

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR MENDOZA MARTINEZ,

Defendant and Appellant.

E053952

(Super.Ct.No. SWF018604)

OPINION

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik, Judge.
Affirmed.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, and Peter Quon, Jr., and
Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Hector Mendoza Martinez repeatedly molested his two nieces, Jane Doe 1 (Doe 1) and Jane Doe 2 (Doe 2). Defendant was convicted of 11 counts of committing lewd and lascivious acts against Doe 1 and three counts of unlawful sexual intercourse and penetration by a foreign object against Doe 2.

Defendant claims on appeal that the trial court erred by refusing to allow him to impeach Doe 1 with a prior statement that was inconsistent with her trial testimony. Such exclusion of evidence violated his federal constitutional rights to confront witnesses against him and his due process rights to a fair trial and to present a defense.

I

PROCEDURAL BACKGROUND

Defendant was found guilty by a Riverside County Superior Court jury of 11 counts of committing lewd and lascivious acts (Pen. Code, § 288, subd. (a))¹ upon Doe 1 when she was a child under 14 years of age (counts 1-11). As for Doe 2, defendant was found guilty of unlawful sexual intercourse with a minor (§ 261.5, subd. (c))(count 14) and penetration of the genital/anal opening with a foreign object (§ 289) (count 15). The jury could not reach a verdict on counts 12 and 13, which charged violations of section 288, subdivision (a) committed against Doe 2.

After the jury reached its verdict and had been discharged, the People amended the information to add two counts of violating section 261.5 (unlawful sexual intercourse

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

with a minor) against Doe 2. Defendant entered a guilty plea to the two counts (counts 16 and 17). The trial court dismissed counts 12 and 13 in the interests of justice.

Defendant was sentenced to the upper term of eight years on count 1. On counts 2 through 11, he was sentenced to two years on each count. On counts 14, 15, 16, and 17, he was sentenced to eight months on each count. All of the sentences were ordered to run consecutive to each other. Defendant received a total sentence of 30 years 8 months.

II

FACTUAL BACKGROUND

A. *Doe 2's Testimony*

Doe 2 was born in 1983; she was 27 years old at the time of trial. When Doe 2 was 13 years old, she, Doe 1, and their brother could no longer live with their mother because she started using drugs.² They all went to live with their aunt, R.M., and defendant. At that time, defendant and R. lived in a three-bedroom apartment in Corona. Their children, a daughter and a son, Abraham, also lived in the apartment.

While they were in Corona, defendant worked during the day, and R. worked the graveyard shift. One night, when Doe 2 was 13 years old, she was asleep in one of the bedrooms alone, and defendant came in the room. He first kissed her on the face and then moved to her mouth. He pulled down her pants and licked her vagina. Doe 2 did

² Doe 1, Doe 2, and their brother all had the same mother but had different fathers.

not resist and did not know what to do. She told no one because she was afraid that she and her siblings would be kicked out of the apartment.

Defendant continued to lick her vagina and kiss her at least twice a week while they lived in Corona. He also would suck on her breasts. When she was 14 years old, she lost her virginity to him. Doe 2 was asleep on the couch, and he put his penis in her vagina. Defendant told Doe 2 that having sex with her made him feel young. Doe 2 did not resist or tell anyone because she was trying to protect her siblings so he would not do the same thing to them.

They moved to Lake Elsinore when Doe 2 was 16 years old. Defendant continued to work during the day, and R. worked the graveyard shift. Defendant would wake Doe 2 up in the middle of the night and take her into his bedroom. He continued to have sexual intercourse with her.

Defendant started using condoms because he was afraid that Doe 2 would get pregnant. When Doe 2 was a month late on her period one time, he talked to her about what an abortion would be like. Defendant had digitally penetrated her vagina. They had sexual intercourse several times a week while in the home in Lake Elsinore.

Doe 2 and the family lived in the house in Lake Elsinore until 2003. They moved to Wildomar into a mobile home when Doe 2 was 17 years old and had graduated from high school. Defendant continued to touch Doe 2 and have sex with her. In 2006, they moved back to Lake Elsinore, into a different house, and he no longer touched her.

Doe 2 was hospitalized when she was 24 years old because she was mentally unstable. She broke down and told R. what had happened. R. assured Doe 2 that she would take care of it. The next morning, R. inquired who knew about her and defendant. Doe 2 told her no one knew about the abuse. R. kicked her out of the house. Doe 2 stayed with a friend until she was found by child protective services (CPS).

In October 2007, while she was attending college, Doe 2 made a report to police that a man had tried to abduct her at knifepoint, but she later retracted the story. She claimed that she only retracted the statement because she felt the police did not believe her because of her mental problems.

B. *Doe 1's Testimony*

Doe 1 was born in 1990. At the time of trial, she was 20 years old. She was five or six years old when they moved in with R. and defendant in Corona. Defendant did not touch her when they lived in Corona.

Doe 1 was in the fourth grade when they moved to the Lake Elsinore house. They lived in Lake Elsinore until she was in the eighth grade. Doe 1 did not recall when defendant first started touching her, but it was in the Lake Elsinore house and closer to when she was in fourth grade. She estimated that she was nine or 10 years old.

Defendant started giving her back rubs. He then moved on to touching her vagina and rubbing her bare breasts with his hand. Defendant would rub his hand on her vagina. He put his finger inside her vagina. She never screamed or ran out of the room because she was confused and scared. Defendant put his mouth and tongue on her vagina.

Defendant continued to touch her until she was in the eighth grade. He stopped touching her in the seventh grade for several months, but then started again. This happened once or twice a week when she was in fourth and fifth grade. She recalled one instance (which she believed was when she was in fifth grade and was 10 years old) where she went into his room to ask for help on her homework and he closed the door. He put a chair in front of the door. He then told her to take her clothes off, and he put his mouth and tongue on her vagina.

She estimated that between fourth and eighth grade he put his mouth on her vagina more than 10 times. When they moved to Wildomar, defendant only touched her with his hands. When they moved to Lake Elsinore the second time, the touching stopped.

In 2006, she recalled that Doe 2 told her that defendant was molesting her. Doe 2 asked her if defendant had also molested her, and she had responded that he had. However, she provided no details. The following day, Doe 2 was kicked out of the house.

In 2005, Doe 1 stole an expensive purse from another girl at school. As a result, she met with a police officer and a probation officer but never said anything about defendant molesting her. Doe 1 did not tell anyone because she was afraid that no one would believe her and that she would be taken away from her siblings.

After Doe 2 told her about what had happened, she was called by her probation officer, who had found out about Doe 2's claims. Doe 1 admitted to the probation officer that defendant had touched her. She did not go into detail because R. took the phone.

Thereafter, she was taken out of the home by CPS and placed in a foster home. She finally disclosed the details of abuse in August 2006.

C. *Investigation and Pretrial Interviews of Does 1 and 2*

Aracely Marks was a probation officer employed by the Riverside County Probation Department. Marks was assigned Doe 1's case after she was arrested for theft of the purse from school. Doe 1 did not initially disclose any sexual abuse. However, during a phone call between Marks and Doe 1, Marks asked her if she was okay and she whispered, "No." When Marks asked her if she felt safe in the home, she whispered, "No," and acknowledged that R. was listening. When Marks asked her if defendant was hurting her, Doe 1 whispered, "Yes."

In August 2006, Riverside County Sheriff's Department Investigator Michael Callahan was assigned to the case. In September 2006, he set up an interview of Doe 1 by the Riverside Child Assessment Team (RCAT). Doe 1 appeared nervous and uncomfortable during the interview. In the interview, Doe 1 disclosed sexual abuse at the hands of defendant. She also disclosed that Doe 2 might also have been a victim.

Investigator Callahan set up pretext phone calls between defendant and Doe 2 in order to try to get him to disclose the abuse. Defendant did not want to discuss Doe 2's allegations of abuse over the phone and wanted to meet with her in person. Defendant never indicated that he was confused or upset over the allegations and said at one point that it was a difficult situation.

Investigator Callahan observed an interview of defendant that occurred prior to a taped interview, which will be discussed, *post*. At the end of this observed interview, defendant admitted that he had had sexual intercourse with Doe 2 from the time she was 17 and a half years old until she was 20. He also admitted touching Doe 1's vagina with his hands on five different occasions when she was 11 years old.

