

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDY LAUDERDALE LUTTRELL,

Defendant and Appellant.

C067553

(Super. Ct.
No. 09F03428)

Defendant Andy Lauderdale Luttrell, Jr., sexually assaulted two of his stepchildren, K.H. and A.H., on multiple occasions. He was convicted by jury of three counts of committing a lewd or lascivious act upon a child under the age of 14 years (Pen. Code¹, § 288, subd. (a)) (Counts 3, 4, and 6), two counts of committing such an act by use of force, violence, duress, menace, or fear of immediate bodily injury (§ 288, subd. (b)(1)) (Counts 1 and 2), and one count of continuous sexual abuse of a child (§ 288.5, subd. (a)) (Count 5). The jury also found that

¹ Undesignated statutory references are to the Penal Code.

these crimes were committed against more than one victim within the meaning of the "One Strike Law." (Former § 667.61, subd. (e)(5).)² The trial court sentenced defendant to five consecutive terms of 15 years to life and imposed other orders.

² At the time defendant committed the crimes involved in this case, section 667.61 provided in pertinent part:

"(b) Except as provided in subdivision (a), a person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years except as provided in subdivision (j).

"(c) This section shall apply to any of the following offenses:
[¶] . . . [¶] (4) A violation of subdivision (b) of Section 288.
[¶] . . . [¶] (7) A violation of subdivision (a) of Section 288,
unless the defendant qualifies for probation under subdivision
(c) of Section 1203.066. [¶] . . . [¶]

"(e) The following circumstances shall apply to the offenses specified in subdivision (c): [¶] . . . [¶] (5) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim. [¶] . . . [¶]

"(f) If only the minimum number of circumstances specified in subdivision (d) or (e) which are required for the punishment provided in subdivision (a) or (b) to apply have been pled and proved, that circumstance or those circumstances shall be used as the basis for imposing the term provided in subdivision (a) or (b) rather than being used to impose the punishment authorized under any other law, unless another law provides for a greater penalty. However, if any additional circumstance or circumstances specified in subdivision (d) or (e) have been pled and proved, the minimum number of circumstances shall be used as the basis for imposing the term provided in subdivision (a), and any other additional circumstance or circumstances shall be used to impose any punishment or enhancement authorized under any other law. Notwithstanding any other law, the court shall not strike any of the circumstances specified in subdivision (d) or (e).

On appeal, defendant contends: (1) the trial court prejudicially erred by admitting into evidence an out-of-court statement from A.H. to his older sister disclosing inappropriate sexual conduct by defendant; (2) the trial court also prejudicially erred by instructing the jury, pursuant to CALCRIM No. 1190, that conviction of a sexual assault crime may be based on the testimony of a complaining witness alone; (3) the trial court further prejudicially erred by instructing the jury, pursuant to CALCRIM No. 1193, that expert testimony on child sexual abuse accommodation syndrome (CSAAS) could be considered in evaluating witness credibility; (4) the cumulative prejudice arising from the foregoing assertions of error requires reversal; (5) defendant's sentence of 15 years to life imposed on Count 5 must be vacated because the crime of continuous

"(g) The term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. If there are multiple victims during a single occasion, the term specified in subdivision (a) or (b) shall be imposed on the defendant once for each separate victim. Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable. [¶] . . . [¶]

"(i) For the penalties provided in this section to apply, the existence of any fact required under subdivision (d) or (e) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." (Stats. 1998, ch. 936, § 9, pp. 6874-6876, eff. Sept. 28, 1998.)

Further references to section 667.61 are to this version of the statute.

sexual abuse of a child was not listed in section 667.61, subdivision (c), at the time defendant committed this crime; and (6) the court facility fee imposed by the trial court must be stricken as an ex post facto application of the law.

The Attorney General concedes the sentence imposed on Count 5 must be vacated. We accept this concession. Defendant's remaining contentions are meritless. With regard to the first contention, the fresh complaint doctrine allows into evidence the out-of-court statement from A.H. to his older sister disclosing the sexual conduct by defendant. As to the challenges to the jury instructions, the California Supreme Court has upheld the instructions given in this case. As we have found no single instance of error, prejudicial or otherwise, there is no cumulative prejudicial error. And defendant's ex post facto challenge to the court facility fee must fail based on our rejection of this claim in several prior cases.

Accordingly, we affirm the judgment of conviction and remand the matter to the trial court with directions to impose sentence on Count 5 in accordance with section 288.5.

FACTS

Incidents on Treeleaf Way (Counts 1-4 & 6)

In March 1999, K.H. and A.H. moved into a house on Treeleaf Way in Citrus Heights with their mother, D.L., and their stepfather, defendant. At the time of the move, K.H. was almost three years old and A.H. was four years old.

