

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re T.S., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

T.S., a Minor,

Defendant and Appellant.

D060545

(Super. Ct. No. J223916)

APPEAL from a judgment of the Superior Court of San Diego County, Desiree A. Bruce-Lyle, Judge. Affirmed.

T.S. was declared a ward of the court under Welfare and Institutions Code section 602 after the juvenile court found true an allegation that he committed a lewd and lascivious act upon a child in violation of Penal Code section 288, subdivision (a). The court ordered T.S. to serve 30 days of home supervision and placed him on probation. T.S. contends the trial court abused its discretion when it admitted hearsay statements of

the victim, A.C., under Evidence Code section 1360 because the People presented no facts to support the reliability of the statements and the trial court never conducted the requisite analysis regarding the hearsay statements. (Undesignated statutory references are to the Evidence Code.) We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the facts in the light most favorable to the juvenile court's ruling. (*In re Michael M.* (2001) 86 Cal.App.4th 718, 726.)

T.S. lived with his mother and his mother's husband, Paul. Paul's daughter and grandson, Alicia and A.C., moved into the home sometime in the summer of 2009. They lived there until around January 2010. After they moved out, Alicia would frequently bring A.C. to the house.

In November of 2010, T.S.'s mother and Paul told Alicia that "something" had occurred between T.S. and A.C. When Alicia asked A.C. what "bad" had happened with T.S., A.C. first stated that he did not want to get anybody in trouble, but then demonstrated by taking Alicia's fingers and putting them in her mouth. After Alicia asked A.C. to explain in words, he stated that T.S. had put A.C.'s "pee pee" in T.S.'s mouth. The incident occurred sometime between February 2010 and August 2010, when A.C. turned six.

Two days later, Alicia reported the incident to the police. Officer Victor Rodriguez took a statement from A.C. that day. Although A.C. was rambunctious when Officer Rodriguez arrived, he sat down next to Alicia to describe the incident and "struggled to get the words across." A.C. told Officer Rodriguez that he was standing in

T.S.'s room playing on the Nintendo Wii when T.S. said, "Don't tell this to anybody," pulled A.C.'s pants down to his ankles and his underpants far enough to reveal his penis and then began to suck on it.

Later that month, Laurie Fortin conducted a videotaped forensic interview with A.C. that the juvenile court viewed during trial. When asked why he had come to talk to her that day, A.C. responded that T.S. had pulled down A.C.'s pants and "sucked [A.C.'s] pippie." A.C. stated the incident occurred when he was five years old while playing the Wii in T.S.'s room. When Fortin asked, "Did [T.S.] say something to you about telling or not telling?" A.C. answered, "Not telling."

Detective Cassie Kramer interviewed T.S. T.S. admitted that he played Wii with A.C., but repeatedly denied that the incident ever occurred. Before trial, the People moved to admit A.C.'s hearsay statements made to Alicia, Officer Rodriguez and Fortin under section 1360 and as a prior consistent statement. T.S. sought to exclude these statements, arguing that section 1360 did not apply to a charge under Penal Code section 288, subdivision (a). At the hearing on the in limine motions, the juvenile court concluded that section 1360 applied to the Penal Code section at issue and ruled that the hearsay statements were admissible under section 1360 and as prior consistent statements if "inconsistency bec[ame] an issue."

T.S. did not testify at trial. A.C. testified that he had been playing a video game with T.S. when T.S. touched A.C.'s lower body over A.C.'s clothes. After confirming A.C. understood that he was supposed to tell the truth even if it was difficult, the prosecutor again asked how T.S. had touched him, with A.C. responding that T.S. used

his hand to touch A.C.'s "wee-wee" over A.C.'s clothes. The prosecutor confirmed that A.C. remembered talking to a lady about what happened with T.S. and that A.C. had told the truth, but asked no follow-up questions.

