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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SCOTT C. HARRINGTON,

Defendant and Appellant.

D060878

(Super. Ct. No. SCD231707)

APPEAL from a judgment of the Superior Court of San Diego County, Esteban Hernandez, Judge. Affirmed as modified.

INTRODUCTION

A jury convicted Scott C. Harrington of two counts of lewd and lascivious conduct with a child under 14 years old (Pen. Code,<sup>1</sup> § 288, subd. (a), counts 1 & 2). As to count 2, the jury also found true an allegation Harrington engaged in substantial sexual conduct with the victim (§ 1203.066, subd. (a)(8)). The trial court sentenced him to a term of six

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<sup>1</sup> Further statutory references are also to the Penal Code unless otherwise stated.

years in prison for count 1. The trial court sentenced him to a concurrent term of six years in prison for count 2, and then stayed execution of the sentence under section 654.

Harrington appeals, contending we must reverse his convictions because the trial court improperly admitted hearsay evidence of the victim's complaints to others ("fresh complaint" testimony) for its truth. In a footnote in his opening brief, he further contends his sentence for count 2 cannot be both concurrent and stayed, and he requests we order the abstract of judgment modified to simply show his sentence for count 2 is concurrent.

As to the first contention, we conclude any error was harmless. As to the second contention, we agree the sentence for count 2 cannot be both concurrent and stayed. However, we conclude the appropriate remedy is to order the abstract of judgment modified to simply show the sentence for count 2 is stayed. In all other respects, we affirm the judgment.

## BACKGROUND

### *Prosecution Evidence*

In April 2008, then 13-year old K. spent the night at Harrington's apartment with her younger maternal half sister, G. Harrington is G.'s father. The girls fell asleep on Harrington's bed while watching a movie. G. was in the middle of the bed and K. was on the left side.

K. awoke around 3:00 a.m. She was lying on her back and G. was no longer in Harrington's bed. Harrington had his hand under K.'s T-shirt and was rubbing her stomach. He moved his hand higher and then lower. She tried to scoot away from him, but he grabbed her and placed her on her side facing him.

He put his knee between her legs and moved it around. He then put his hand in her shorts and started rubbing her vagina. After that, he put his fingers in her vagina and moved them in and out about 20 times. K. was shocked and could not comprehend what was going on. She kept her eyes closed and did not say anything to him. She tried to get to the other end of the bed to get away, but he just kept getting closer to her. He stopped after about five minutes and repeatedly apologized to her.

K. moved away from Harrington and looked at the blinds and clock. He started rubbing her stomach again and she ran to the bathroom. She closed the door, sat against it, and cried. She then went to G.'s room and woke her up because she did not want to be alone with him. She did not tell G. what happened because Harrington's is G.'s father and K. thought G. would hate her. Later the next day, when their mother picked them up, K. did not tell her mother what happened because she did not want G. to never see her father again and also because she felt the incident was her fault.

After the incident, K. avoided Harrington whenever possible and never spent a night at his house again. She became moody and depressed. She also started having nausea and severe abdominal pain. Although she had previously been treated for constipation-related abdominal pain and dyspepsia, she stated the abdominal pain she experienced after the incident was different. It felt like someone was stabbing her with a knife and taking medicine did not help. Doctors conducted tests and determined her symptoms were stress related. She did not tell the doctors about the incident because she did not think they would believe her and also because she felt it was her fault.

About a year and a half after the incident, she told her brother C. about it. She was scared, crying and stuttering. She said Harrington came up to her when they were lying down and "fingered" her. C. tried to comfort her and suggested K. might have dreamed the incident. After that, C. noticed that K. tried to avoid Harrington.

A couple of months after telling C., K. told her friend D. about the incident. She said she and G. fell asleep on the bed at Harrington's house. When she woke, G. was gone and Harrington was in bed with her. He rubbed her back, scooted closer and closer to her, and then "fingered" her.

About two and a half years after the incident, K. finally told her mother about it because she could not handle the stress anymore and was having suicidal thoughts.<sup>2</sup> Once she told her mother what happened, her stomach condition improved.

After learning about the incident, K.'s mother contacted K.'s pediatrician and the police. She told K.'s pediatrician K. said Harrington came to K. when she was asleep, lay in her bed, rubbed her stomach, and put his fingers in her vagina.<sup>3</sup> K. further admitted this was why she had been so stressed and was experiencing abdominal pain. After K.'s

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<sup>2</sup> Unlike C. and D., K.'s mother did not testify about the content of her conversation with K. about the incident.