K.H.'s first memory of being sexually assaulted by defendant was when she was three years old. K.H. and A.H. were playing in an inflatable swimming pool in the back yard when defendant called them into the house to take a nap. A.H. and K.H. went to their separate bedrooms to do so. Before K.H. fell asleep, defendant entered her room and told her to follow him to his bedroom. She obeyed. Once inside, defendant locked the door and told her to take off her swimsuit. She again obeyed. Defendant then took off his shorts, picked up K.H., placed her on top of him on the bed, and inserted his penis in her vagina. K.H. cried out in pain and yelled: "Stop. It hurts."

At this point, A.H. came to the door and knocked several times, saying: "Let me in, let me in." K.H. continued to cry. Defendant told A.H. that he could not come into the room, withdrew his penis from K.H.'s vagina, and sat her on the bed next to him. K.H. took this opportunity to retreat to the master bathroom. She urinated, "but it hurt." When she came out of the bathroom, defendant was lying on the floor between the bed and a dresser. He told her to come over to him, again placed her on top of him, and again inserted his penis in her vagina. K.H. cried while A.H. continued knocking on the door. At some point, defendant ended his assault on his three-year-old stepdaughter, allowed her to put her swimsuit back on, and threatened to "hurt" her if she told anyone about what happened. Defendant got dressed, opened the door, and allowed K.H. and A.H. to continue playing in the pool.

About a month later, K.H. and A.H. were playing in the pool when defendant called them both into his bedroom. In the room, defendant told A.H. to take off his swim shorts. A.H. obeyed. While defendant and A.H. were sitting on the bed, defendant started "pulling on" his stepson's penis with his hand. He then told K.H., who was also on the bed, to do the same. She also obeyed. After some time, A.H. put his shorts back on and defendant took them both to get ice cream.

Incidents on Winlock Avenue (Count 5)

In November 2001, the family moved in with defendant's parents on Winlock Avenue, also in Citrus Heights. By this time, D.L. had given birth to defendant's daughter, K.L. They then moved into another house on Treeleaf Way in March 2002. In November 2002, the family moved back in with defendant's parents.

When K.H. was "six or seven" years old, defendant came into her room on an "almost nightly" basis for about three months. During these visits, defendant pulled his penis out of his pajama shorts. K.H. "pulled on his penis because that's what [she saw] him do to [her] brother, so that's what [she] thought [he wanted]." While K.H. did not know how many times this happened, she testified that it was more than three times. On another occasion, while defendant and K.H. were alone in the garage, defendant "started rubbing [her] leg and [her] vagina area with [her] clothes on." His hand was beneath her shorts, but on top of her underwear. Defendant stopped when D.L. came home and told K.H.: "Don't tell your mom about this."

In November 2003, D.L.'s other children, Ka., Ki., and Ke. moved in with the family. When they arrived, defendant's sexual abuse of K.H. ended.

The Abuse Comes to Light

In April 2009, A.H., who was then 14 years old and staying with a friend of the family in Fremont, sent his older sister, Ka., a series of text messages reporting that defendant had done some "sexual stuff" to him and K.H. when they were younger. A.H. also sent his mother a series of text messages while she was at work stating that he wanted to talk to her about defendant. When D.L. got home from work, she called her son, but was not able to speak to him. Instead, she spoke to the family friend with whom he was staying. D.L. then confronted defendant about the abuse. Defendant responded: "I knew they would find a way to split us up."

Two days later, D.L. picked up K.H. from a friend's house and asked whether defendant had ever touched her inappropriately. K.H. began to cry and said that he had done so. D.L. told K.H. to pack a bag because she and her sisters would be staying at a friend's house while D.L. handled the situation. While the children packed their bags, defendant asked D.L. what was wrong and said: "Well, by the look on your face, it looks like you found out more information." D.L. answered that K.H. told her about the abuse, that she was taking the children out of the house, and that defendant "needed to call the cops or [she] was going to." By the time D.L. returned from dropping off the children, defendant had called the police.

