the allegations were deemed unfounded. Defendant acknowledged he put his finger in Angelica's eye when she "charged" him and he put his hands up defensively. Defendant explained that Angelica was a "frisky" and "tough" girl. No charges were filed.

Defendant denied inappropriately touching or fondling Doe. He considered Doe a "brat" who had falsely accused him of raping her because she was jealous that he had given Francisco a car. Defendant claimed that Doe went to live with her mother because he had "kicked her out" for failing to do her chores and for "talk[ing] back" to him. After she moved out defendant continued to see Doe frequently until June 2010, when she failed to call him on Father's Day. In March of that year Doe and her boyfriend attended a family birthday party at defendant's house.

Defendant explained that when he told Doe not to be a "rat," he meant that he did not want her speaking about their family life to her mother's family. Defendant also explained that when Doe asked him to say he was sorry he thought he was apologizing for not "being a good dad" and not returning her telephone calls. Defendant claimed that he did not rape Doe, but apologized for raping her because he was busy and wanted to get back to work so he "just said it."

Defendant characterized Maggie as angry, and constantly talking about rape. Defendant claimed to have spent a good deal of money on counseling for Maggie because she was molested as a child.

Defendant's stepdaughter, Susana, once accused him of molesting her. However, after he and Maggie confronted her, Susana told them that she was really molested by a relative whom she named.

4. Rebuttal

Pomona Police Officer Carol Ward testified that she took the report from Angelica in 2003. Angelica told Officer Ward then that her father had punched her in the face during an argument. Officer Ward observed bruising under both of Angelica's eyes and saw that her nose was swollen. Defendant told Officer Ward that Angelica "came at him several times as though she were going to assault him," and he "may have poked her [in] her eye" when he "put his hands up to defend himself."

Susana testified that when she was 16 years old, she and defendant were wrestling in play and he got on top of her, caressed her breasts and made a "grinding" motion against her with his penis. Susana kicked and screamed, left the room, and told her mother what had happened. Maggie did not believe Susana's accusation after defendant assured her that they were "just playing." After Susana threatened to burn herself with a candle unless her mother believed her, Susana was placed in a mental facility. Susana and Maribel were about the same age and very close. Maribel confided in Susana that both she and Angelica had been molested by defendant when they were younger and now Maribel refused to leave her children alone with defendant.

Maggie added that she and defendant once went to counseling due to his drinking. Maggie confirmed that Susana had told her about the molestation by her father, and that she had done nothing.

DISCUSSION

I. Exclusion of photographs

Defendant contends that the trial court erred in excluding from evidence photographs taken at a family birthday party in March 2010. Citing *Holmes v. South Carolina* (2006) 547 U.S. 319, *Crane v. Kentucky* (1986) 476 U.S. 683, and *Chambers v. Mississippi* (1973) 410 U.S. 284, defendant argues that the trial court's ruling prevented him from presenting a complete defense in violation of his federal constitutional rights under the Sixth Amendment, and that the error should be reviewed for prejudice under the test of *Chapman v. California* (1967) 386 U.S. 18, 24.

Just before defendant's testimony, his attorney asked the court to admit the photographs to contradict Officer Soderstrom's testimony that Doe had not communicated with her father since she moved out. Counsel had obtained the photographs just that day and had not yet made copies of them or shown them to the prosecution. The trial court excluded the photographs because the prosecution did not have the opportunity to authenticate them.² The trial court did allow testimony on the issue. Indeed both Selene and defendant testified that Doe attended Selene's birthday party which was the purported subject of the photographs.

Following rebuttal, defense counsel asked the trial court to reopen and reconsider admitting the photographs to contradict Officer Soderstrom's testimony that Doe had no contact with defendant for a year. The trial court denied the request, ruling that the photographs would be cumulative of the testimony of witnesses that Doe had attended the birthday party. On appeal, defendant contends that the trial court should have allowed the photographs to corroborate defense witnesses who testified that Doe continued to socialize with the family after the alleged molestation.

