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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.

TED JULIUS RICK,

Defendant and Appellant.

E054826

(Super.Ct.No. FBA1000401)

OPINION

APPEAL from the Superior Court of San Bernardino County. Victor R. Stull,
Judge. Affirmed.

Patricia L. Brisbois, 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 Barry Carlton and Sharon L.
Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Ted Julius Rick raped his 11-year old stepdaughter, M., and was convicted of one count of aggravated sexual assault of a child under the age of 14 years. Defendant essentially claims on appeal that his rights to confrontation and a fair trial under the federal Constitution were violated by the trial court refusing to allow him to cross-examine M. regarding previously being molested by her biological father.

I

PROCEDURAL BACKGROUND

Defendant was found guilty by a San Bernardino County Superior Court jury of aggravated sexual assault (rape by force or fear) upon M. when she was a child under 14 years of age and at least 7 years younger than defendant. (Pen. Code, §§ 261, subd. (a)(2); 269, subdivision (a)(1)).¹ Defendant received a total sentence of 15 years to life.

II

FACTUAL BACKGROUND

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

M., born in March 1999, was 12 years old at the time of trial. On June 22, 2010, she was home in Needles with her mother, her sister, a friend, and defendant, who was born on December 20, 1977. M. and the friend fell asleep in the living room. Defendant was watching a movie on the couch in the living room; M.'s sister and her mother were asleep in the bedrooms.

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

M. testified at trial that defendant woke her up to watch the movie with him. They both sat on the couch. During the movie, defendant asked M. for 20 hugs and 20 kisses. She gave him hugs and kisses. Some of the kisses were on the lips. When she kissed him on the lips, he put his tongue in her mouth. M. told him that she did not want him to put his tongue in her mouth.² M. and defendant cuddled on the couch watching the movie.

M. went to the kitchen to get a glass of water and returned to the living room. Defendant asked her to sit on his lap, and she complied.³ Defendant started to move in a different way. She tried to get up off his lap, but he held his arms around her stomach. Defendant slid his hand underneath her nightgown (which was one piece) and touched her breast. M. was facing defendant on his lap straddling him.

Defendant inserted his “private area” into her “private area.” He kept his hands on her hips. Defendant had moved M.’s underwear to get inside her. She described that his “private” was “[a] little” inside her.⁴ M. tried to push defendant away with her hands but was unsuccessful. He said nothing to her. Defendant finally let her go, and she ran to her room. As she ran to her room, he told her not to tell anyone. Defendant left for work the following morning, and M. told her mother what had happened.

² M. later testified that she said nothing and just gave him a “look.”

³ M. admitted she could have gone to her room but chose to stay with defendant.

⁴ M. had no idea how defendant got his penis out of his shorts.

M. was interviewed on June 29, 2010, at the Child Assessment Center. The interviewer noted that children who have been molested commonly will minimize what has happened to them. The interviewer mentioned in the interview that she had talked to M. a year before about her biological father. M. told the interviewer, “[N]ow it’s my stepdad.” She indicated that she was there because her stepfather “screwed up” by molesting her.

M. explained that she and defendant were on the couch watching a movie, and she got on his lap to kiss him good night. She tried to kiss him on his cheek, but he moved and kissed her on the mouth. He put his tongue in her mouth. He then put his hands under her night gown and touched her chest. Defendant unzipped his jean shorts. M. was facing defendant. He put his “private part in [hers].”

M. tried to get away but did not want to scream and wake up her mother. M. tried to push him away, but he held her tight on the waist. M. put her arm against his neck. Defendant told her stop. She listened to him and drew back her arm because she had a “bad habit” of listening to her parents. M. then went back to bed, and defendant took a shower in order to go to work. It hurt when he put his penis in her private area, and she did not like it. M. thought she saw “white stuff” coming out of his penis.⁵ She had seen the same thing when she had talked to the interviewer the year before.

⁵ At trial, M. did not recall actually seeing his penis or anything coming out of it.

