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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES ALLEN McDOWELL,

Defendant and Appellant.

E051260

(Super.Ct.No. FSB901727)

OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster, Judge. Affirmed.

Steven A. Torres, under appointment by the Court of Appeal; Donald R. Wager; and Paula Elden for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lise S. Jacobson, and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION¹

Defendant James Allen McDowell repeatedly molested his stepdaughter when she was between the ages of six and nine. A jury convicted defendant of 53 counts of lewd acts upon a child (§ 288, subd. (a)) and one count of sodomy upon a child 10 years of age or younger. (§ 288.7, subd. (a).)

The court sentenced defendant to the upper term of eight years on count 1, two consecutive years each for counts 2 through 53 (104 years), and a consecutive term of 25 years to life on count 54. Defendant's total sentence is 137 years to life.

On appeal, defendant argues there is insufficient evidence to support his convictions on 54 counts of sexual abuse. He further charges the court committed *Griffin*² error. In supplemental briefing, he asserts it was also error to admit the victim's unredacted recorded statement and the court should not have imposed the aggravated term on count 1. We have reviewed the record and determined the evidence is sufficient and no prejudicial error occurred. We affirm the judgment and the sentence in full.

II

FACTUAL BACKGROUND

A. K.M.'s Testimony

At trial in May 2010, K.M. testified she married defendant in January 2004 when

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

² *Griffin v. California* (1965) 380 U.S. 609.

her daughter Jane Doe was four years old. K.M. had two other children, an older son and a younger daughter, living with her. During their marriage, defendant picked up the children after school and watched them while K.M. worked as a dental assistant three or four days a week.

In 2007, Jane Doe fabricated a story at school about defendant shooting her mother and about her older brother sleeping with an 18-year-old woman.

Defendant and K.M. separated in August 2008 but they agreed defendant could have visitation with the three children every other weekend.

On April 22, 2009, K.M. learned from her former babysitter, Marty, about a conversation overheard between Jane Doe and her brother concerning defendant doing “inappropriate things” to Jane Doe. K.M. “freaked out” and immediately talked to Jane Doe who confirmed defendant had hurt her. After K.M. was referred to the Children’s Fund Assessment Center, she arranged for defendant to collect the children for visitation so the deputy sheriffs could arrest him.

B. Jane Doe’s Testimony

Jane Doe was 10 years old when she testified. She considered defendant to be like a father. The parties stipulated the first incident occurred in January 2007 when Jane Doe was six years old. Jane Doe was watching television and defendant directed her to go in a room and undress. After he undressed himself and told her to bend over, he began touching her on the buttocks with his penis which felt wet. Defendant spread her buttocks and touched her genitalia with his penis. Defendant pushed and penetrated her

with his penis. He also licked her genitalia with his tongue and asked her if it felt good. He put his penis in her mouth. Jane Doe felt and tasted a liquid like urine.

Thereafter, defendant molested Jane Doe twice a day. Defendant had little red protuberances like beads on his genitalia. Defendant also showed Jane Doe pornographic videos featuring anal sodomy and oral copulation. Defendant told her not to tell anyone. Although Jane Doe remembered having told the story about defendant shooting her mother, she did not remember the story about her brother sleeping with a young woman

C. Jane Doe's Brother's Testimony

Jane Doe's brother testified that, on some occasion before defendant and K.M. separated, Jane Doe was watching a movie with her siblings and defendant told them to turn up the sound and called Jane Doe into the mother's bedroom. After a few minutes, Jane Doe's brother heard her crying. At some point after defendant and K.M. had separated, Jane Doe confided to her brother about what defendant was doing to her. Jane Doe told her brother that defendant engaged in anal sodomy, oral copulation, and vaginal copulation. He ejaculated in her mouth. When Jane Doe argued with her brother on April 22, 2009, he threatened to disclose what he knew.

When the police initially interviewed Jane Doe's brother, he was not forthcoming because he was scared. In November 2009, he finally told the police what Jane Doe had told him.

D. Additional Evidence

Roxanne Bessinger, a sheriff's detective testified that she was assigned in April 2009 to investigate defendant's conduct. Bessinger interviewed Jane Doe at the

Assessment Center. Jane Doe told Bessinger defendant had touched her, beginning when she was in the first grade. The touching occurred when her mother was at work. When defendant licked Jane Doe's genitalia, he said to her, "I don't know what I'm doing right now. I'm sick." Jane Doe described defendant masturbating his penis against her buttocks without penetration. Defendant apologized when he "peed" in her mouth. Jane Doe described "red beads" or growths on defendant's genitals that he would ask her to tweeze off. The only significant difference between Jane Doe's statement in the forensic interview and her trial testimony was whether defendant engaged in vaginal contact.³

Bessinger interviewed defendant who speculated he was facing a child abuse charge. Defendant claimed Jane Doe would embellish and tell fairy tales. Defendant admitted he had skin tags on parts of his body, groin, and testicles. Defendant thought K.M. might falsely accuse him because they were divorcing.

A deputy photographed the skin tags on defendant's groin and a distinctive circular mark on his penis.

A forensic pediatric nurse examined Jane Doe and determined her hymen was normal but there was a fissure and abrasion of the natal cleft, the space between the buttocks, and the skin was friable and bleeding abnormally, causing discomfort. The nurse's opinion was the exam was abnormal. Two weeks later, the area had healed. Anal laxity may be caused by sodomy.

³ The vagina is an internal organ but Jane Doe seems to be referring to external contact.

Over defense objections, the court allowed the jury to watch the recorded forensic interview of Jane Doe and the jury was given an unredacted copy of the transcript.

III

SUFFICIENCY OF EVIDENCE

The first issue on appeal involves the sufficiency of evidence for defendant's convictions. The prosecution charged defendant with 24 offenses between January and December 2007, 22 offenses between January and December 2008, and eight offenses between January and April 23, 2009, when defendant was arrested. Defendant argues on appeal the evidence is too generic and vague to support these convictions.

Both parties rely on *People v. Jones* (1990) 51 Cal.3d 294, 305 (*Jones*), in which the California Supreme Court described how “[c]hild molestation cases frequently involve difficult, even paradoxical, proof problems. A young victim . . . assertedly molested over a substantial period by a parent or other adult residing in his home, may have no practical way of recollecting, reconstructing, distinguishing or identifying by ‘specific incidents or dates’ all or even any such incidents.” The *Jones* court expressed concern that a “resident child molester is not immunized from substantial criminal liability merely because he has repeatedly molested his victim over an extended period of time.” (*Ibid.*) Nevertheless, defendant should still have “a due process right to fair notice of the charges against him and reasonable opportunity to defend against those charges. In addition, the defendant is entitled to a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to each count charged. Finally, the defendant’s conviction can be sustained only if supported by substantial evidence.” (*Ibid.*)

In *Jones*, the court determined that generic testimony should not preclude a jury from convicting a defendant of multiple molestations because, even if the child victim cannot remember specific dates and details, the trial usually “centers on a basic credibility issue -- the victim testifies to a long series of molestations and the defendant denies that any wrongful touchings occurred. . . . [But] if the defendant has lived with the victim for an extensive, uninterrupted period and therefore had continuous access to the victim, neither alibi nor wrongful identification is likely to be an available defense. [Citation.]” (*Jones, supra*, 51 Cal.3d at p. 319.) Furthermore, “defendant has the option of taking the witness stand and directly denying any wrongdoing. If credible, his testimony should prevail over the unspecific assertions of his young accuser. In some cases, the very nonspecificity of the child’s testimony, especially if uncorroborated, may offer defense counsel fertile field for challenging the child’s credibility. [Citation.]” (*Id.* at p. 320.) Defendant may also focus on the victim’s past fabrications and attempt to refute “the victim’s apparent knowledge of or familiarity with sexual behavior generally or the defendant’s physical characteristics in particular, as well as expert testimony refuting or contradicting any physical evidence of molestation.” (*Ibid.*) As in *Jones*, “we decline to follow the thesis . . . that generic testimony deprives the defendant of a due process right to defend against the charges against him.” (*Id.* at pp. 320-321.)