The right to present a defense is a fundamental element of due process. (*Washington v. Texas* (1967) 388 U.S. 14, 19.) However, "[w]hile the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. [Citations.]" (*Holmes v. South Carolina, supra*, 547 U.S. at pp. 326-327.) Thus, "[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense." [Citation.]" (*People*

² Because the trial court commented, "We're not going to be doing the sandbagging nonsense," respondent has construed the court's ruling as a sanction for a discovery violation. We do not interpret the ruling as a sanction. Considering that defense counsel had not yet made copies of the photographs and the trial court's indication that the prosecutor would have no opportunity to authenticate the photographs, it is more likely that the court was concerned about an undue consumption of time.

v. Dement (2011) 53 Cal.4th 1, 52, quoting *People v. Hall* (1986) 41 Cal.3d 826, 834.) The trial court, exercising its discretion under Evidence Code section 352, may exclude cumulative impeachment evidence without violating the defendant's right to present a defense. (See *People v. Dement, supra*, at p. 51 [cross-examination].) To establish a constitutional violation, the defendant must show that the impeachment evidence "would have produced "a significantly different impression of [the witness's] credibility."" (*Id.* at p. 52.)

Defendant has not made the required showing. He contends that because the case turned on Doe's credibility, he was severely prejudiced by the inability to show the photographs. On the contrary, the photographs would not have impeached Doe's credibility or contradicted Officer Soderstrom. Officer Soderstrom wrote in her report that Doe had not *communicated* with her father; she did not say that Doe had no contact with him. The photographs were not marked or preserved in the record and there was no indication that they depict Doe communicating with her father. Moreover, Officer Soderstrom may have been mistaken, she may have misunderstood Doe, or she may not have asked Doe whether she had seen her father at family gatherings. Defendant questioned Officer Soderstrom on this point and did not ask Doe whether she had attended the party or had seen defendant there.

In short, defendant did not establish that the photographs had any significant probative value or would have produced a significantly different impression of either Doe's or the officer's testimony. The exclusion of the photographs thus did not interfere with defendant's Sixth Amendment right to present a defense. (See *People v. Dement, supra*, 53 Cal.4th at pp. 51-52.)

Moreover, the exclusion of the photographs was harmless beyond a reasonable doubt. Considering defendant's recorded admission to Doe that he had raped her, as well as evidence that he had also molested Susana and Maribel, there is no reasonable possibility that the exclusion of evidence of such minimal probative value might have contributed to defendant's conviction. (See *Chapman v. California, supra*, 386 U.S. at p. 24.)

II. Cross-examination

Defendant contends that his federal constitutional right of confrontation was violated when the trial court did not allow him to ask Susana on cross-examination about having been molested by someone other than defendant and whether she had accused others of molesting her. The trial court excluded the evidence as irrelevant. Defendant argues that evidence of Susana having been molested by someone else was relevant to her credibility.

“Trial judges retain ‘wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.’ [Citations.]” (*People v. Ledesma* (2006) 39 Cal.4th 641,705, quoting *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679-680.) “A trial court’s ruling to admit or exclude evidence offered for impeachment is reviewed for abuse of discretion and will be upheld unless the trial court ‘exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.’ [Citation.]” (*Ibid.*, quoting *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Defendant argues that evidence of molestation of Susana by other persons would hurt her credibility. Only evidence of a prior *false* report of molestation may be relevant to a victim’s credibility. (*People v. Miranda* (2011) 199 Cal.App.4th 1403, 1424.) The party offering such evidence must be prepared to prove the falsity of the report, and the trial court has wide discretion under Evidence Code section 352 to exclude evidence of prior reports of sexual assault if the proponent of the evidence cannot prove falsity or where the proof of the falsity of the prior report would involve an undue consumption of time. (*People v. Miranda, supra*, at pp. 1424-1426.) When the trial court has acted properly within its discretion to exclude such evidence, no constitutional violation is established. (*Id.* at p. 1426; see *People v. Jenkins* (2000) 22 Cal.4th 900, 1014-1015.)

Defendant did not offer to prove that Susana had made false accusations against others. As respondent observes, defendant does not contend that the evidence was

relevant to the issue of third party culpability. Like respondent, we are unaware of how a witness's credibility can be called into question simply because she may have been molested by more than one person. And we note that defendant has cited no examples of such impeachment. We conclude that the trial court did not abuse its discretion in curtailing defendant's inquiry; thus there was no confrontation violation. (See *People v. Jenkins, supra*, 22 Cal.4th at pp. 1014-1015; *People v. Miranda, supra*, 199 Cal.App.4th at p. 1426.) Moreover, because such evidence has no impeachment value, there is no reasonable possibility that its exclusion contributed to defendant's conviction. The trial court's ruling was thus harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24.)

DISPOSITION

The judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST