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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.

MICHAEL DIOKNO NUESTRO,

Defendant and Appellant.

E052410

(Super.Ct.No. RIF152130)

OPINION

APPEAL from the Superior Court of Riverside County. Mark E. Johnson, Judge.

Affirmed.

Law Office of Anthony D. Zinnanti and Anthony D. Zinnanti for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, William M. Wood and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

When Jane Doe was three years old, defendant Michael Diokno Nuestro had her rub lotion on his penis to make him “explode.” Defendant was found guilty of one count of committing a lewd act against a child under the age of 14. (Pen. Code, § 288, subd. (a).)¹ He was sentenced to six years in state prison and ordered to register as a sex offender upon his release.

Defendant now contends on appeal as follows:

1. The young victim did not have the capacity to testify, considering her age, her inability to distinguish truth from falsehood, and her susceptibility to suggestion.
2. The trial court erred by refusing to allow in third party culpability evidence.
3. The admission of a video interview of the victim violated his right to cross-examine and confront witnesses under the federal Constitution.
4. Cumulative error warrants reversal.
5. Insufficient evidence was presented to support defendant’s conviction.²

We affirm the judgment.

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

² Defendant filed a petition for writ of habeas corpus in case No. E055109. We ordered on December 8, 2011, that the petition be considered with the instant appeal. We will decide the petition by separate order.

I

FACTUAL BACKGROUND

A. *People's Case-in-Chief*

1. *Trial testimony*

Holly N. was married to defendant. In April 2009, she lived in Riverside with him. Also living in the house was Jane; Holly's son R.; and two of Holly's other sons, John Doe 1 (John 1) and John Doe 2 (John 2). In April 2009, Jane was three years old, John 2 was four or five years old, and John 1 was around nine years old. In April 2009, defendant watched the children while Holly was at work.

Jane took the court's oath that she promised to tell the truth. She was five years old at the time of trial and was in kindergarten. She denied that she was nervous or scared. Jane stated that "if you tell a lie, it's not the truth." Jane was able to answer the prosecutor's questions regarding telling truth and lies. At the time of trial, Jane lived with Holly and R. Jane's real father, J.H., lived in Utah. She considered defendant, whom she called "Mike," to be a "daddy [she] used to have."

Jane recalled that in California, when she was three years old, she and defendant were in a bedroom belonging to defendant and Holly. The door to the bedroom was closed. Jane had come into the bedroom in the middle of the night and had slept in the room. When she woke up, defendant was lying on the floor near the bathroom. Defendant told her "to do a secret." Jane explained that the secret was to rub lotion on his "private part."

Jane went to the bathroom and got some lotion at defendant's request. Defendant instructed her to rub the lotion on his "private," which Jane explained was on the front of his body. She said that boys used the private to go "pee." Defendant had his pants and underwear off. The prosecutor asked Jane to show him the motion that she made in rubbing on the lotion, but Jane was too uncomfortable. She was also too uncomfortable to say why she stopped rubbing him. Defendant never touched her.

Defendant gave Jane some candy and told her not to tell anyone. He had a towel that he was lying on but never wiped himself with it. Nothing came out of defendant's private part while she was rubbing him. Jane told Holly and John 2 what had happened, but they did not believe her at first.

Jane knew that she had private areas in the front and back. She went "pee" in the front area and "poop" in the back area. Jane admitted that John 2 had touched her in both areas. Jane indicated this occurred about four days prior to defendant touching her. John 2 touched her with his hands, not his face.

Jane recalled talking to a woman prior to trial but did not recall telling her that something came out of defendant's private and went on his belly. Jane recalled visiting her father, J.H., both before and after this incident.

Jane shared a room with John 1 and John 2 at this time. There was a television in the room, but Jane was the only one who watched it. Jane denied that she asked John 1 and John 2 to show her their privates. She had seen them when they were in the bathroom. She never tried to put sticks up their shorts.

John 2, who was six years old at the time of trial, promised to tell the truth and said he knew the difference between the truth and a lie. At the time of trial, John 2 lived with his uncle in Utah.

When John 2 lived with defendant, there was one time that he wanted candy because Jane had told him she had eaten some candy. Jane told John 2 that she got the candy because defendant asked her to get the lotion bottle and rub it on his privates. John 2 immediately ran and told Holly. John 2 heard defendant say that Jane had been banging the lotion bottle on the counter and he told her that if she did not stop that it was going to explode.

John 2 watched cartoons in his room. At night, he was not supposed to watch the channel because it showed adult cartoons, and he denied watching them. John 2 recalled one time playing in a box with Jane. John 2 did not want to answer any more questions because he was embarrassed.

Holly indicated that on April 22, 2009, Jane made a statement to her that “she was trying to make daddy explode with the lotion.” John 2 was with Jane when she made this statement. Holly inquired further, and Jane just acted “silly.” Jane again stated that she was trying to make defendant explode with the lotion, but he didn’t. John 2 then pointed to his genitalia and said, “Down there, mom.”

Defendant told Holly that Jane had gotten in trouble in the bathroom for pounding a lotion bottle on the counter and that he had taken it away from her, telling her that it

would explode. Defendant surmised that this was what Jane was referring to and denied he had her touch his penis. Holly wanted to believe defendant.

Defendant remained in the house for about a week after this. Holly indicated that John 2 and Jane kept talking about the lotion. Holly asked Jane again about the incident; she told Holly that defendant had her rub lotion on his private. Jane did not want to talk about the lotion in front of defendant. Holly asked defendant to leave. Holly did not immediately report the incident.

Holly and defendant went to see a counselor at their church. A social worker came to the house the next day. On April 29, defendant was arrested, and Holly's children were taken away and put in foster care. Jane eventually was returned to Holly's care. As part of the reunification, defendant could not live with Holly.

Prior to the allegation in this case, Jane had visited her real father, J.H., in Utah. She stayed half of the time with J.H. and half with her grandmother. Jane returned at the end of March. When she returned from Utah, Holly felt that Jane was having a hard time adjusting; she was talking back and being bossy. Holly described Jane as precocious.

Sometime before the incident involving defendant, Jane and John 2 were playing in a big plastic box. Holly came into the room, and they appeared to be engaged in something that they were not supposed to be doing. Jane told Holly that John 2 had been trying to kiss her on the bottom. John 2 admitted that he had done this and claimed to have learned it from the television but did not say which channel. Holly believed that this occurred either one or two weeks before the incident with defendant.

Holly admitted that she was not cooperative with the detectives who wanted to interview her at the beginning of the case. She had been skeptical about Jane's accusations until the preliminary hearing in the case. She indicated that it was Jane's "very, very graphic" testimony that changed her mind. Prior to this allegation, she would have never suspected that defendant would engage in this type of activity.

John 2 had reported to Holly around the same time that he touched her that Jane was trying to show her privates to him. On another occasion, around the same time, Jane had gotten in trouble for trying to put a stick up John 1's pants. Holly stated that defendant had a dark complexion, and his penis was dark. J.H. was Caucasian.

For the first time at trial, Holly claimed that defendant had hit her and choked her in front of John 1 sometime in 2007. Holly had not disclosed the domestic violence before the trial because she still loved defendant.

2. *Pretrial statements and testimony*

Sarah Carter (formerly Walker) was a social worker employed by Riverside County. She was a child forensic interviewer, interviewing children who were suspected to be victims of abuse or neglect; these were called "RCAT" interviews. She interviewed Jane in 2009, and it was recorded. The recording was played for the jury, and they were given transcripts.

At the beginning of the interview, Jane was asked to spell her name, but she just recited random letters. Jane also gave her full name incorrectly and had trouble saying

her age. She indicated that she liked to play at the park and go on picnics. She lived with Holly, defendant, and her brothers. Jane knew the difference between the truth and a lie.

Jane was able to describe the parts of her body and knew that she had blood inside her body. Jane indicated that she used her private to “pee.” Jane indicated that John 2 had tried to kiss two of her privates and was licking her in both places. John 2 told her that he learned how to do this on television.

Jane spontaneously stated that defendant told her “to do it to his private.” She explained that defendant wanted her to push with her hands on his “private.” Defendant wanted to keep pushing so that he could “splode.” Jane explained that she thought he was “gonna ’splode and he’s gonna die.” She thought defendant meant that every part of him was going to explode. She explained that defendant’s private was what he used to go “pee.” Defendant did not have any clothes on, and they were in his bedroom. Defendant was lying down on the ground.

Jane indicated that defendant told her that his private was itchy and that it was just part of his body. Defendant told her to push harder and used his own hands. He never asked her to use any other part of her body. She kept pushing on his private; white lotion came out and went on defendant’s belly. Jane said that she thought she got lotion in his private. Defendant washed himself off with a wash rag.

Jane described defendant’s “wee-wee” as black; it was the same color as his face. Jane then said that it had blue and black stripes.

Defendant gave Jane some candy. She denied that anything happened with J.H. On a diagram (given to Jane at the interview) of a boy with no clothes, she wrote a P over the genitalia on the boy.

John 2's RCAT interview was played for the jury. He was able to tell what was the truth, and what was a lie. He told the interviewer that he wanted to tell her what made the "cops" come to his house and take him to another house.

John 2 said that Jane pounded a lotion bottle on the counter. He then described that Jane tried to pull "Daddy's" private on his belly, but she couldn't. Jane told him that if she didn't do it, "Daddy would have blowed on everything." John 2 told Sarah that this was wrong. Jane told John 2 that defendant gave her candy and that she was not to tell anyone what had happened. John 2 did not see this happen. John 2 later said that Jane had told him that she was holding defendant's "wiener" and that she "couldn't do it," so defendant did it himself. After Jane got the candy, John 2 said that the "cops" came, and he got sent to another home.

John 2 told John 1, and John 1 said that Jane was lying. John 2 initially denied that he did anything to Jane or that she wanted him to do something to her. Sarah then told him that she was aware the Holly had walked in on him and Jane doing something. John 2 then admitted that he kissed both of her "privates," and licked and smelled them. John 2 said he learned to do it on the television that he had in his room.

Jane's preliminary hearing testimony was played for the jury. She gave several inaudible responses prior to finally stating that she would tell the truth. Jane was shown a

diagram of a boy. When counsel circled the male genitalia, she called it “another bottom” and that it was used “to go pee.” Jane had seen the part where defendant “[went] pee”; she had touched it while he had his pants off and was lying on the ground. She touched him with two hands. She used lotion to rub on where he went “pee,” and he told her to rub him. She was asked to demonstrate. She took her hands and put them in a circle shape and then moved her hands forward and back. Defendant gave her two pieces of candy once she was done. Nothing came out of defendant’s private part.

B. *Defense*

Defendant testified on his own behalf. He had been married three times and had another child from his first marriage; he also had stepchildren from his second marriage. Holly already had five children, including Jane, when they got married. Holly and defendant had a child together in 2007. Defendant denied that he ever hit or choked Holly.

In February 2009, Jane stayed with J.H. When she returned, she was different. She was defiant, played by herself, and was distant. Prior to April 22, 2009, Jane shoved a long toy into John 1’s crotch area and was rubbing it on his crotch. Defendant yelled at Jane and told her that it was something she was not supposed to do.

Holly told defendant about what had happened between Jane and John 2. After this incident, he found Jane in the bathroom pounding a lotion bottle on the counter. It was in the afternoon, and Holly was not home. Defendant took the bottle and told her

that she could not do that because it was going to explode. Defendant raised his voice, and Jane was upset.

Defendant presented the testimony of two of his stepdaughters, his niece, his sister, and a family friend who had young children. The witnesses attested that defendant had never touched them or their young children inappropriately. Further, defendant was considered an honest and truthful person by these character witnesses. Defendant's family friend had allowed defendant to be around his children after the allegations by Jane.

Dr. Veronica Thomas was a private clinical and forensic psychologist. She testified in cases for both the prosecution and the defense. She had been hired by defense counsel to "perform a comprehensive psychosexual assessment to determine whether or not [defendant] ha[d] any deviant sexual interests or problematic sexual issues." Dr. Thomas interviewed defendant and tested him, including administering the Abel Assessment for Sexual Interest.

Dr. Thomas evaluated all of the tests given to defendant and her observations of him. The tests indicated that he was sexually interested in adult females. Dr. Thomas found no evidence that he was a pedophile. There was no inappropriate or sexually deviant behavior in his records. Dr. Thomas admitted that some child molesters were not necessarily pedophiles. All of the information on defendant's sexual history and relationships was self-reported.

Defendant was also diagnosed as a narcissist. He was preoccupied with his own needs and had a sense of entitlement.

C. *Rebuttal*

Holly was recalled. The first time that defendant mentioned disciplining Jane for banging the bottle on the counter was when she confronted him about the accusations being made by Jane. Jane appeared to act normal around defendant after April 22, 2009. The People also presented two witnesses who attacked defendant's good character.

II

CAPACITY TO TESTIFY

Defendant contends that the trial court erred by finding that Jane had the capacity to testify against him, as she was just over three years old when she alleged that defendant had her masturbate him, and she was five years old when she testified. Defendant contends that the trial court should have conducted a more extensive evaluation of her capacity to testify to determine if she was improperly coerced through pretrial interviews and interrogations.

A. *Additional Factual Background*

The People filed a motion in limine seeking to have Jane found to be competent. Defendant filed his own motion arguing that Jane could not testify unless deemed competent to testify under Evidence Code sections 701 and 702.

The trial court felt it necessary to question Jane outside the presence of the jury prior to her testifying. It admitted that it had inquired of other judges whether Jane could

testify due to her young age. It noted that Jane had been found competent to testify at the preliminary hearing.

Jane first was examined by the trial court, and she promised to tell the truth. The People then examined Jane. She indicated that she was five years old. She went to school, which she liked, and she liked her teacher. Jane had to be admonished to respond out loud instead of nodding her head in response to questions. She stated that it was better to tell the truth than a lie. Jane promised to only tell the truth in court.

The prosecutor then held up a black pen. Jane stated that if the prosecutor said that the color was orange, it would be a lie, and if he said it was black, that would be the truth. The prosecutor then asked Jane if she knew his middle name or where he lived, and she stated she did not know. The prosecutor also asked her how many children he had, and she responded that she did not know because he had never told her. The prosecutor asked, “So all we’re going to ask you to do is just answer questions, but just tell truthfully about what happened. Okay? Do you think you can do that?” Jane responded, “Yes.”

Defense counsel briefly asked Jane if she would tell the truth in response to his questioning at trial, and she said she would. There were no further questions.

The trial court stated, “. . . I think the girl is competent to testify.” Defense counsel stated, “Submit to the Court, Your Honor.”

The trial court ruled, “I think she is. I know in one of the briefs that I read that she, I guess, was asked to spell her name and she gave some jumbled letters.^[3] You know, as I recall, kids learn to spell at about age five or six, so I didn’t take that as persuasive. But in hearing her testify, I do believe she is competent.”

B. *Analysis*

“The relevant determination in California is whether a minor victim is competent to testify.” (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1149.) “A person is incompetent and disqualified to be a witness if he or she is ‘[i]ncapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him’ [citation], or is ‘[i]ncapable of understanding the duty of a witness to tell the truth.’ [Citation.]” (*People v. Lewis* (2001) 26 Cal.4th 334, 360.) “[T]he burden of proof is on the party who objects to the proffered witness’ [Citation.] The challenging party must establish a witness’s incompetency by a preponderance of the evidence. [Citations.]” (*Ibid.*)

“Whether a witness has the capacity to communicate and an understanding of the duty to testify truthfully is a preliminary fact to be determined exclusively by the trial court, whose determination will be upheld absent a clear abuse of discretion. [Citation.]” (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1368.) “A witness’s competency to

³ In the RCAT video of Jane, she was unable to spell her name, and she did not know her numbers.

testify is determined exclusively by the judge. [Citation.]” (*People v. Montoya, supra*, 149 Cal.App.4th at p. 1150.)

In *People v. Roberto V, supra*, 93 Cal.App.4th 1350, the defendant committed lewd acts upon his two daughters, one of whom was three years old at the time of the molestation. (*Id.* at pp. 1355-1356.) The victim was approximately four years old at the time of trial, and the trial court immediately concluded she was not competent to testify and found her unavailable to testify without conducting an inquiry into her competency. (*Id.* at p. 1368.) On appeal, the appellate court noted that in several cases, four and five year old children could be considered competent witnesses. (*Id.* at pp. 1368-1369.) It noted, “While we agree with the trial court that most four year olds would have difficulty qualifying as witnesses, this is not a foregone conclusion. Testimonial competence may vary greatly given an individual child’s abilities. Some four-year-old children are precocious and verbal, while many have limited language and cognitive abilities. Whether a child is competent to testify may also depend upon the nature of the testimony sought to be elicited. While a young child may have difficulty expressing complex or abstract thoughts, such a child may well be able to relate uncomplicated, simple facts.” (*Id.* at p. 1369, fn. omitted.)

Here, the trial court observed Jane in court and made an assessment of her competency. Although defendant claims that whether she could tell the truth from a lie was not enough to evaluate her competency, clearly the trial court, observing Jane first

hand, could evaluate her competency not only based on the responses she gave, but also on her physical appearance. The testimony and facts were not complicated or complex.

Although Jane had some inconsistent testimony, such inconsistencies do not render her automatically incompetent. As the Supreme Court held in *People v. Lewis, supra*, 26 Cal.4th at p. 361, “[m]ere difficulty in understanding a witness, however, does not disqualify that witness under Evidence Code section 701, subdivision (a).” It concluded that these types of missteps went to “credibility” and not “competency.”

(Ibid.)

Further, the trial court noted in denying probation to defendant, “Frankly, I believe the girl. I can tell you, watching that little’s girl’s testimony, I thought it was heartbreaking. And I also thought that in her prior statements made she seemed to demonstrate a knowledge of what had occurred far beyond a kid that age would be able to come up with on her own or had been prepped to do.” It was not a clear of abuse of the trial court’s discretion concluding that Jane was competent to testify against defendant.

Defendant appears to contend that the trial court had a duty to conduct a “taint hearing” in order to properly evaluate Jane’s competency. “Taint hearing” refers to a hearing conducted to determine a child witness’s credibility and/or competence by inquiry into “‘whether pretrial events, the investigatory interviews and interrogations, were so suggestive that they give rise to a substantial likelihood of irreparably mistaken or false recollection of material facts bearing on defendant’s guilt.’ [Citation.]” (*People v. Montoya, supra*, 149 Cal.App.4th at p. 1149.) These hearings arise from the holding in

a New Jersey Supreme Court case, *State v. Michaels* (1994) 136 N.J. 299, in which the trial court there felt that since the evidence of influence on the testifying children was so strong that it gave the appearance that the children were suffering from false recollection of material facts that a more detailed hearing was required. (See *Montoya* at pp. 1148-1149.)

Initially, California law does not support such a hearing. In *Montoya*, where the defendant raised the same claim, the court rejected it, finding, “Appellant cites no authority and we can find none that approves or requires *Michaels*-style taint hearings in California. Like other states, we reject *Michaels* in favor of our well-established competency jurisprudence. [Citations.]” (*People v. Montoya, supra*, 149 Cal.App.4th at p. 1149.) The trial court here was under no obligation to conduct further inquiry into Jane’s competency.

Moreover, there is no appearance of influence on Jane to testify as she did. Defendant refers to the fact that Holly used a hand gesture in her testimony and that she had a motive to have defendant removed from her home in order to regain custody of Jane.⁴ He contends that Jane testified at trial for the first time that defendant was not a good daddy after what happened to her. Finally, defendant points to the fact that

⁴ For the first time on cross-examination, Holly indicated that Jane made a hand motion when she told her about rubbing lotion on defendant’s privates. Holly used the motion in court, which was described as making a circle with her hands together and moving up and down.

Detective Ellefson only interviewed Jane one time as she felt subjecting children to numerous interviews regarding sexual abuse was cruel.

The record does not support that Jane was coached or influenced. In her first report to Holly, in the RCAT video, at the preliminary hearing, and at trial, Jane's testimony on the salient facts remained the same. Nothing in the record establishes that Jane was influenced or that she had a misrecollection of the facts.

Defendant additionally appears to argue (for the first time on appeal) that the law should be changed to include a further requirement that inquiry be conducted the same as admitting a hearsay statement of a witness, which requires a determination of the indicia of reliability. Appellant relies upon *Idaho v. Wright* (1990) 497 U.S. 805, 817 [110 S. Ct. 3139, 111 L.Ed.2d 638], which consists of four areas that must be met prior to admitting a hearsay statement: (1) spontaneous and consistent repetition of statements; (2) the witness's mental state; (3) the use of terminology unexpected of a child of a particular age; and (4) lack of motive to fabricate. (*Id.* at pp. 821-822.)

Defendant never raised this issue in the lower court. When the trial court completed its evaluation of Jane, defense counsel submitted on the evaluation and did not contend that the evaluation was insufficient. Hence, defendant has waived such claim on appeal. (See *People v. Wright* (1990) 52 Cal.3d 367, 411, disapproved on other grounds in *People v. Harris* (2008) 43 Cal.4th 1269.)

Moreover, as set forth, *ante*, the law of this state is well established as to a trial court's requirement to evaluate competency. The trial court followed that procedure in

this case, and nothing in defendant's argument or Jane's testimony requires us to question this long-standing jurisprudence. The trial court did not abuse its discretion by finding Jane was competent to testify against defendant.

III

THIRD PARTY CULPABILITY

Defendant contends the trial court committed prejudicial error by depriving him of the opportunity to present third party culpability evidence. He claims the jury should have been informed that Jane's real father, J.H., was a convicted child molester.

A. *Additional Factual Background*

In his motion in limine, defendant sought to introduce evidence that J.H. was a registered sexual offender in Utah and had a prior conviction for sexual abuse of a child. Defendant also argued that J.H.'s prior conviction should be admitted and set out evidence that Jane had been with J.H. just prior to the allegations and was acting out sexually when she returned from the visit. Defendant admitted that it was not known if J.H. had touched Jane inappropriately.

The People filed a motion to exclude third party culpability evidence. They argued that defendant had failed to show evidence that J.H. was the real culprit of the sexual abuse.

At the hearing, defendant referred to statements made in the divorce proceeding between Holly and J.H. that when Jane visited J.H. in 2007, she returned confused and frightened, refused to have her diaper changed, and was inconsolable. Jane exhibited the

same behavior when she returned from a visit in 2009, just prior to the accusations in this case. Defendant admitted that John 2 watched inappropriate television about oral copulation in the room he shared with Jane.

The trial court stated, “I will be quite candid. I’ve been torn on this one.” It then tentatively ruled that it would deny evidence that J.H. was a registered sex offender. It stated, “There’s got to be something there, and that’s what I’m really seeing lacking here. I’m not seeing any evidence that [J.H.] molested this girl. . . . I’ve been torn on this one, and I also spoke with four other judges.” The trial court recognized that this was an important piece of evidence but recognized the law required some evidence that J.H. molested Jane.

The trial court also considered admitting the evidence pursuant to Evidence Code section 352. Even though the evidence was compelling, it was similar to not introducing a person’s entire criminal background when testifying. The trial court stated, “So I think that the propensity of the evidence to mislead the jury . . . significantly outweighs the probative value, which I really think is minimal if you really examine it given the fact there really is no evidence that [J.H.] molested this girl.”

Defense counsel requested that the trial court at least admit evidence that Jane had visited J.H. just prior to this incident and that, when she returned, her behavior had changed. The trial court tentatively stated that it thought it was appropriate to introduce evidence that she saw J.H. before the incident and acted differently afterward. It ruled

that Holly could testify that Jane acted differently when she returned from J.H.'s home because it went to possible motive or bias.

The trial court did note that jury would be aware that there was something “seriously” wrong in the home based on the five-year-old boy acting out by molesting Jane. The trial court noted, “I think this is a close call. I wasn’t the only one that thought so; several judges thought this one was tough.”

Defendant brought a motion for new trial based on the third party culpability evidence being excluded. At the hearing on the motion, the trial court ruled, “[T]he court’s decision not to allow evidence that the natural father of the girl is a registered sex offender in the state of Utah. I tell you, I labored long on that one, but finally what guided me was turning to the law of the case as to the issue on third-party culpability. I didn’t see where the defense had met the standards for that. I recognized how powerful that evidence likely might be for the defense, but like I said, that was a tough decision for me, but I felt comfortable with it. Because when I finally stepped back and turned to the law, I felt I was making the right decision.”

B. *Analysis*

All evidence having any tendency in reason to prove or disprove a disputed fact is admissible. (Evid. Code, § 210.) “In general, third party culpability evidence is admissible if it ‘rais[es] a reasonable doubt of defendant’s guilt.’ [Citation.] This does not mean, however, that no reasonable limits apply. Evidence that another person had ‘motive or opportunity’ to commit the charged crime, or had some ‘remote’ connection to

the victim or crime scene, is not sufficient to raise the requisite reasonable doubt. [Citation.] . . . [T]hird party culpability evidence is relevant and admissible only if it succeeds in ‘linking the third person to the actual perpetration of the crime.’ [Citations.]” (*People v. DePriest* (2007) 42 Cal.4th 1, 43.) “[E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant’s guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.” (*People v. Hall* (1986) 41 Cal.3d 826, 833.)

Here, the evidence did not link J.H. to committing the crime. Jane was consistent in accusing defendant. When asked in the RCAT video if J.H. did anything to her, she said no. The evidence established that J.H. may have had the motive or opportunity to molest Jane, but there was not “more” that would support that J.H. committed the crime. (*People v. Hall, supra*, 41 Cal.3d at p. 833.)

Defendant points to evidence that Jane acted out sexually after returning from visiting J.H. and prior to the molestation by defendant. All of that evidence was presented to the jury. The jury was well aware that she had a change of behavior when she returned from Utah. There was no evidence that J.H. had exposed Jane to any sexual material when she visited him. Jane consistently testified that the penis she had touched was a darker color; the evidence established that J.H. was Caucasian. None of the evidence established that J.H. committed the molestation to warrant admission of evidence that he was a convicted child molester.

Moreover, even if the trial court erred, we find that it was not prejudicial. “When the reviewing court applying state law finds an erroneous exclusion of defense evidence, the usual standard of review for state law error applies: the court must reverse only if it also finds a reasonable probability the error affected the verdict adversely to defendant. [Citations.]” (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1089; see *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Here, although the jury did not receive evidence that J.H. was a convicted child molester, it did receive evidence that Jane engaged in sexual behaviors prior to the molestation. Further, it was well aware that Jane acted differently when she returned from Utah. In his closing argument, defendant argued that Jane may have seen something in the bedroom she shared with John 2, and she may have seen something while she was in Utah. Defendant also stated during argument, “How about J.H., the dad, where is he? Am I saying that J.H. did something to (Jane Doe)? No. I don’t know that. But you want all the information. You want to get the whole picture of everything so you can really assess this, and we don’t have a full picture of everything.”

There was no direct evidence that J.H. committed the instant crime against Jane. Jane consistently testified that defendant had committed the molestation. Evidence was presented to the jury that Jane may have gained her behaviors in Utah or through television. The jury necessarily rejected that Jane was wrong in her accusation of molestation by convicting defendant. Since there was no direct evidence that J.H. had

molested Jane, the refusal to introduce evidence that J.H. was a convicted child molester was not prejudicial.

IV

ADMISSION OF RCAT VIDEOS

Defendant contends the admission of Jane's and John 2's RCAT interviews violated his rights to cross-examine and confront witnesses under the federal Constitution. He claims that since the trial court made no inquiry into the indicia of reliability of the interviews, the admission violated his constitutional rights because he could not adequately cross-examine Jane and John 2.

A. *Additional Factual Background*

The People sought to admit Jane's testimony given during the RCAT video under Evidence Code section 1360. Defendant sought to exclude the interview of Jane under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] as the interviews were testimonial in nature. Defendant also objected to the admission of the interview pursuant to Evidence Code section 1360 unless the interviews were found to have a sufficient indicia of reliability.

The trial court felt that an Evidence Code section 402 hearing was necessary to determine the reliability of the statements. The People noted that it was not an issue if Jane testified. The trial court deferred a determination on the RCAT videos to determine whether the children were going to testify, i.e. after the competency determination.

After Jane testified at trial, the People stated on the record that they were going to play the RCAT videos. There was no objection by defendant.

B. *Analysis*

The confrontation clause of the Sixth Amendment to the United States Constitution provides that in all criminal prosecutions that the accused shall have the right to confront witnesses against him. (*Idaho v. Wright, supra*, 497 U.S. at p. 813.)

In *Crawford v. Washington, supra*, 541 U.S. 36, the Supreme Court held that out-of-court testimonial statements must be excluded under the confrontation clause of the United States Constitution unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the declarant. (*Id.* at pp. 59, 68.)

“The confrontation clause precludes admission of hearsay evidence unless the prosecution demonstrates that the statement possesses adequate indicia of reliability. Reliability may be inferred, without more, if the evidence is admitted under a firmly rooted hearsay exception. Otherwise, the evidence is presumed unreliable and must be excluded absent a showing of particularized guarantees of trustworthiness such that adversarial testing would be expected to add little, if anything[,] to the statement’s reliability. [Citations.]” (*People v. Roberto V., supra*, 93 Cal.App.4th at pp. 1373-1374.)

“[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. [Citation.]’ [Citation.]” (*People v. Redd* (2010) 48 Cal.4th 691, 730.)