D. *Child Sexual Abuse Accommodation Syndrome Testimony*

Dr. Jody Ward was a clinical and forensic psychologist. She explained that child sexual abuse accommodation syndrome (CSAAS) is a pattern of behaviors that many children exhibit once they have been sexually abused. CSAAS consists of five components. The first is secrecy, which is that most abuse is committed in secret and that the victim keeps the abuse secret. A victim is much more likely to keep the secret if the person is a close family member.

The second component is helplessness, which refers to the difference in power between the adult and the child. Children do not have the ability to take care of themselves and have no alternative but to stay with their abuser. The third component is entrapment and accommodation. Once a child does not disclose the abuse, the abuser realizes he or she can continue to commit the abuse. The child learns to accommodate to the abuse. A child may start to have psychological problems, including being depressed, acting out, and using drugs and alcohol.

The fourth component is delayed disclosure syndrome. Research shows that two-thirds of all children who are abused do not report the abuse until they are adults.

Further, when a victim of child abuse finally reports the abuse, the victim tends to only disclose a few details at first. Disclosure is usually prompted by an event or crisis.

The final component is retraction, which refers to a child backing away from the story due to the consequences, including being removed from his or her family.

Helplessness and secrecy are always present in a victim of sexual abuse, but the other factors do not necessarily show up.

In answering several hypothetical questions, Dr. Ward averred it was consistent with CSAAS that two victims who lived in the same house would not report the abuse. It was part of the accommodation and entrapment component that one person in the home would take the brunt of the sexual abuse thinking he or she was protecting other members of the family. Being hospitalized for mental problems was an event or situation that would trigger disclosure. Refusing to call the police was consistent with CSAAS.

E. *Defendant's Interview*

Investigator Callahan interviewed defendant in 2006, and the video was played for the jury.³ Defendant admitted he gave full body massages to Doe 1 when she was 10 and 11 years old. He denied they were sexual but insisted they were healing massages to help with sickness and for relaxation. These massages occurred when they were living in Lake Elsinore. He claimed that Doe 1 wanted the massages. During the massages, he

³ The trial court did not admit the accompanying transcript as an exhibit and stated to the jury that it was not the evidence in the case. However, for purposes of this appeal, both parties have relied upon the transcript, and neither has objected to its accuracy. We therefore consider it an accurate representation of the statements made by defendant during the police interview.

may have accidentally touched her vagina. She was naked during some of the massages. He claimed he gave her the massages with the door open, and anyone could have seen. He also touched her breasts. He did not touch her when she was 12 years of age or older. He denied ever putting his mouth on her vagina or putting his fingers in her vagina.

Defendant initially stated that he never had sex with Doe 2. He later admitted that he had sexual intercourse with Doe 2 when she was 18 years old. Doe 2 wanted to have sex with him. He used a condom. He had started massaging her when she 17 years old. He eventually admitted that he touched her when she was almost 18 years old -- he rubbed her vagina somewhere between 10 and 20 times, kissed her, and touched his mouth to her vagina -- but did not have sex with her until she was 18 years old. He got an erection when he touched her, and he claimed that Doe 2 liked when he would do it. He stopped touching Doe 2 and having sex with her when she was 20 years old.

Defendant presented no evidence at trial.

III

IMPEACHMENT EVIDENCE

Defendant contends that the trial court erred by excluding a statement made by Doe 1 during a prior proceeding involving his son, Abraham, in which she stated that no one else had touched her besides Abraham despite the fact that the interview took place after she testified at trial that the molestations had been committed by defendant.

A. *Additional Factual Background*

Prior to trial, the People filed a motion in limine seeking to exclude any evidence that Doe 1 and Doe 2 had been molested by other men, as it was not relevant evidence. The People also argued the evidence should be excluded under Evidence Code section 352, because it would result in an undue consumption of time.

The People proffered that in 2005 Doe 1 had disclosed to police that she had been molested by defendant's son, Abraham. Abraham had been convicted of sexual abuse. The People argued that allowing in evidence of the abuse by Abraham would require presenting additional witnesses and evidence. There was no evidence that these other allegations were made up. Defendant argued the evidence was highly probative. It went to the credibility of Does 1 and 2.

The trial court felt that whether or not Does 1 and 2 made these accusations against others was irrelevant. If defendant had evidence that Does 1 and 2 made false allegations, the trial court would consider the evidence at an Evidence Code section 402 hearing. However, if there were other accusations that were true, that evidence would be irrelevant. As to the true accusations, the trial court ruled, "So I would deny that unless the defense has something of false allegations."

Prior to cross-examination of Doe 1 by defendant's counsel, counsel stated to the trial court that Doe 1 had been subject to a RCAT interview on October 17, 2005, regarding the allegations against Abraham. During the interview, she was asked, "[D]id anything like this ever happen to you with anyone else?" She responded, "No."

Defendant's counsel sought to introduce the statement as an inconsistent statement for impeachment because this statement was made after the abuse by defendant.

The trial court outlined what could be asked of Doe 1. First, she could be asked if she ever denied that this happened with defendant. If she answered yes, then there could be no further inquiry. If she answered no, she could be asked to read the transcript of the interview to refresh her recollection. She then could say that she had previously denied it, but no other details of the circumstances that brought up such a denial could be pursued.

The People objected because she was asked about "anyone else" and not specifically defendant; it was not inconsistent. The trial court limited the testimony to yes or no answers by Doe 1.

In front of the jury, Doe 1 was asked to read the transcript, and she stated it refreshed her recollection. She was asked, "Okay. So you have denied that he's ever touched you before; correct?" Defendant's counsel was instructed to rephrase the question after the People objected that it misstated the question. Defendant's counsel then asked, "After you've taken a look at this, what would be the answer to that question . . . ?" She responded, "I didn't actually deny he didn't touch me." Defendant's counsel followed up by asking, "That's what you say here; correct?" Doe 1 responded, "Well, not him specifically."

On redirect, the People asked her about the “little excerpts that defense counsel showed” her and asked, “That question had no reference to the defendant Hector Martinez, did it?” She responded no.

On recross-examination, the following exchange occurred:

“[DEFENSE COUNSEL]: Remember when I asked you[,] . . . did you ever deny that [defendant] ever touched you?”

[DOE 1]: Yes.

[DEFENSE COUNSEL]: The transcript I gave you shows that you did; correct?”

The People objected on the grounds that it called for a legal conclusion and was speculation. The trial court added that it was argumentative. Defense counsel withdrew the question.

B. *Analysis*

Evidence Code section 770 provides, “Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action.” Evidence Code section 1235 provides that “[e]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with [Evidence Code] Section 770.”

“The ‘fundamental requirement’ of [Evidence Code] section 1235 is that the statement in fact be inconsistent with the witness’s trial testimony. [Citation.] Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness’s prior statement describing the event. [Citation.] However, courts do not apply this rule mechanically. ‘Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness’ prior statement [citation], and the same principle governs the case of the forgetful witness.’ [Citation.] When a witness’s claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.]” (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219, italics omitted.)

Here, the trial court could consider Doe 1’s statements to be inconsistent with her trial testimony. Although she did not specifically mention defendant, it was clear that she was claiming at trial that defendant had molested her prior to the time she gave the Abraham interview. Although the substance of the Abraham interview is not before this court, it is clear it pertained to sexual touching by anyone other than Abraham.

Nonetheless, evidence that is admissible may be excluded under Evidence Code section 352 if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or of misleading the jury. “[T]he trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.]” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) We review Evidence Code section 352 rulings under an abuse of discretion standard.

(*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314-1315; see also *People v. Geier* (2007) 41 Cal.4th 555, 586 [“[t]he trial court’s evidentiary rulings are reviewed for abuse of discretion”].) “We will not overturn or disturb a trial court’s exercise of its discretion under section 352 in the absence of manifest abuse, upon a finding that its decision was palpably arbitrary, capricious and patently absurd.” (*Jennings*, at p. 1314.)

Here, the trial court had already decided that any reference to Abraham molesting Doe 1 would be excluded from trial. Defendant does not dispute that ruling on appeal. Having so excluded the evidence, the trial court had the discretion to limit the use of her statement during the Abraham interview in the instant case. Defendant was given considerable leeway in attempting to advise the jury that Doe 1 had previously denied that anyone had touched her. The trial court properly exercised its discretion in limiting the impeachment evidence.

Defendant criticizes the trial court for restricting his questioning of Doe 1. He claims he should have been able to inquire and ask the question, “Did you tell police in 2005 that no one other than Abraham had sexually molested you?” He claims, “The entire point of using an inconsistent statement of a witness for impeachment is that, if the witness denies making the statement, the party impeaching the witness can then offer the statement in evidence.” However, as noted, the trial court had already denied the admission of any evidence pertaining to allegations against Abraham, and defendant does not attack that ruling. Clearly, the trial court was within its discretion to restrict the

impeachment of Doe 1 so that the jury would not be aware of the accusations involving Abraham.

Defendant contends that the exclusion of the statement violated his federal constitutional right to confront witnesses against him, as well as his right to a fair trial and to present all relevant evidence of significant probative value to his defense.

“[N]ot every restriction on a defendant’s desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] California law is in accord. [Citation.] Thus, unless the defendant can show that the prohibited cross-examination would have produced ‘a significantly different impression of [the witnesses’] credibility’ [citation], the trial court’s exercise of its discretion in this regard does not violate the Sixth Amendment. [Citation.]” (*People v. Frye* (1998) 18 Cal.4th 894, 946, disapproved of on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Here, excluding the statement itself did not violate defendant’s Sixth Amendment rights as it did not significantly impact Doe 1’s credibility. Doe 1 had been molested by defendant since fourth grade and never told anyone until she was arrested for stealing a purse and her sister had disclosed similar abuse. She clearly was reluctant to tell anyone what was happening in her home and admitted as much. The jury was well aware that

Doe 1 delayed telling anyone that she had been abused by defendant and that this delay should be considered in deciding if she was telling the truth.

Further, defendant was able to use the evidence of impeachment that was admitted to attack Doe 1's credibility during argument. During closing argument, defendant's counsel stated, "Now, let's talk about one of the things that ([Doe] 1) said on cross-examination. That a year before she makes the allegation to her probation officer, she denied that he touched her. That was her position in 2005. Didn't happen." He continued that she had to make up the story in 2006 when she is caught stealing the purse. Later, defense counsel stated, "And back in 2005 she says never happened." The People objected that this misstated the testimony, but the trial court stated, "The jury are to determine what the testimony was." In response, the People stated that she never denied that defendant did anything to her and that they did not have any further information.

Based on the foregoing, defendant was not completely foreclosed from impeaching Doe 1's credibility regarding her prior denial of abuse at the hands of defendant. There was no federal Constitutional violation of his right to present a defense or confront witnesses.

Even if we were to consider that the trial court erred by excluding the statement made by Doe 1 in her interview, such error was harmless. "Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson*^[4] test: The reviewing court must ask whether it is reasonably probable the verdict would

⁴ *People v. Watson* (1956) 46 Cal.2d 818, 836.

been more favorable to the defendant absent the error. [Citations.]” (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Defendant claims that he is entitled to the more stringent beyond-a-reasonable-doubt standard of review under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. However, as set forth, *ante*, there was no constitutional violation.

The evidence was overwhelming that defendant molested Doe 1. Defendant admitted that he gave massages to Doe 1 when she was 10 and 11 years old. He admitted that he may have touched her vagina during these incidents. He had admitted in an untaped interview that he had touched Doe 1’s vagina with his hands. His admissions coincided with the testimony given by Doe 1 that the touching had started as massages but escalated to his putting his finger inside her vagina, licking her vagina, and rubbing her breasts during this same time period.

In addition, there was strong corroborating evidence. Doe 2 described that defendant had also molested her. Defendant admitted having sexual intercourse with Doe 2. Further, Doe 1 exhibited many of the signs of CSAAS. Also, although she may have been willing to advise the police that Abraham was touching her, she would reasonably be more reluctant to accuse defendant of the molestations because she relied upon him for food and shelter. As such, the evidence was overwhelming that defendant had touched Doe 1 inappropriately, and her previous denials did not impact this evidence.

Based on the foregoing, even had the trial court allowed defendant to fully impeach Doe 1 with the statement she made in the interview regarding Abraham, the

results of the proceeding would not be different. Overwhelming evidence showed that defendant had committed lewd and lascivious acts against Doe 1 on at least 11 occasions with the requisite intent.

IV

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.