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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.

JAIME ROSA CRUZ,

Defendant and Appellant.

E054478

(Super.Ct.No. RIF131575)

OPINION

APPEAL from the Superior Court of Riverside County. Elisabeth Sichel, Judge.

Affirmed.

Robert E. Boyce, 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 Lilia E. Garcia and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

A. and D. were repeatedly molested while they were staying with their grandmother (Grandmother). Both A. and D. identified defendant as a perpetrator of the

molestations and testified that he showed them pornographic movies. Defendant was convicted of exhibiting pornography to A. and D., two forcible lewd and lascivious acts upon a minor, two forcible oral copulation charges, and a multiple-victim of sexual assault enhancement.

Defendant claims on appeal that his rights to due process and a fair trial under the federal Constitution were violated by the trial court allowing the prosecutor to question him about a restraining order that had been granted by another court based on accusations of his ex-wife that he threatened acts of violence against her.

I

PROCEDURAL BACKGROUND

Defendant was found guilty by a Riverside County Superior Court jury of two counts of forcible oral copulation on a child under the age of 14 (Pen. Code, § 269, subd. (a)(4))¹; two counts of committing a lewd and lascivious act on a child under the age of 14 by the use of force or fear (§ 288, subd. (b)(1)); and two counts of exhibiting pornography to a minor (§ 288.2, subd. (a)). The jury also found true the special allegation that defendant committed an offense against more than one victim (§ 667.61,

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

subd. (e)(5)). Defendant received a determinate sentence of 3 years 8 months, plus an indeterminate sentence of 60 years to life in state prison.²

II

FACTUAL BACKGROUND

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

D. was born in September 1995 and was 15 years old at the time of trial. A. was 13 years old at the time of trial. They were sisters. D. lived with her mother, Jamie, until she was eight years old (2004) and then was placed in foster care.

1. *D.'s testimony*

D. was taken from Jamie because D. was left to care for her younger siblings for days at a time when she was only seven years old. D. and A. were eventually adopted by a woman named Michelle, who also had a daughter, P. When A. was five years old, she lived with Grandmother in a room that Grandmother rented in a house located in Riverside. D. visited Grandmother and A. at that house. Defendant was one of Grandmother's friends or her boyfriend.

Grandmother and defendant did "nasty stuff" to D. and A. When D. was eight years old, Grandmother told D. to touch defendant's penis while defendant was naked.

² Grandmother was charged with Defendant. She pleaded guilty to one count of a lewd act with a minor under the age of 14 prior to trial. She received a sentence of 16 years in state prison.

D. felt that she had to do it because she was little. She recalled touching his penis for five minutes.

D. also indicated that, around the same time, Grandmother would put “stuff on [Grandmother’s] boobs” and make D. lick it off. A. was also in the room. D. had to do this three or four times.

Grandmother made D. and A. shower with her. Grandmother would touch their chests and vaginas. Grandmother and defendant also made D. and A. watch “nasty” movies showing people naked; D. believed they were pornographic movies where people had sex. Grandmother had a back massager that she would turn on and place on the vaginas of D. and A. She would hold it there for several minutes while defendant watched.

While the pornographic movies were playing, defendant would take off his clothes. Grandmother made D. and A. sit on defendant’s lap. Nothing happened while they sat on his lap.

D. observed Grandmother take off her clothes and make A. touch her vagina. A. was only five years old. Before D. would leave for school, Grandmother would put her fingers inside D.’s vagina for five or 10 minutes.

When D. was eight years old, on three or four occasions, defendant tried to stick his penis in her vagina. He tried to force it, but he could not get it inside her. It hurt her. Defendant put his tongue on her vagina. Grandmother was present and watched. A. was also in the room. D. complied because defendant was older and bigger than she.

At some point after Michelle adopted D., P. took D. to a restaurant. D. saw someone whom she identified as defendant and started to cry. She was afraid he was going to do something to her. D. did not immediately tell P. what defendant had done to her in the past. Up until this time, she had told no one what defendant and Grandmother had done to her. D. finally told P. what they had done to her, and P. told Michelle.

When D. was taken away from her mother in 2004, she never told anyone what was happening with Grandmother and defendant because she was embarrassed. D. had seen Grandmother smoke some kind of drug between 2003 and 2004; she never saw defendant smoke drugs. Prior to defendant living with Grandmother, and after he left, Grandmother never touched D.³

2. *A.'s testimony*

While A. was living with Grandmother, defendant touched her on her vagina with his hands. He did it “[a]ll the time.” He touched her inside and outside her vagina. He also would lick her vagina. A. would have her clothes off. He licked her vagina “a lot.”

³ D. and A. were interviewed prior to trial, and the interviews were taped. The interviews were played for the jury. Although the jury was given transcripts to guide them during the playing of the interviews, and those transcripts are included in the clerk’s transcript, the trial court, upon defendant’s objection, excluded the transcripts from evidence. The trial court noted that there were inaccuracies in the transcripts. Neither party on appeal has requested that the exhibits containing CD’s of the interviews be transferred to this court or that we review them. We consider the transcripts of the interviews contained in the clerk’s transcript to be inaccurate and will not consider them in resolving this case.

Defendant also would put his penis against her vagina. He did not put it inside her. He would also touch her “all over.” He did this many times.

Defendant forced A. to watch “porn.” While they were watching these movies, he would put his hand on her vagina. He would also lick her vagina.

Most of the time, Grandmother was in the room when these things happened. Grandmother would just sit and watch or “join him.” Grandmother would touch A.’s vagina. Grandmother also licked A.’s vagina. They would take turns. Grandmother sometimes did these things when defendant was not there.

A. had observed defendant touch D.’s vagina with his hand. On occasion, Grandmother would touch A. at the same time defendant was touching D.

A. indicated that defendant would use a vibrator on D., which she described as a thing that “a girl sticks up her” and looks like a penis. He would stick it in D.’s vagina and move it around. A. saw Grandmother touch D.’s vagina with her hands.

Sometimes A. would refuse to allow defendant to take off her underwear, and he would either stop or keep trying. He was able to touch A. even though she said no.

Grandmother made A. lick Grandmother’s vagina. She almost threw up. Grandmother also made A. put her hand inside Grandmother’s vagina, and she thought it was “gross.”

Defendant also touched A.’s vagina with the vibrator. It was not true when she told an interviewer prior to trial that he never touched anyone with it. Defendant had masturbated and ejaculated in front of her.

A. was interviewed when she was sent to foster care in 2004 and did not disclose the abuse. A. did not recall telling an interviewer prior to trial that defendant had a tattoo with cursive writing on his chest. A. recalled Grandmother had a cursive-writing tattoo on her chest. A. had seen Grandmother and defendant having sex.

3. *Grandmother's testimony*

During Grandmother's testimony, the jury was informed that she had been charged with defendant in this case, that she pleaded guilty to a lewd act upon a minor under the age of 14, and that she was serving 16 years in prison. Grandmother had custody of A. from 1999 until 2006. D. came to her home off and on in 2003 and 2004.

Grandmother met defendant in 2003. Defendant stayed with her while she lived in Riverside. They had a sexual relationship. Defendant stayed with Grandmother at least three times per week until the girls were taken away from her in 2004.

Defendant licked A.'s vagina in front of Grandmother. Grandmother claimed she was in the room, and defendant threatened her if she said anything. D. was also in the room. Defendant took off A.'s pants. Grandmother told him to stop, but he refused.

Grandmother had seen defendant cut up, and he said he had "busted out" the window on his brother's van. She had also witnessed defendant fight with his brother, and defendant had bit him. Grandmother was afraid of the violence. Defendant never touched her, but he verbally threatened her.⁴

⁴ The jury was admonished regarding these prior incidents of violence by defendant that they were only admitted to show that Grandmother was afraid of him.

In January 2004, defendant licked D.'s vagina. Defendant had taken off her pants and underwear. He did this on several occasions and would on occasion not have any clothes on. Grandmother recalled that he licked A.'s vagina two times; he did this to D. two or three times. Grandmother had seen defendant touch D.'s chest as she started to develop.

Grandmother admitted that she touched D. and A. on their vaginas and that it was sexually exciting to do it. She touched them in front of defendant. He would masturbate while she touched them. Prior to her relationship with defendant, she had not touched them.

Grandmother admitted that she and defendant watched pornography and watched it in front of D. and A. on one occasion. She admitted that they had sex in the room but that D. and A. were asleep.

Grandmother had a vibrator and a back massager. The vibrator was white. There was a black light in the bedroom which could have caused it to glow. D. and A. had seen the vibrator when Grandmother used it on herself. They were only six and eight years old, but Grandmother found it exciting to show them how it worked. She denied she had A. put her hand in her vagina.

Grandmother initially told the police that she did not see anything sexual between defendant and the girls, and she denied touching them. Grandmother had D.'s and A.'s names tattooed on her chest in cursive writing. She denied that avoiding a 46-year-to-life sentence was the reason she was testifying.

4. *Other testimony*

P. was 18 years old at the time of trial. D. and A. started living with P. and Michelle in 2006. P. was with D. at a restaurant when they saw defendant. D. started crying hysterically and just told P. that he was really mean. Defendant had long hair pulled back in a ponytail. A few weeks later, D. told P. more about why she was scared of defendant. A. also talked to her. A. talked the most at first, but then D. told her more things later.

Riverside Police Detective Roberta Hopewell interviewed Grandmother in May 2006. She did not initially admit any sexual molestation of A. and D. In April 2011, she was interviewed again. By the end of the second interview, she admitted that she and defendant had molested D. and A.

B. *Defense*

Carmen Mendoza was defendant's sister. Mendoza considered Grandmother to be "trash" and a drug addict. Mendoza had seen defendant around children, including her nieces and nephews. She had never seen him act strange or do anything sexual with children. Mendoza had observed that defendant had a drug problem in 2004, but he started treatment in 2005. Defendant had a reputation for being honest.

Leonardo Govea-Cruz was defendant's nephew. Govea-Cruz spent a lot of time with defendant when he was growing up. Defendant helped him with his homework. Defendant never showed him any pornographic material. He also stated that defendant had a reputation for being honest. He was also aware that defendant had a drug problem.

Luis Alberto Ayala was defendant's brother. At one time, he was in a relationship with Jamie, the mother of D. and A. In 2003, he had argued with Jamie and defendant when he found them at a hotel and had broken the windshield on defendant's car. A month later he and defendant got into a fistfight. They bit each other.

Ayala met Grandmother through Jamie. In 2004, when she lived in Riverside, Ayala bought methamphetamine from her. Ayala went with defendant to Grandmother's house to either buy drugs or get high. In 2005, Ayala had sex with Grandmother.

Defendant testified on his own behalf. Defendant met Grandmother at the end of April 2004 because he bought drugs from her. Defendant returned several times to buy more drugs. He claimed he was selling them for a profit. Defendant only bought drugs from Grandmother; he never had sexual relations with her. At some point, defendant started selling drugs to Grandmother because she lost her supplier. Defendant and Grandmother got in a fight over payment.

Defendant had seen A. and D. at the house. He was friendly with them. Defendant had been married to a woman named Chelsea, from whom he separated in 2003. She had obtained a restraining order against him for threats of violence he made against her.

In 2006, when he was at the restaurant where D. saw him, he had a shaved head. Defendant denied ever having a cursive-writing tattoo on his chest, and he showed his chest to the jury. Defendant denied any sexual relationship with A. or D. He never watched pornographic movies with the girls or with Grandmother.

The parties stipulated that Michelle stated prior to trial to investigating officers and to the prosecutor that A. had told her that other men came to the house and had sex with Grandmother. They also would touch A. D. said that no one else touched her. D. also told Michelle that she shaved her pubic hair because defendant told her to. He wanted to lick her on her vagina and did not want her to have any hair.

III

GRANT OF RESTRAINING ORDER

Defendant contends that the trial court erred by allowing the prosecutor to question him whether a restraining order that was filed by Chelsea, his ex-wife, was granted. Although he concedes that the details of the restraining order were admissible, he claims that the judgment granting the restraining order by another judge was improperly admitted evidence. As a result, he was denied his fundamental right to a fair trial under the federal Constitution.

A. Additional Factual Background

During Ayala's testimony, he was asked on direct examination by defense counsel if he had ever seen defendant yell at Grandmother and if he ever saw defendant yell at Chelsea. He responded no to both questions. Ayala also said he had never seen him be violent or physical toward any woman.

At the break, defendant's counsel informed the trial court that he had just received a copy of the restraining order that had been issued in defendant's divorce proceedings.

He anticipated that the People would be asking Ayala if he was aware of the document. The restraining order was granted in July 2003.

The prosecutor stated that she intended to ask Ayala if he was aware of the circumstances surrounding a restraining order. According to the restraining order, defendant had threatened to “beat the hell” out of Chelsea. The restraining order also stated that defendant had pushed her down on a couch and hit her with his hands.