<sup>3</sup> Defense counsel objected to the pediatrician's recounting of K.'s mother's remarks. The trial court asked the prosecutor if she was offering the testimony for its truth or to explain the pediatrician's subsequent conduct. After the prosecutor said she was offering it for the latter purpose, the trial court stated, "It will be admitted for that limited purpose."

disclosure to her mother, she never again complained to her pediatrician of abdominal pain.

A few days after K.'s mother contacted the police, K. told a police officer about the incident. At the officer's request, K. made a pretext phone call to Harrington. During the call, Harrington asked whether K. was using a speakerphone or recording the call. He said he did not recognize her phone number and was concerned about entrapment. Although he adamantly denied ever putting his finger in K.'s vagina, he said he remembered that particular night. He said they slept in the same bed and were snuggled up against each other. He admitted they were "a little close" and it was not appropriate for them to have lain next to each other. He explained that while they were snuggling, he pulled her closer because he thought she wanted him to and it was comfortable to hold her. He admitted his knee was in an inappropriate place and that he told her he was sorry afterwards.

#### *Defense Evidence*

Harrington testified G. and K. had asked to sleep in his bed and he agreed. He woke up in the middle of the night and used the bathroom. When he returned to the bed, he noticed G. was not there. He searched for her and found her in her room in her own bed.

He then got back into his bed. K. awoke and asked where G. was. He told her G. was in her own room. K. then rolled over and snuggled up against him. His leg was between her legs and her head was on his shoulder. After about three minutes, he realized the situation was "not kosher" or "not cool." So, he kissed K. on the forehead,

rolled over on his back, and went to sleep. He unequivocally denied committing the charged crimes.

During the pretext call, he asked whether K. was using a speakerphone because she did not sound like she was on a cell phone. He asked if he was being recorded because he had seen similar things on television and it occurred to him K. might be setting him up.

The preschool teacher of one of Harrington's children testified Harrington was an honest person and not manipulative. Three former coworkers, one of whom was a former girlfriend, also testified he is an honest person and not manipulative.

#### *Rebuttal Evidence*

In a tape recorded conversation, Harrington told K.'s mom G. was in his bed when the snuggling with K. occurred and he moved G. to her bed sometime afterwards. Harrington later testified he was flustered during the conversation and this statement was incorrect.

## DISCUSSION

### I

#### *Admission of Fresh Complaint Evidence and Failure to Give Limiting Instruction*

### A

Before trial, the prosecutor sought the trial court's authorization to admit K.'s statements to C. and D. about the incident to show K. did not remain silent after it. In conjunction with the request, the prosecutor acknowledged the trial court should give the jury a limiting instruction if the trial court admitted the statements. Defense counsel

objected to the statements on the grounds they were hearsay and more prejudicial than probative. Relying on *People v. Brown* (1994) 8 Cal.4th 746 (*Brown*) and, after determining the statements were not more prejudicial than probative, the trial court ruled the People could admit the statements. The trial court further indicated it would instruct the jury not to consider the statements for their truth, but solely to show the victim did not remain silent after the incident.

For reasons not shown in the record, the trial court never gave the jury such a limiting instruction.<sup>4</sup> Conversely, the trial court instructed the jury with CALCRIM No. 318. This instruction informed the jury it could use evidence of a witness's pretrial statements, which Harrington contends implicitly included K.'s statements to C., D., and to her mother (as related by her pediatrician),<sup>5</sup> both to evaluate whether the witness's trial testimony was believable and as evidence the information in the statements was true.

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<sup>4</sup> The trial court held the jury instruction conference off the record. At the conclusion of the conference, both parties stated on the record they had no objections to the final version of the instructions and they were not requesting any additional instructions. As one possible explanation for the omission of a limiting instruction, we note defense counsel's theory of the case was that K. was lying. Defense counsel pursued this theory primarily by pointing out inconsistencies in K's accounts to police and at the preliminary hearing. Given this tactic, the prosecutor may have argued and the trial court may have determined K.'s statements to her friend, brother, and mother were admissible for their truth as prior consistent statements. (Evid. Code, §§ 791, subd. (a), 1236; *People v. Fair* (1988) 203 Cal.App.3d 1303, 1309, abrogated on another ground by *Brown, supra*, 8 Cal.4th at pp. 749-750, 756.)