“[Evidence Code s]ection 1360 safeguards the reliability of a child’s hearsay statements by requiring that: (1) the court find, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances surrounding the statement(s) provide sufficient indicia of reliability; (2) the child either testifies at the proceedings, or, if the child is unavailable to testify, other evidence corroborates the out-of-court statements; and (3) the proponent of the statement gives notice to the adverse party sufficiently in advance of the proceeding to provide him or her with a fair opportunity to defend against the statement. [Citations.]” (*People v. Roberto V., supra*, 93 Cal.App.4th at p. 1367.)

Defendant argues that although there was a hearing under Evidence Code section 402, no findings were made by the trial court that the time, content, and circumstances of Jane’s and John 2’s statements during the RCAT interviews provided sufficient indicia of their reliability under Evidence Code section 1360. We agree the record does not show that the trial court made such a determination. However, defendant does not appear to be arguing that the admission under Evidence Code section 1360 was error. He entitles his argument “Unqualified Admission of the RCAT Video Was a Prejudicial Violation of Appellant’s Right to Cross and Confront Witnesses.” His argument addresses his inability to cross-examine Jane and John 2. In his reply brief, he emphasizes his inability to

properly cross-examine Jane or John 2. Hence, we only address whether the admission of the RCAT interview violated his constitutional rights.⁵

However, despite this failure, the admission of the RCAT videos did not violate defendant's right of cross-examination and confrontation. Jane and John 2 both testified at trial. Although defendant claims that he was unaware at the time they testified that the RCAT video was going to be admitted, such an argument is disingenuous. Defendant was aware that the People were going to admit the interviews whether or not Jane and John 2 testified. Jane and John 2 were present in court and defendant had ample opportunity to cross-examine them. There was no constitutional violation.

V

CUMULATIVE ERROR

Defendant asserts that he did not get a fair trial due to a laundry list of errors that occurred at trial. He provides no independent argument as to how these errors deprived him of a fair trial. We have rejected in the previous arguments that any trial court error occurred. Since we conclude no errors occurred at trial, there can be no cumulative error.

⁵ We note that even if there was error in admission under Evidence Code section 1360, the prior interviews appear to be admissible as prior inconsistent or consistent statements.

VI

SUFFICIENCY OF THE EVIDENCE

Defendant’s final claim is that the evidence presented was insufficient to support his conviction.

“In reviewing a claim [regarding the] sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or special circumstance beyond a reasonable doubt. We review the entire record in the light most favorable to the judgment below to determine whether it discloses sufficient evidence — that is, evidence that is reasonable, credible, and of solid value — supporting the decision, and not whether the evidence proves guilt beyond a reasonable doubt.

[Citation.] We neither reweigh the evidence nor reevaluate the credibility of witnesses.

[Citation.] We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. [Citation.] If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 638–639.)

“Because ‘we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence . . .’ [citation], the effect is that on appeal ‘a defendant challenging the sufficiency of the evidence to support her conviction “bears a heavy burden,” [citation] . . .’ [citation] of showing insufficiency of the evidence

and must do so in accordance with well-established standards [citation].” (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1287.)

Section 288, subdivision (a) provides in pertinent part, “[A]ny person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony”

Jane testified at trial that when she was three years old, she had been in defendant’s room sleeping. When she woke up, defendant was lying on the ground naked from the waist down. Defendant asked her to do a secret, which was to rub lotion on his “private part.” Jane rubbed the lotion on defendant’s penis. At trial, she stated nothing came out of his penis.

Jane’s RCAT interview differed from her trial testimony in that she stated that something did come out of defendant’s penis. She also stated that defendant asked her to push harder. At the preliminary hearing, she made a motion that showed how she rubbed defendant.

Although Jane’s testimony differed slightly, she remained consistent that she rubbed lotion on defendant’s penis while he was lying on the floor in his bedroom. The jury could find that this testimony was reasonable and credible. The jury heard Jane’s testimony and was equipped to evaluate her testimony. They were instructed regarding child witness testimony that “[y]ou have heard testimony from a child who is age 10 or

younger. As with any other witness, you must decide whether the child gave truthful and accurate testimony. [¶] In evaluating the child’s testimony, you should consider all of the factors surrounding that testimony, including the child’s age and level of cognitive development. [¶] When you evaluate the child’s cognitive development, consider the child’s ability to perceive, understand, remember, and to communicate. [¶] While a child and an adult witness may behave differently, that difference does not mean that one is any more or less believable than the other. You should not discount or distrust the testimony of a witness just because he or she is a child.” The evidence supported the verdict in the instant case.

VI

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

MILLER
J.