Jones also rejected the contention that jury unanimity cannot be achieved “where testimony regarding repeated identical offenses is presented in child molestation cases. In such cases, although the jury may not be able to readily distinguish between the various acts, it is certainly capable of unanimously agreeing that they took place in the

number and manner described.” (*Jones, supra*, 51 Cal.3d at p. 321.) Generic testimony describes a repeated series of specific, though indistinguishable, acts of molestation. There is “no constitutional impediment to allowing a jury . . . to find a defendant guilty of more than one indistinguishable act, providing the three minimum prerequisites . . . are satisfied.

“For example, if the victim testified that an act of oral copulation occurred once each month for the first three months of 1990, and the People charge three counts of molestation, the jury’s unanimous conclusion that these three acts took place would satisfy the constitutional requirement of unanimity.

“Similarly, if an information charged *two* counts of lewd conduct during a particular time period, the child victim testified that such conduct took place *three times* during that same period, and the jury believed that testimony in toto, its difficulty in differentiating between the various acts should not preclude a conviction of the two counts charged, so long as there is no possibility of jury disagreement regarding the defendant’s commission of any of these acts. [Citations.]” (*Jones, supra*, 51 Cal.3d at p. 321.)

Because the issue is credibility the jury either will believe or not believe the child’s testimony that the consistent, repetitive pattern of acts occurred. “In either event, a defendant will have his unanimous jury verdict [citation] and the prosecution will have proven beyond a reasonable doubt that the defendant committed a specific act, for if the jury believes the defendant committed all the acts it necessarily believes he committed each specific act [citations].” (*Jones, supra*, 51 Cal.3d at p. 322.)

In evaluating a claim for insufficient evidence, the *Jones* court observed: “It must be remembered that even generic testimony (e.g., an act of intercourse ‘once a month for three years’) outlines a series of *specific*, albeit undifferentiated, incidents, *each* of which amounts to a separate offense, and *each* of which could support a separate criminal sanction.” (*Jones, supra*, 51 Cal.3d at p. 313.) In the present case, the prosecutor presented a conservative charge of one or two molestations a month for 28 months.

Jones asked what is the minimum quantum of proof necessary to support a conviction on one or more counts based on generic testimony. (*Jones, supra*, 51 Cal.3d at p. 316.) “Does the victim’s failure to specify precise date, time, place or circumstance render generic testimony insufficient? Clearly not. As many of the cases make clear, the particular details surrounding a child molestation charge are not elements of the offense and are unnecessary to sustain a conviction. [Citation.]

“The victim, of course, must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., ‘twice a month’ or ‘every time we went camping’). Finally, the victim must be able to describe *the general time period* in which these acts occurred (e.g., ‘the summer before my fourth grade,’ or ‘during each Sunday morning after he came to live with us’), to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the

various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction. . . . [¶] . . . [¶] . . . Nothing more is required to establish the substantiality of the victim's testimony in child molestation cases." (*Jones, supra*, 51 Cal.3d at pp. 315-316.)

Applying the foregoing analysis to the present case, we conclude that Jane Doe's testimony was substantial evidence of frequent molestations by defendant, occurring at least once or twice a month for more than two years when K.M. was at work. According to the evidence, defendant began molesting Jane Doe in January 2007 and continued to do so twice a day when her mother was at work until April 2009 when K.M discovered the abuse. Jane Doe's detailed testimony, as set forth in our factual summary, was fully supported by the physical evidence and corroborated by the conversation with her brother. Jane Doe's inability to specify the exact time, place or circumstance of these assaults neither denied defendant due process nor rendered his testimony too insubstantial to support a conviction.