During cross-examination, A.C. stated that T.S. had touched him while A.C. had his pants on. A.C. remembered talking to a lady about T.S., but claimed that he "forgot" most of what he told her. When asked whether he told that lady that his pants were off, A.C. stated that his pants were on. Without objection, the People subsequently admitted A.C.'s statements to Alicia, Officer Rodriguez and the videotaped interview.

Counsel argued the matter to the court, focusing on A.C.'s credibility. The juvenile court recognized the inconsistencies in A.C.'s renditions of what happened; nonetheless, it found the allegation true after considering A.C.'s testimony, viewing the videotape and watching A.C.'s "demeanor and how he answered the questions."

DISCUSSION

T.S. contends the trial court abused its discretion when it admitted the hearsay statements because the People presented no facts to support the reliability of the statements and the trial court never conducted the requisite analysis regarding the hearsay statements. As we shall explain, even if the hearsay statements were inadmissible under section 1360 (which we do not decide), the hearsay statements were properly admitted under the hearsay exception for prior inconsistent statements. (§ 1235.)

As a threshold matter, we note that T.S. objected to admission of the hearsay statements under section 1360 on the ground this statute did not apply to the charge against him. T.S. never objected to the hearsay statements as unreliable. Accordingly,

T.S. forfeited his contentions. (*People v. Partida* (2005) 37 Cal.4th 428, 438 ["to the extent defendant asserts a different theory for exclusion than he asserted at trial, that assertion is not cognizable" on appeal].) Nonetheless, in the interests of judicial economy and to prevent an ineffective assistance of counsel claim, we review the contention on its merits.

Section 1360 creates an exception to the hearsay rule for statements by a person under 12 years of age describing an act of child abuse or neglect in a criminal prosecution. Section 1360 provides in relevant part as follows: "(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse . . . performed with or on the child by another . . . is not made inadmissible by the hearsay rule if [¶] (1) *The statement is not otherwise admissible by statute or court rule.* [¶] (2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability." (§ 1360, subd. (a), italics added.) In evaluating the reliability of a victim's extra-judicial statements, we consider factors such as "(1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) use of terminology unexpected from a child of that age; and (4) lack of a motive to fabricate." (*People v. Eccleston* (2001) 89 Cal.App.4th 436, 445.) We review the court's admission of the victim's statement for abuse of discretion. (*People v. Brodit* (1998) 61 Cal.App.4th 1312, 1330.)

T.S. focuses on the requirement that the trial court hold a hearing to evaluate the reliability of any hearsay statement. However, we need not concern ourselves with the

admissibility of the hearsay statements under section 1360 as the statements were "otherwise admissible" as prior inconsistent statements. (§ 1360, subd. (a)(1).)

Section 1235 states, in part, "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his [or her] testimony at the hearing" This hearsay exception is premised on the fact the witness who made the prior out-of-court statement is present in court and subject to cross-examination, thus overcoming the unreliability problem with hearsay evidence. (*People v. Zapien* (1993) 4 Cal.4th 929, 953.) Prior inconsistent statements are admissible under section 1235 to prove their substance as well as to impeach the declarant. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 55, fn. 4.)

In this case, A.C.'s trial testimony that T.S. touched A.C.'s penis with his hand over A.C.'s clothes was inconsistent with the proffered hearsay statements to Alicia, Officer Rodriguez and Fortin that T.S. sucked A.C.'s penis. In his reply brief, T.S. admits that the hearsay statements could have been admitted as prior inconsistent statements, but argues that not all of A.C.'s hearsay statements were inconsistent with A.C.'s trial testimony. To the extent A.C.'s hearsay statements were *consistent* with his trial testimony, there was no prejudice as the consistent hearsay statements were merely cumulative of A.C.'s trial testimony. T.S. also claims that the admission of the hearsay statements prejudiced him because the case turned entirely on A.C.'s credibility and the hearsay statements were not subject to cross-examination. This argument, however, overlooks that A.C. was subject to cross-examination at trial about all of the hearsay statements.

Accordingly, even if a section 1360 objection had been successfully made, T.S. was not prejudiced by the hearsay statements that were admitted into evidence.

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.