Defendant's Statement to Police

Defendant was arrested and taken to the police station for questioning. Defendant began by stating that he did not "recall anything that would've taken place" and had "no memory" of sexually abusing his children. One of the detectives asked: "Is it that it, it didn't happen or is it that you just don't remember that it happened?" Defendant answered: "Well, I would like to hope it never did." Defendant also stated that he did not remember any of the alleged incidents "visually in [his] mind." When detectives confronted defendant with the specific incident in which he sexually assaulted K.H. in his bedroom while A.H. knocked on the door, defendant responded: "That just don't seem like me." Later in the interview, defendant admitted some of the abuse, but mitigated the severity of his crimes. For example, when defendant was asked whether he allowed K.H. to touch his penis while they lived at his parent's house, he responded: "I guess so. I mean if all these stories are coming out I guess I must have." One of the detectives then asked how many times this happened. Defendant responded: "A couple times, if that." He then estimated that it happened "[t]wo or three" times, and that it was a "freak thing" that "only happened every so-often." Defendant also admitted that there was an incident in which K.H. fondled A.H., but stated that this was just "them being young" and "touchy feely."

DISCUSSION

I

Admission of Out-of-court Statement

Defendant contends the trial court prejudicially erred by allowing Ka. to testify that A.H. sent her a series of text messages disclosing inappropriate sexual conduct by defendant. Specifically, he argues that these messages are inadmissible hearsay and that reference to them violated his constitutional rights. Defendant has forfeited this contention by failing to adequately brief the issue on appeal. The contention also fails on the merits.

“‘[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as [forfeited], and pass it without consideration. [Citations.]’ [Citation.]” (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *People v. Hovarter* (2008) 44 Cal.4th 983, 1029; Cal. Rules of Court, rule 8.204(a)(1)(B).) Defendant’s argument that the trial court erred in allowing Ka. to testify about these text messages spans four sentences. Aside from quoting the definition of hearsay found in Evidence Code section 1200, defendant cites no legal authority whatsoever. Defendant also fails to mention the very doctrine relied upon by the trial court in admitting this evidence, i.e., the fresh complaint doctrine. We presume the trial court correctly applied this doctrine; the burden is on defendant to demonstrate otherwise. He has failed to carry this burden. (See *Sharabianlou v. Karp*

(2010) 181 Cal.App.4th 1133, 1149-1150 [appellant did not mention the basis upon which the trial court reached its decision; absent some argument the trial court's decision was erroneous, reversal is not warranted].)

In any event, defendant's contention fails on the merits. Under the common law fresh complaint doctrine, evidence of complaints made by a victim of a sexual assault to third persons shortly after the crime occurred may be admissible for the nonhearsay purpose of establishing that such a report was made in order to prevent the trier of fact from inferring erroneously that no report was made, and from further concluding, as a result of that mistaken inference, that the victim in fact had not been sexually assaulted. (*People v. Brown* (1994) 8 Cal.4th 746, 748-749 (*Brown*)). In California, such a complaint need not be prompt in order for the doctrine to apply. As our Supreme Court explained: "[W]hen the victim of an alleged sexual offense did not make a prompt complaint but instead disclosed the alleged incident only some time later, evidence of the fact and circumstances surrounding the delayed complaint also may be relevant to the jury's evaluation of the likelihood that the offense did or did not occur. In the absence of evidence of the circumstances under which the victim ultimately reported the commission of an alleged offense, the jury in many instances may be left with an incomplete or inaccurate view of all the pertinent facts. Admission of evidence of the circumstances surrounding a delayed complaint, including those that might shed light upon the reason for the delay, will reduce the risk that

the jury, perhaps influenced by outmoded myths regarding the 'usual' or 'natural' response of victims of sexual offenses, will arrive at an erroneous conclusion with regard to whether the offense occurred." (*Id.* at pp. 761-762.) However, such evidence must be "carefully limited to the fact that a complaint was made, and to the circumstances surrounding the making of the complaint, thereby eliminating or at least minimizing the risk that the jury will rely upon the evidence for an impermissible hearsay purpose." (*Id.* at p. 762.)

In this case, as already mentioned, the trial court allowed Ka. to testify that A.H. sent her a series of text messages reporting that defendant made him do some "sexual stuff" with both K.H. and defendant when he was younger. While Ka. also testified that A.H. went into "some detail," she was not allowed to reveal the details of these text messages to the jury. This limitation on Ka.'s testimony was in line with our Supreme Court's cautionary advice in *Brown, supra*, 8 Cal.4th 746, that "if the details of the victim's extrajudicial complaint are admitted into evidence, even with a proper limiting instruction, a jury may well find it difficult not to view these details as tending to prove the truth of the underlying charge." (*Id.* at p. 763.) The trial court properly limited Ka.'s testimony to the fact that A.H. made a complaint of sexual abuse against defendant and the circumstances surrounding the making of the complaint. There was no error.

II

CALCRIM No. 1190

Defendant also claims the trial court prejudicially erred by instructing the jury that conviction of a sexual assault crime may be based on the testimony of a complaining witness alone. Defendant did not object to this instruction at trial. "Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights. [Citations.] The question is whether the error resulted in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818. [Citation.]" (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927.) We find no error, much less a miscarriage of justice.