IV

GRIFFIN ERROR

In its preliminary comments to the jury explaining the order of the trial, the court said: "We'll do opening statements, and then after that the prosecution will put on their evidence. After that the defendant can put on evidence if they want. He's not required to. Often the defense case is based on the cross-examination of the prosecution's witnesses because prosecution has the burden of proof. . . . [¶] They [the defense] don't need to present any evidence unless they feel they want to give you a full picture and if

they do give evidence or open the case and give evidence to you, you're not to consider that as an admission that the prosecution has proved their case. It's that sometimes they [defendant] want to give you a complete picture."

Defendant argues the court committed *Griffin* error by indirectly commenting on defendant's invoking his constitutional right to silence by not testifying. (*People v. Medina* (1995) 11 Cal.4th 694, 755; *People v. Champion* (2005) 134 Cal.App.4th 1440, 1449.) The parties agree it must be reasonably likely the jury construed the court's statements as a comment on defendant's failure to testify. (*People v. Clair* (1992) 2 Cal.4th 629, 662-663.) Defendant further contends "[t]here is only one way to read the court's instructions," meaning the court had commented improperly on defendant not testifying.

We disagree with defendant's interpretation of the court's comments. The court said nothing about defendant not testifying. Instead, the court correctly explained to the jury that defendant had no obligation to testify because the prosecution carries the burden of proof. The jury could not reasonably have understood the court's statements at the beginning of trial to constitute improper comment on defendant ultimately not testifying, especially when the court expressly instructed the jury based on CALCRIM No. 355 that defendant "ha[d] an absolute constitutional right not to testify." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) The court's instruction combined with the substantial evidence rendered any possible error harmless beyond a reasonable doubt. For the same reason, defendant cannot assert a claim based on ineffective assistance of counsel. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.)

JANE DOE'S RECORDED STATEMENT

Defendant contends the trial court should not have admitted Jane Doe's unredacted recorded statement under Evidence Code section 1360 because it was not reliable and it was unnecessary. After reviewing the CD, the trial court specifically found the recorded statement was not cumulative. Defense counsel objected to the statement as hearsay but did not ask for it to be redacted, waving this claim on appeal. (*People v. Raley* (1992) 2 Cal.4th 870, 892.) The trial court overruled the defense objection because Jane Doe could be recalled.

Evidence Code section 1360 allows the introduction of hearsay statements by a child abuse victim under the age of 12 if the statement is reliable and the child testifies. The trial court's ruling under section 1360 is reviewed for an abuse of discretion. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367.)

The trial court did not abuse its discretion in deciding the statement was reliable based on the time, content, and circumstances. The interview with Jane Doe occurred immediately after the ongoing abuse was discovered. Jane Doe's answers during the interview were voluntary and spontaneous and offered in a straightforward manner. Her knowledge of sexual matters was much more detailed than would be expected from a nine-year-old child. Her descriptions of the abuse were almost entirely consistent with her trial testimony. All these factors indicate that Jane Doe's recorded statement was reliable under Evidence Code section 1360.

Although defendant forfeited his claim that the statement should have been redacted, the preliminary portions of the interview served to show that the interviewer explained the process to Jane Doe and tried to put her at ease in spite of Jane Doe's fearfulness and discomfort. These were also important factors in the reliability analysis. It is not reasonably probable that a different outcome would have resulted if the statement had been redacted. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

VI

THE AGGRAVATED TERM ON COUNT ONE

The trial court imposed the eight-year upper term on count 1 for committing lewd and lascivious acts on a child under age 14 based on the aggravating factors of the victim's particular vulnerability and defendant's planning and sophistication in execution, taking advantage of a position of trust, and posing a danger to society if not incarcerated.

Defendant argues his Sixth Amendment right to a jury trial was violated because he was entitled to have a jury decide the aggravating factors. The California Supreme Court has rejected this claim in *People v. Towne* (2008) 44 Cal.4th 63, 83, which is binding on this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

VII

DISPOSITION

Sufficient evidence supports defendant's conviction on 54 sexual offenses against his stepdaughter. The court did not err in its instructions, its evidentiary ruling,

or its sentencing.

We affirm the judgment.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.