A pretext telephone call (which was a way to try to get a suspect to confess or talk about the alleged crime) was set up between defendant and M. M. called defendant at work. She told him that he hurt her “really bad” and that she “didn’t want that.” Defendant asked where she was, and she responded the “library.” He then asked if M.’s mother was there. M. told him that she was not, and he told her he had to close the door at his work. He then told her that he was sorry. He claimed he was confused and said, “I don’t know if you can forgive me or not.” M. told him she could not keep it a secret. He asked if he could tell her mother that night. M. told him that she was going to tell her mother, and he begged her to wait until he got home.

M. then asked defendant, “[W]hat if I’m pregnant?” Defendant responded, “I know. That’s why I’m asking you please let me – let me tell – let me wait till I get home tonight. Please, [M.], . . . I’m begging you.” When M. again told him she was going to tell her mother, he told her he did not know what was going on the prior night, and he swore he would pack his things and leave. He promised that she would never see him again. Defendant kept begging her not to tell her mother until he got home. Defendant told M. that if she told her mother, that the police would come and arrest him. He told her he did not want to ruin her life.

Defendant was arrested that same day. He was briefly interviewed when he was arrested. He was asked if he knew why he was being arrested. He stated, “I have an idea, but if it’s what I think it is, I’m not sure what happened if that’s what it is.” The arresting sheriff’s deputy asked him what he thought it was about. Defendant responded,

“Well, my little girl, my wife’s little girl said something happened last night, and if that’s what happened, I don’t know if it did or not, because I’ve been having trouble blacking out the last couple of days.” Defendant thought it was due to his blood pressure.

Defendant was interviewed again at the sheriff’s station. Defendant stated that he was not going to argue with M. as to what she was saying and said, “[T]hen I did it then.” Defendant knew that M. was 11 years old but thought of her as being 14 or 15 years old because she was mature for her age. He again expressed concern that he had been blacking out and not remembering things.

Defendant first recalled that at 10:30 p.m., M. and her friend came in the living room where he was sleeping. He put on a movie. At either 2:00 or 4:00 a.m., M. gave him a hug and a kiss. She was wearing a nightgown. Defendant did not know what had happened between them and wanted to talk to M. and her mother at home. Defendant was told by the interviewer that his story was “bullshit.”

Defendant was asked if M. should be checked to see if she is pregnant. He responded, “Sir, get her checked. I don’t know. Please God – uh plea – I’m praying. Just if – if I did, get her checked. I don’t know. Okay? I don’t know.”

Defendant finally admitted that M. had been sitting on his lap and was kissing him and that he got aroused. Defendant remembered that he asked her if this was what she wanted and why did she want it. M. responded that she did not know and stopped kissing him. M. rubbed his penis with her leg.

M. straddled him, and defendant put his arms around her. Defendant asked M. about her father and whether he had done this to her; he asked if she did it because it felt good. Defendant told her that they could not do it, because it was wrong. He recalled that she was rubbing against him and that “something happened.” Defendant blurted out, “I’ll be damned. I had sex with her.”

Defendant could not recall if he ejaculated inside M. He did not think that the sex lasted long. He did not know why he had sex with her; it may have been because she came over to him.

B. *Defense*

Defendant briefly testified to identify the clothes that he was wearing the night of the incident.

Jeff Williams was an investigator employed by defendant’s counsel. He interviewed M. on January 13, 2011, at her home with her mother present. M. told him that defendant shook her up while she was lying down in the living room and asked for kisses and hugs. She kissed him five times, and he put his tongue in her mouth. M. claimed to have blacked out and did not remember anything more. She woke up the following morning in her bedroom.⁶

⁶ M. explained during her trial testimony that she said she blacked out because she did not want to talk about what had happened.

Williams interviewed her again on January 28. M. said that she had on pajamas with tops and bottoms.⁷ M. gave defendant 15 kisses on the cheek and then a few on the lips. She thought it was “no big deal” to kiss him on the lips because “mom’s” and “dad’s” always give kisses on the lips. When he put his tongue in her mouth, she tried to push him away. Defendant asked M. if she was trying to get away. Defendant then said to her, “. . . I am sorry, I guess I did a wrong thing.” She then walked away, and either she tripped or defendant grabbed her. He asked her not to go and pulled her down on his lap.

M. indicated that defendant was wearing his work pants. She told Williams that defendant pulled down her underwear and put his “dick” inside her.⁸ After this, defendant just “froze” and looked “drowsy.” She got up and got a drink of water.

III

RESTRICTION ON CROSS-EXAMINATION

Defendant contends that the trial court erred by not allowing him to cross-examine M. on the previous molestation committed by her biological father. He insists his Sixth and Fourteenth Amendment rights under the federal Constitution were violated by the restriction on his cross-examination.

⁷ M. did not recall telling Williams that she was wearing pajamas with a top and bottom.

⁸ M. admitted using the term “dick” despite calling it defendant’s private area at trial.

A. *Additional Factual Background*

The trial court discussed pretrial motions that had been filed in open court after a chambers conference. It stated in general that based on the People's pretrial motion it would preclude the defense from asking about matters under the Rape Shield Law. It stated, "No reason why we should deviate from that. I'll grant that."

The People presented a caveat to the above ruling. They referred to a statement made by defendant during his interview that he asked M. that night if what he was doing was what her biological father had done to her. The People claimed that M. also told law enforcement that defendant said this, which corroborated the testimony. The People stated, "I want that statement in. I don't think that we're violating the Rape Shield Law by alluding or inferring that this child has been a prior victim of a sexual assault. It's only for the purpose of allowing that statement in for the purpose to corroborate one other [sic]." The People also noted that under Evidence Code section 782, defendant could not ask her anything in regards to the specifics of the prior sexual incident in order to attack her credibility.

Defendant's counsel stated that his understanding of the Rape Shield Law was that he could not address other sexual conduct by M. in order "to cast aspersions upon her character and the like." Defendant's counsel, however, noted that from a "psychological point of view" this may be the way that her biological father taught her to deal with male parental figures who are mad at her.

The trial court stated, “On the 782 issue, it requires a motion and an affidavit So I’ll need that.” The trial court later stated, “And also, again, on the issue of the testimony which may be limited under Evidence Code Section 782. If you want to pursue that cross-examination of the victim on the issue of credibility, then I do need a motion. I do need an affidavit.” Defendant’s counsel was given time to file the motion.

Just prior to the trial, the trial court inquired of defendant’s counsel if he was going to file the Evidence Code section 782 motion, as one had not been filed. Defendant’s counsel argued that the People were introducing the evidence by playing the transcript of the interview, which included defendant and the interviewing officer discussing that M. had been abused by her biological father. Although defendant’s counsel had not planned to introduce M.’s sexual history, it was being introduced by the People. It opened the door, and defendant should be able to discuss it. Defendant’s counsel also suggested that the statements not be introduced. Defendant’s counsel argued that he should be able to ask if she was taught to act a certain way because of the abuse. The trial court was not sure how it was relevant and asked the People what they planned to introduce as to the biological father’s molestation.

The People explained that the defendant said during the interview that he asked M. if what he was doing was what she had done with her biological father. M. confirmed that defendant said this to her during the molestation. This corroborated M.’s story. The People argued that Evidence Code section 782 applied to prior acts of sexual conduct to

attack credibility, and the People did not intend to introduce any prior acts. The specific acts could not be introduced because consent was not an issue.

Defendant's counsel referred the trial court to defendant's interview. He argued that if M. was used to initiating sexual conduct when she believed an adult male was upset with her, the jury should be notified of why she acted this way. Defendant's counsel was not seeking to admit the specific acts of molestation.

Just prior to testimony being presented, the People acknowledged that M. had not said anything about her biological father in her interview. The People argued it was still admissible as a statement by defendant within the meaning of Evidence Code section 1220.⁹ It was circumstantial evidence of his intent with M.

The trial court noted Evidence Code section 782 did not appear to apply to the People. Defendant's counsel again argued that the People had opened the door. He also argued that the statement should be redacted and not brought into the case; the probative value of the statement was greatly outweighed by the prejudice.

The People did not understand the prejudice of the statement. They denied that they were seeking to admit any of the prior sexual acts committed on M. that would violate Evidence Code section 782. The trial court found the statements about M. being molested by her biological father admissible and that it was not unduly prejudicial.

⁹ Evidence Code section 1220 provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

During the interview with the defendant that was played for the jury, one of deputies stated, “Nobody wants to hear blackout stor[i]es. . . . I believe that little girl, because . . . I dealt with her last time.” The deputy stated, “And I believed her then,” and defendant responded, “And I believe her too, sir.” Later, one of the deputies asked defendant why he would hurt her, and defendant claimed he did not want to hurt her. The deputy responded, “You did. You’re no better than her dad.” Defendant was asked if M. touched him while he was aroused. The deputy said, “You gotta remember, maybe she’s got a little experience from this previous . . . past experience she’s had. Maybe she’s confused and thinking this is what you want.” One of the deputies again reiterated that M. “has experience” and that maybe she initiated the contact.

B. *Analysis*

“Evidence of the sexual conduct of a complaining witness is admissible in a prosecution for a sex-related offense only under very strict conditions.” (*People v. Fontana* (2010) 49 Cal.4th 351, 362.) This evidence may be admissible when “offered to attack the credibility of the complaining witness” and when presented in accordance with the procedures under Evidence Code section 782. (*Ibid.*) “. . . Evidence Code section 782 provides for a strict procedure that includes a hearing outside of the presence of the jury prior to the admission of evidence of the complaining witness’s sexual conduct. [Citations.] Evidence Code section 782 is designed to protect victims of molestation from ‘embarrassing personal disclosures’ unless the defense is able to show in advance that the victim’s sexual conduct is relevant to the victim’s credibility. [Citation.] If, after

review, ‘the court finds the evidence relevant and not inadmissible pursuant to Evidence Code section 352, it may make an order stating what evidence may be introduced and the nature of the questions permitted.’ [Citation.]” (*People v. Bautista* (2008) 163 Cal.App.4th 762, 782.)

“By narrowly exercising the discretion conferred upon the trial court in this screening process, California courts have not allowed the credibility exception in the rape shield statutes to result in an undermining of the legislative intent to limit public exposure of the victim’s prior sexual history.” (*People v. Chandler* (1997) 56 Cal.App.4th 703, 708.) “Great care must be taken to insure that this exception to the general rule barring evidence of a complaining witness’ prior sexual conduct, i.e., Evidence Code section 1103, subdivision (b)(1), does not impermissibly encroach upon the rule itself and become a ‘back door’ for admitting otherwise inadmissible evidence.” (*People v. Rios* (1984) 161 Cal.App.3d 905, 918-919.)

We review the trial court’s ruling in denying the admission of sexual conduct for an abuse of discretion. (*People v. Chandler, supra*, 56 Cal.App.4th at p. 711.)

Defendant indisputably failed to comply with Evidence Code section 782 in the manner required by law. Although prompted by the trial court to file such a motion so it could consider whether the evidence of the acts constituting the prior molestation could be admitted at trial, defendant failed to do so. Clearly the trial court disagreed with defendant’s argument that Evidence Code section 782 was not applicable and advised defendant to file the motion. The trial court could reasonably conclude that defendant’s

cross-examination would elicit the circumstances of the prior molestation despite defendant's claim that he only sought to ask her if she had been groomed to have sex with male parental figures. Because of defendant's failure to follow the trial court's order, the trial court could exclude any cross-examination on the acts committed against M. by her biological father.