The trial court noted that since the defense had proffered evidence regarding any propensity for violence on defendant’s part, the fact that a restraining order was issued was relevant to test the witnesses’ knowledge of defendant. The trial court would allow the People to ask Ayala if he was aware of a restraining order that had been issued for domestic violence against defendant. The trial court did not think any further testimony was appropriate, “[b]ecause I don’t see that issue as being terribly relevant to the issues at hand.”

The People further argued that if defendant testified, it would be relevant to the force issue. It showed defendant’s character as a violent individual. The People additionally argued that by offering three witnesses as to defendant’s character, he had put his character in issue. The trial court then stated that the evidence was relevant under Evidence Code section 1102. Once the good character of defendant was introduced, the People could rebut the evidence.

Defendant’s counsel conceded the accusations were admissible but was concerned about showing the document that was written by a third party for which there was no

foundation. Defense counsel stated, “Whether some magistrate somewhere found a probable cause to issue an injunction is not . . . judicial notice that this was true.” The People argued that they could ask defendant specific questions about what was said in the restraining order. The prosecutor stated, “And I don’t think that I can then admit the document as proof that it somehow did.” The trial court then ruled, “Okay. So you may ask him questions based on the allegations, and you can ask him if the order was issued.”

Ayala testified that he had no knowledge that Chelsea obtained a restraining order against defendant.

Defendant stated during cross-examination that he and Chelsea had separated in July 2003. When they separated, Chelsea filed a restraining order against him. The following exchange occurred:

“[PROSECUTOR]: Okay, she said that on July 4th of 2003, you had told her that you were going to beat the hell out of her if she didn’t change her attitude?”

[DEFENDANT]: That’s what she said.

[PROSECUTOR] Okay. Did she also say that you had told her that if she tried to leave that your drug dealer was going to retaliate against her because she was your wife and the drug dealer was jealous?

[DEFENDANT]: That’s what she wrote.

[PROSECUTOR]: Okay. Now in July of 2003, you hadn’t started using drugs yet; right?

[DEFENDANT]: No.

[PROSECUTOR]: And you hadn't started selling drugs yet?

[DEFENDANT]: No.

[PROSECUTOR]: So you didn't have a drug dealer?

[DEFENDANT]: No.

[PROSECUTOR]: You certainly didn't have a jealous female drug dealer?

[DEFENDANT]: No.

[PROSECUTOR]: But that's what she said?

[DEFENDANT]: That's what she implied because my brother was hanging around.

[PROSECUTOR]: Okay. It's not what she implied. She said really specifically, 'He also told me if I tried to leave, that his drug dealer was going to retaliate against me because I was his wife, and she was jealous.'

[DEFENDANT]: That's what she said.

[PROSECUTOR]: So it wasn't implied. It was pretty darn specific.

[DEFENDANT]: Yes. But - -

[PROSECUTOR]: Okay. Now, did she also allege that you were going to take her to a motel and tie her up, and you were going to bring the drug dealer there to hurt her?

[DEFENDANT]: That's what she said.

[PROSECUTOR]: In addition to that, did she allege that on July 7th of 2003 that you had threatened her life and the lives of her children?

[DEFENDANT]: That's what she said.

[PROSECUTOR]: And did she say that a week prior to that in June of 2003 you had held her down on the couch and hit her several times in the head with your hands and a pillow from the sofa?

[DEFENDANT]: That's what she says.

[PROSECUTOR]: And did she talk about the reason why she wanted this restraining order in addition to all that was all the drug use in the home?

[DEFENDANT]: That's what she says.

[PROSECUTOR]: Okay. Now, much like the allegations in this case, none of that is true?

[DEFENDANT]: No.

[PROSECUTOR]: Was that restraining order granted against you?

[DEFENDANT]: Yes, it was."

Defense counsel's objection was overruled.

On redirect, defendant denied that any of the accusations were true. Based on the declarations, Chelsea was able to gain custody of their children. He never beat her up. After Chelsea received custody of the children, she dropped the litigation. They reconciled until he was arrested in this case.

B. *Allowing Questioning of Defendant on the Restraining Order*

“The rules pertaining to the admissibility of . . . evidence are well-settled. Only relevant evidence is admissible [citations], and all relevant evidence is admissible unless

excluded under the federal or California Constitution or by statute. [Citations.] Relevant evidence is defined in Evidence Code section 210 as evidence “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” The test of relevance is whether the evidence tends “‘logically, naturally, and by reasonable inference’ to establish material facts such as identity, intent, or motive. [Citations.]” [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence. [Citations.]’ [Citation.]” (*People v. Heard* (2003) 31 Cal.4th 946, 972-973; see also Evid.Code, §§ 350, 351.) “‘As with all relevant evidence, . . . the trial court retains discretion to admit or exclude evidence offered for impeachment.’” (*People v. Brown* (2003) 31 Cal.4th 518, 534.)

“Broadly speaking, an appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion.” (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.)

Defendant relies exclusively upon *People v. Beevers* (1893) 99 Cal. 286 and *People v. Barker* (1938) 29 Cal.App.2d Supp. 766 to support his claim that the People could not ask defendant if the restraining order was granted despite his claims the accusations were not true on the grounds that a judgment in a civil action is not admissible in a criminal proceeding.

In *People v. Beevers, supra*, 99 Cal.286, the defendant was being prosecuted for bigamy. (*Id.* at p. 287.) The trial court allowed in evidence that an action for divorce had

been filed against the defendant, and a default against him was taken. (*Id.* at p. 290.)

The appellate court found that admission reversible error and concluded, “At the time the judgment roll was offered in evidence the case was upon appeal to this court, and it follows necessarily that the findings of fact and other recitals therein contained were inadmissible as evidence upon any question involved in this prosecution. [Citations.] The adjudication of the superior court that these parties were husband and wife, and a decree being entered dissolving the bonds of matrimony, were matters which probably had great weight with the jury. The question as to the marriage was the contested issue, and this evidence pointed directly to that element of the case.” (*Ibid.*)

In *People v. Barker, supra*, 29 Cal.App.Supp. 766, the trial court addressed whether evidence of an award by the Industrial Accident Commission (a predecessor to the Workers Compensation Appeals Board⁵) to an employee against the defendant could be used as conclusive proof or prima facie evidence that the defendant was an employer and criminally liable in another proceeding. (*Id.* at p. 769.) The court found that the action of the commission was a civil action that involved different parties. The court held that “[a] judgment in a civil action is not admissible in a subsequent criminal prosecution, although exactly the same questions are in dispute in both cases, for the reason that the parties are not the same, and different rules as to the weight of the evidence prevail.” (*Id.*

⁵ See *Sampson v. Parking Service 2000 Com, Inc.* (2004) 117 Cal.App.4th 212, 225.

at p. 771.) It found it could not be admitted as either conclusive or prima facie evidence of guilt. (*Id.* at p. 770.)

Defendant did not properly raise the issue he now raises in this court in the trial court. The People sought to admit the specific instances of misconduct committed in order to rebut the character witnesses proffered by defendant and ask whether the restraining order was granted as impeachment of defendant. During discussion of the restraining order, defendant's counsel's stated, "Whether some magistrate somewhere found a probable cause to issue an injunction is not . . . judicial notice that this was true." The People agreed that it could not submit the document, and the trial court found that the People could only ask questions based on the allegations and whether the order was issued. When defendant's counsel objected to the question by the prosecutor regarding the restraining order, there was no reason stated for the objection.

It is undisputed that a defendant must object to evidence on the same grounds raised in the trial court. (*People v. Homick* (2012) 55 Cal.4th 816, 867.) In deciding whether to introduce the evidence of the restraining order, the trial court was not informed of the above cases and the rule that a judgment in a civil action could not be admitted in a criminal prosecution to prove an element of the crime or as prima facie evidence. Although defendant alluded to the fact that the granting of the restraining order did not make the accusations true, he never argued to the trial court that this type of evidence had be excluded on that basis because it was a separate proceeding involving a different burden of proof. The trial court was not given an opportunity to address this

issue and consider whether it was grounds for excluding the evidence. As such, the issue has been waived on appeal.

Moreover, the question to defendant as to whether the restraining order was granted did not go to proving an element of this case or as prima facie evidence of defendant's guilt; it was introduced for impeachment. The same circumstances that occurred in the cases cited by defendant were not present in the instant case. Defendant has provided no further argument or reason for excluding the prosecutor's question to him as to whether the temporary restraining order was granted. As such, we will not consider whether the evidence was admissible as impeachment evidence or under Evidence Code section 1102⁶ to rebut the character evidence proffered by defendant.⁷ Defendant has failed to show how the trial court erred by allowing questioning of him regarding the granting of the restraining order.

C. *Prejudice*

Even if defendant has not waived the issue, and the question and defendant's response should have been excluded, any conceivable error was harmless.

⁶ Evidence Code section 1102 provides as follows: "In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character. [¶] (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)."

⁷ The trial court did not evaluate the evidence under Evidence Code section 352, and defendant advances no argument here that its admission violated that section. Therefore, we will not address the issue.

The erroneous admission of the type of evidence at issue here “does not compel reversal unless a result more favorable to the defendant would have been reasonably probable if such evidence were excluded. [Citations.]” (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018-1019; see also *People v. Watson* (1956) 46 Cal.2d 818, 836.) Defendant contends that the jury’s role as a fact finder was usurped, rendering his trial fundamentally unfair. He 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]. Defendant has failed to establish his trial was fundamentally unfair. We will review the claim under *Watson*.

Defendant contends that if the jury found that he was lying about the incident with his wife, it necessarily concluded that all of his testimony was called into doubt. He refers to CALCRIM No. 226, which instructed the jury, “If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things but told the truth about others, you may simply accept the part that you think is true and ignore the rest.” We do not agree that the jury necessarily disregarded all of his testimony based on the instruction. Based on the language of the instruction, the jury could have considered that he lied about the restraining order but found his testimony about the molestations credible. The instruction does not necessarily lead to the conclusion that jury had to find all of defendant’s testimony untrue if they found he lied about the restraining order.

Moreover, during closing argument, defendant's counsel warned the jury about the impact of the restraining order. He argued, "But this idea that my client, his ex-wife or wife filed for some type of restraining order and the Court admonished. That isn't introduced to prove he really did anything to his ex-wife. It's a limited admissibility. There's a limiting instruction in the jury instruction packet.^[8] Don't be misled by that because it's sort of like unringing a bell. You tell a person you can only consider it for this purpose. Don't consider it for any other purpose. But really what it does is it causes you to say, hey, that guy, [defendant] is a maniac. He threatened to do this to his wife. He threatened to do that. There's no evidence that he did that. That only came in because of his reputation, whether he had a good reputation or not. So be careful with those. Those are loaded. That's like a land mine. It's like a bouncing Betty. That is a type of thing that can sway jurors when it's not what it's admissible for. So I'm asking you to be very careful with that." The prosecutor made no rebuttal argument on this issue. In fact, the prosecutor never mentioned the restraining order in his closing argument.

Further, whether or not the restraining order was granted, the jury still heard evidence that defendant was violent. Grandmother and Ayala testified to acts of violence

⁸ The jury was instructed as follows: "The attorney for the People was allowed to ask defendant's character witnesses if they had heard that the defendant had engaged in certain conduct. These have-you-heard questions and their answers are not evidence that the defendant engaged in any such conduct. You may consider those questions and answers only to evaluate the meaning and importance of the character witness's testimony."

committed by defendant. Even if the trial court had excluded testimony on whether the restraining order was granted, the jury certainly was given an impression of defendant as a violent person. Evidence of the restraining order being granted did not cast him in such a different light as to be prejudicial. The fact the restraining order was granted was not material to the already strong evidence present attacking defendant's credibility.

Finally, the evidence of defendant's guilt was overwhelming. A. and D. separately testified to similar acts committed by Grandmother and defendant. They both clearly identified defendant in court. Their testimony was corroborated by Grandmother. Although she certainly had a motive to testify against defendant, she testified to acts similar to those testified to by A. and D., and there was no indication that Grandmother had influenced either girl. These girls graphically testified to acts that were beyond their years. It was evident they had been molested and the jury could reasonably believe their identification of defendant as the molester.

This was not a case where this occurred on one occasion and where they only briefly saw defendant. A. lived with Grandmother and saw defendant repeatedly. D. visited on several occasions and also saw defendant on several occasions. Moreover, the record reveals absolutely no evidence of a motive possessed by the girls that caused them to falsely accuse defendant.

Defendant points to the contradictory evidence that he had a shaved head when D. saw him at the restaurant (despite P. describing him with long hair), that he did not have a tattoo on his chest (as A. indicated), and that other persons were present in the home who

molested A. This evidence does not undermine the compelling testimony of A. and D. that defendant had molested them. The prosecutor admitted it might not have been defendant at the restaurant, but that the person D. saw resembled him and brought up these horrific acts in D.'s mind. Even if defendant did not have the tattoo described by A., the jury could reasonably conclude that defendant was the perpetrator of these acts based on D.'s testimony, who saw defendant molest A. Based on the foregoing, even if the trial court erred by allowing the People to question defendant whether the restraining order had been granted against him, such error was harmless in this case.

IV

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
Acting P. J.

We concur:

KING
J.

MILLER
J.