<sup>5</sup> Harrington contends the evidence implicitly includes the latter statements despite their admission for a limited purpose (see fn. 3, *ante*) because the trial court did not instruct the jury with CALCRIM No. 303, explaining evidence admitted for a limited purpose may only be used for the limited purpose and for no other purpose. We do not decide this contention, but accept it solely for discussion purposes.

In addition, both counsel briefly referenced K.'s pretrial statements in their closing arguments. Specifically, the prosecutor argued that, in addition to considering K.'s trial testimony, the jury could "consider what she told her friend [D.], what she told her brother [C.], and the way that that came out, and what she told her mother." Defense counsel argued, "[T]his truly is a one-witness case. You've heard from a number of different witnesses, and you've heard from witnesses talking about what [K.] said to them, but it all comes down to this one witness. And you've heard from this witness from multiple sources, but it all comes down to one witness."

## B

Harrington contends we must reverse his convictions because K.'s statements to her brother, her friend, and her mother about the incident were not admissible for their truth and the jury did not know this because the trial court failed to give an appropriate limiting instruction. He further contends the error was not harmless because the evidence against him was not overwhelming and he offered a reasonable defense to the charges. We disagree.

## 1

"[P]roof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose—namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others—whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred." (*Brown, supra*, 8 Cal.4th at pp. 749-750.) However,

"only the fact that a complaint was made, and the circumstances surrounding its making, ordinarily are admissible; admission of evidence concerning details of the statements themselves, to prove the truth of the matter asserted, would violate the hearsay rule." (*Id.* at p. 760.) Furthermore, "the trial court upon request must instruct the jury to consider such evidence only for the purpose of establishing that a complaint was made, so as to dispel any erroneous inference that the victim was silent, but not as proof of the truth of the content of the victim's statement." (*Id.* at p. 757.)

2

The People argue the trial court did not err by failing to give a limiting instruction because defense counsel never requested one. (*People v. Manning* (2008) 165 Cal.App.4th 870, 880 [absent a request, the trial court has no duty to give a limiting instruction for fresh complaint evidence].) However, this argument ignores the fact the prosecutor acknowledged at the time she moved to admit the statements that the trial court should give a limiting instruction. It also ignores the fact the trial court stated at the time it granted the prosecutor's motion that it would give a limiting instruction. Under such circumstances, we cannot fault defense counsel for failing to make a further, essentially perfunctory, request for such an instruction.

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The People argue any error in failing to give the instruction was harmless. We agree. Because K. testified at trial, the jury was able to hear her version of events and assess her credibility directly. Her fresh complaint statements were consistent with and cumulative to her trial testimony. Both the prosecutor and defense counsel focused on

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K.'s testimony, not her fresh complaint statements, in their closing arguments to the jury. Before the jury reached its verdicts, it requested transcripts of K.'s pretext call to Harrington and a reading of K.'s and Harrington's entire trial testimony, demonstrating the fresh complaint statements were not the basis of its decision making. We, therefore, conclude it is not reasonably probable a different outcome would have occurred had the trial court given the jury a limiting instruction for the fresh complaint evidence. (*People v. Manning, supra*, 165 Cal.App.4th at pp. 880-881 [harmless error to admit fresh complaint evidence for all purposes where victim testifies and fresh complaint evidence consistent with and cumulative to testimony]; *People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1526 [same].)

## II

### *Modification of Abstract of Judgment*

For count 2, the trial court imposed a concurrent sentence of six years in prison, which it then stayed under section 654. Harrington contends a sentence cannot be both concurrent and stayed under section 654. He consequently requests we order the abstract of judgment modified to simply show the sentence for count 2 is concurrent to count 1.

We agree the trial court could not permissibly impose both a concurrent and a stayed sentence for count 2. (*People v. Duff* (2010) 50 Cal.4th 787, 796.) However, we disagree with Harrington's proposed remedy. To avoid the addition of incremental punishment, when a court determines section 654 applies to a conviction, the court must impose a sentence for the conviction and stay execution of the sentence, rather than dismissing the charge or imposing a concurrent sentence. (*Ibid.*) Accordingly, we shall

order the abstract of judgment modified to simply show the sentence for count 2 is stayed, not concurrent to count 1.

#### DISPOSITION

The trial court is directed to modify the abstract of judgment to show the sentence for count 2 is stayed under section 654 and not concurrent to count 1. In all other respects, the judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

IRION, J.