Additionally, defendant's offer of proof was insufficient in order for the trial court to conclude that Evidence Code section 782 did not apply. Evidence Code section 354 provides in pertinent: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by questions asked, an offer of proof, or by any other means"

Here, defendant made little or no offer of proof of how he intended to show that M. initiated the sexual intercourse because her biological father had taught her to deal with male parental figures by having sex with them. Defendant and M. never said as much in their statements. It is just as reasonable to surmise that M.'s biological father forcibly raped or otherwise molested her without her consent as to speculate that she had been groomed to have sexual relations with her parental figure. Defendant could not expect the trial court to allow him to go on a fishing expedition by questioning M. as to whether this was true. The trial court asked defendant to file an Evidence Code section

782 motion so that it could consider the evidence. Because defendant failed to do so, the trial court was not in a position to allow the cross-examination of M. in order for defendant to hope to prove she initiated the sexual intercourse, and the trial court could reasonably be concerned the sex acts would be disclosed.

Defendant contends that he did not have to comply with Evidence Code section 782 because the People opened the door to the evidence being admitted.¹⁰ Defendant claims the “evidence” would be relevant to show how M. learned to behave with the father figures in her life, to show that she initiated the sexual contact, and to negate the element of force. He argues, “Under the circumstances, this showing was more than sufficient to permit cross-examination of [M.] on the topic of the prior molestation by her father.” Again, defendant’s offer of proof was lacking in that he provided nothing to the trial court to support that M. had been groomed to have sex with male parental figures. There simply is no evidence that this was the case and even though the People introduced that she had been previously molested, this did not open the door for defendant to (1) ask her about the specific sex acts unless he complied with Evidence Code section 782 or (2) ask her if this was the way she was taught to deal with men, when there was no offer of proof that this was the circumstance. The trial court properly restricted defendant’s cross-examination.

¹⁰ Defendant does not separately argue on appeal that the trial court erred by allowing the People to introduce the evidence.

Defendant's attempts to show error are to no avail. The People introduced evidence from which it could be inferred M. was subjected to some type of molestation by her biological father. The details of that molestation were not introduced and were not before the jury. Defendant claims he did not seek to introduce the details but rather to question her in order to imply that this was the way she dealt with male parental figures, thereby negating the use of force. However, without an offer of proof from defendant as to what occurred between M. and her biological father, the trial court was not in a position to rule on the issue. Defendant was given an opportunity to give an offer of proof but failed to present one. As such, the trial court, and now this court, is left with no evidence of the sexual molestation or whether M.'s biological father trained her to deal with male parental figures by having sex with them. Mere speculation does not amount to error.

Defendant claims for the first time on appeal that his federal Constitutional rights to present a defense and to confront witnesses was violated by the restriction on his cross-examination of M. Defendant failed to object on these grounds in the lower court. The failure to object waives the argument on appeal. (*People v. Sanders* (1995) 11 Cal.4th 475, 510, fn. 3.)

Even if we were to consider his claim, his federal constitutional rights were not violated. “[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.” (*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.)

Defendant was given ample opportunity to attack M.’s credibility. He presented the testimony of Williams that the first time he interviewed M., she claimed that she blacked out and did not recall what had happened with defendant. Williams later interviewed M. again, and she remembered the events of that night. However, in conflict with her trial testimony and her pretrial interview, she denied that defendant ever touched her breasts and that she was wearing a one-piece nightgown. M. could not recall if defendant grabbed her or if she tripped. She admitted that she kissed defendant on the lips. M. at one point said she saw “white stuff” coming out of defendant’s penis, but later denied she saw his penis at all.

Had the jury been advised (which is pure speculation on defendant’s part) that M. was groomed to have sex with male parental figures, it would not have given the jury a significantly different impression of her credibility.

Finally, even if we were to assume that through cross-examination of M., defendant could establish that she dealt with male parental figures by complying with their demands to engage in sexual intercourse, the exclusion of such evidence was

harmless under any standard. Defendant claims that “[t]o the extent evidence relating to the prior molestation would have tended to show [M.] engaged in similar acts of sexual conduct with her biological father for a lengthy period of time, this would have been highly relevant to show she may have willingly engaged in the act of sexual intercourse with [defendant].”

“Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson*^[11] test: The reviewing court must ask whether it is reasonably probable the verdict would have 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.

Defendant was convicted of violating section 269, subdivision (a)(1) and 261, subdivision (a)(2). “The offense[] of aggravated sexual assault . . . on a child under the age of 14 years require[s] proof that ‘force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person’ was used. [Citations.] [¶] ‘Force’ as used in this context means ‘physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself.’ [Citation.] A number of cases have held that if the defendant grabs or holds a

¹¹ *People v. Watson* (1956) 46 Cal.2d 818, 836.

victim who is trying to pull away, that is the use of physical force above and beyond that needed to accomplish the act. [Citations.]” (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13, disapproved on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12.)

First, there is “the long-standing presumption that children *under age 14* cannot give legal consent to sexual activity.” (*People v. Soto, supra*, 51 Cal.4th at p. 248, fn. 11.) And, when the law ““implies incapacity to give consent, . . . this implication is *conclusive*. In such case the female is to be regarded as resisting, no matter what the actual state of her mind may be at the time. The law resists for her.’ [Citation.]” (*Id.* at p. 248, fn. omitted.) Even if M. consented to the sexual intercourse, such consent was not relevant in this case. The only possible relevance of the evidence was to the use of force.

Here, the evidence that was presented showed that defendant used force to accomplish the rape of M. M. testified that defendant put his hands on her hips or around her stomach. M. stated that she put her arm up on his chest to get away from him, but he convinced her to stop, relying upon his position of power over her. In addition, during the pretext telephone call, M. told defendant that he hurt her and he did not deny it. Based on the foregoing, there was ample evidence from which the jury could conclude defendant used force against M. Even if M. had been groomed to have sexual intercourse with male parental figures, the evidence here established that defendant used force in order to commit the rape in this case.

Defendant points to the fact that the jury had questions regarding the definition of force to show reversal is necessitated by the restriction on cross-examination. During

deliberations, the jury asked for a more detailed definition of force, asking if someone had their hands around someone, did that constitute force. The jury was referred back to the instruction on rape by force, fear, or threats. The fact that defendant held M. with his hands on her hips constituted force. She was consistent that he held onto her. Moreover, the other evidence supported force, including that she told him he hurt her, which he did not deny.

Overwhelming evidence showed that defendant had committed the forcible rape of M. Defendant has failed to show the trial court erred or that his federal constitutional rights were violated.

IV

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Defendant claims that to the extent the People argue that he waived his claim that his federal constitutional rights were violated by the limitation on his cross-examination of M., and that his counsel failed to file a motion pursuant to Evidence Code section 782, he received ineffective assistance of counsel.

“Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel.” (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) “To establish constitutionally inadequate representation, a defendant must demonstrate that (1) counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel’s representation

subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant.

[Citations.] 'When a defendant on appeal makes a claim that his counsel was ineffective, the appellate court must consider whether the record contains any explanation for the challenged aspects of representation provided by counsel. "If the record sheds no light on why counsel acted or failed to act in the manner challenged, 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' [citation], the contention must be rejected.'" [Citations.]' (*People v. Samayoa* (1997) 15 Cal.4th 795, 845.)

The record does not disclose why defendant's trial counsel refused to file a motion pursuant to Evidence Code section 782. The trial court did not state it would necessarily exclude the cross-examination; it wanted an offer of proof that complied with Evidence Code section 782. Even if counsel disagreed with the ruling, there is no explanation as to why he refused to file the motion. An equally reasonable explanation is that the circumstances of the prior molestation did not support his theory. On this record, it is not possible to determine the reason counsel refused to file an Evidence Code section 782 motion.

Moreover, as stated, *ante*, there was no constitutional violation in this case. Hence, even if defendant's trial counsel had objected on these grounds, the results of the case would be the same. As fully explicated, the evidence in this case was

overwhelming. Assuming that defendant's counsel was deficient, defendant cannot show prejudice.

V

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.