The jury was instructed with CALCRIM No. 301, which informed the jury: "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." Then, in connection with the specific crimes charged in this case, the trial court instructed the jury with CALCRIM No. 1190: "Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone." According to defendant, "[b]y propping up the testimony of a complaining witness in a case involving sexual assault charges with extra support, then, CALCRIM No. 1190 improperly lightens the prosecution's burden of proof, when the proper principle has already been provided to the jury through CALCRIM No. 301, in

contravention of a defendant's Fourteenth Amendment right to due process of law." He is mistaken.

Indeed, our Supreme Court rejected this very argument in *People v. Gammage* (1992) 2 Cal.4th 693 (*Gammage*). There, the defendant in a sexual assault case asserted that the trial court should not have instructed the jury with CALJIC Nos. 2.27 and 10.60, which stated the same principles as CALCRIM Nos. 301 and 1190. The defendant argued, as here, that the combination of these instructions created a "preferential credibility standard for the complaining witness" and "suggest[ed] that that witness [was] entitled to special deference." (*Gammage, supra*, at p. 701.)

Beginning with the genesis of CALJIC No. 2.27, our Supreme Court explained that, prior to its decision in *People v. Rincon-Pineda* (1975) 14 Cal.3d 864 (*Rincon-Pineda*), juries in sexual assault cases were instructed that a sexual assault accusation is "'easily made and, once made, difficult to defend against,'" and, therefore, the jury must "'examine the testimony of the female person named in the information with caution.'" (*Gammage, supra*, 2 Cal.4th at p. 695.) This instruction was disapproved in *Rincon-Pineda*. In its place, the court "mandated that in every criminal case in which no corroborating evidence is required the jury be instructed as follows: "'Testimony which you believe given by one witness is sufficient for the proof of any fact. However, before finding any fact to be proved solely by the testimony of such a single witness, you should carefully review all of the testimony upon which proof of

such fact depends.” [Citation.]” (*Gammage, supra*, 2 Cal.4th at p. 695.) The court then explained that CALJIC No. 10.60, providing that “the testimony of the witness with whom sexual intercourse is alleged to have been committed [need not] be corroborated by other evidence,” correctly stated the law. (*Gammage, supra*, at pp. 696-697, 700.)

Rejecting the argument that it was error to provide these instructions together, our Supreme Court explained: “Although the two instructions overlap to some extent, each has a different focus. CALJIC No. 2.27 focuses on how the jury should evaluate a fact (or at least a fact required to be established by the prosecution) proved solely by the testimony of a single witness. It is given with other instructions advising the jury how to engage in the *fact-finding* process. CALJIC No. 10.60, on the other hand, declares a substantive rule of law, that the testimony of the complaining witness need not be corroborated. It is given with other instructions on the legal elements of the charged crimes.” (*Gammage, supra*, 2 Cal.4th at pp. 700-701.) Thus, “[t]he one instruction merely suggests careful review when a fact depends on the testimony of one witness. The other tells the jury there is no legal corroboration requirement. Neither eviscerates or modifies the other. As we observed early in this century, ‘There was no singling out of the testimony of the prosecuting witness with a view of giving it undue prominence before the jury.’ [Citation.] Nor do the instructions ‘dillute[] the “beyond a reasonable doubt” standard.’ [Citation.] The instructions in combination are no less

correct, and no less fair to both sides, than either is individually." (*Id.* at p. 701.)

Defendant reiterates the same arguments raised and rejected in *Gammage, supra*, 2 Cal.4th 693. We are bound by the decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Nor does it matter that the *Gammage* decision involved CALJIC instructions because the CALCRIM instructions challenged by defendant are not materially different. (*People v. Cromp* (2007) 153 Cal.App.4th 476, 480.) There was no instructional error.

III

CALCRIM No. 1193

Defendant further asserts the trial court prejudicially erred by instructing the jury, pursuant to CALCRIM No. 1193, that expert testimony on CSAAS could be considered in evaluating witness credibility. Because defendant did not object to this instruction at trial, he has forfeited the issue on appeal unless the error resulted in a miscarriage of justice. (*People v. Anderson, supra*, 152 Cal.App.4th at p. 927.) We find no error.

In *People v. Bledsoe* (1984) 36 Cal.3d 236, our Supreme Court held expert testimony concerning the behavior of rape victims to be admissible under Evidence Code section 801 "to rebut misconceptions about the presumed behavior of rape victims," but not "as a means of proving -- from the alleged victim's post-incident trauma -- that a rape in the legal sense had, in fact, occurred." (*Id.* at pp. 248, 251.) In *People v.*

McAlpin (1991) 53 Cal.3d 1289 (*McAlpin*), a case involving the sexual abuse of a child, our Supreme Court explained: "[E]xpert testimony on the common reactions of child molestation victims is not admissible to prove that the complaining witness has in fact been sexually abused; it is admissible to rehabilitate such witness's credibility when the defendant suggests that the child's conduct after the incident -- e.g., a delay in reporting -- is inconsistent with his or her testimony claiming molestation. 'Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior.'" (*Id.* at pp. 1300-1301; see also *People v. Bowker* (1988) 203 Cal.App.3d 385, 394 [expert testimony held to be admissible to explain a child's delay in reporting abuse is "not inconsistent with the secretive environment often created by an abuser who occupies a position of trust"]; *People v. Housley* (1992) 6 Cal.App.4th 947, 955-956 [expert testimony held to be admissible to explain a child's recantation of her molestation claim].)

In accordance with these principles, Dr. Anthony Urquiza testified regarding CSAAS, explaining that the syndrome has five stages: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed and unconvincing disclosure; and (5) retraction or recantation. After going into each of the stages in some detail, Dr. Urquiza testified that CSAAS is "not a diagnostic tool." Thus, it would be "inappropriate for prosecutors to say there are these five parts of [CSAAS] and so

if you fit them, you are abused," and it would be "similarly inappropriate for defense attorneys to say you don't fit all five of these things so you're not abused." Instead, CSAAS is used to educate therapists as to the dynamics of child sexual abuse "so that they can do a better job of treating," and to "take away any misperceptions or myths that people may have, therapists and certain members of a jury, about child sexual abuse." Dr. Urquiza also testified that he did not know about the facts of this case and had no opinion as to whether sexual abuse occurred, stating: "That's the responsibility of the jury."

Defendant does not take issue with Dr. Urquiza's testimony. Instead, he challenges the propriety of CALCRIM No. 1193, which instructed the jury: "You have heard testimony from Dr. Anthony Urquiza regarding [CSAAS]. [¶] Dr. Anthony Urquiza's testimony about [CSAAS] is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not [K.H./A.H.'s] conduct was not inconsistent with the conduct of someone who has been molested and in evaluating the believability of [her or his] testimony."

According to defendant, "in evaluating the believability of testimony" is the portion of the instruction that violates the principles enunciated in *People v. Bledsoe*, *supra*, 36 Cal.3d 236, *People v. Bowker*, *supra*, 203 Cal.App.3d 385, and *People v. Housley*, *supra*, 6 Cal.App.4th 947, because it "affirmatively invites the jury to apply the expert's testimony case-

specifically to evaluate the believability of certain named witnesses who testify at trial.” But this is precisely what our Supreme Court allowed in *McAlpin*, *supra*, 53 Cal.3d 1289. There, expert testimony concerning the general behavior of parents of sexual abuse victims was properly admitted to assist the jury in evaluating the credibility of the specific victim’s mother. (*Id.* at p. 1302.) While *McAlpin* involved the admissibility of the expert testimony, and not the propriety of the limiting instruction, we conclude the instruction properly informs the jurors that they may use such testimony in evaluating the believability of testimony. There was no error.

IV

Cumulative Prejudice

We have found no single instance of error, prejudicial or otherwise. Thus, defendant’s assertion of cumulative prejudice must fail.

V

Sentence on Count 5

We do agree that defendant’s sentence of 15 years to life imposed on his conviction for continuous sexual abuse of a child must be vacated because the crime of continuous sexual abuse of a child was not listed in section 667.61, subdivision (c), at the time defendant committed this crime. The Attorney General properly concedes the point. We hereby remand the matter to the trial court with directions to impose sentence on Count 5 in accordance with section 288.5. (See *People v. Palmer* (2001) 86 Cal.App.4th 440, 443-446.)

VI

Court Facility Fee

Finally, defendant contends the \$180 court facility fee imposed by the trial court must be stricken as an ex post facto application of the law. We have repeatedly rejected this claim and decline to belabor the point here. (See, e.g., *People v. Knightbent* (2010) 186 Cal.App.4th 1105, 1111-1112; *People v. Fleury* (2010) 182 Cal.App.4th 1486, 1489-1494; *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1412-1415.)

DISPOSITION

The judgment of conviction is affirmed. The sentence imposed on Count 5 is vacated and the matter is remanded to the trial court with directions to impose sentence on this count in accordance with Penal Code section 288.5.

HOCH, J.

We concur:

RAYE, P. J.

ROBIE, J.