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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.

DONELL LAMAR PIMPTON,

Defendant and Appellant.

E060345

(Super.Ct.No. FVI1301308)

OPINION

APPEAL from the Superior Court of San Bernardino County. Debra Harris,
Judge. Affirmed.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney
General, Charles C. Ragland and Stacy Tyler, Deputy Attorneys General, for Plaintiff
and Respondent.

A jury found defendant and appellant, Donell Lamar Pimpton, guilty of (1) continuous sexual abuse of a child under the age of 14 years old (Pen. Code, § 288.5, subd. (a));¹ and (2) engaging in sodomy with a child who is 10 years old or younger (§ 288.7, subd. (a)). In the interest of justice, the trial court dismissed the conviction for continuous sexual abuse of a child (§ 288.5, subd. (a)). (§ 1385.) The trial court sentenced defendant to prison for an indeterminate term of 25 years to life.

Defendant raises three issues on appeal. First, defendant contends the trial court erred by permitting the prosecutor to amend the information to charge an offense not adduced at the preliminary hearing. Second, defendant asserts that if the first issue is forfeited due to a lack of specific objection, then defendant's trial counsel rendered ineffective assistance. Third, defendant contends the trial court erred by excluding defense evidence. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. PROSECUTION'S CASE

The victim, a female, was born in September 2005. The victim's mother (Mother) had been incarcerated for various time periods during the victim's life. While Mother was incarcerated, the victim stayed with different family members or one of Mother's friends.

Mother was released from custody in August 2012; however, Mother did not resume full custody of the victim until April 2013. From August 2012 through April

¹ All subsequent statutory references will be to the Penal Code unless indicated.

2013, when the victim was six and seven years old, the victim stayed at two different residences. At the first residence, in Apple Valley, the victim lived with her aunt (Aunt) and Aunt's children, including defendant. Defendant was the victim's cousin. At the second residence, also in Apple Valley, the victim lived with (1) Anthony Prieto (Prieto), who was the victim's cousin; (2) Jessica, who was Prieto's girlfriend; (3) Jessica's daughter; (4) Prieto and Jessica's son, who was a baby; and (5) defendant. Defendant and Prieto were half brothers.

At Aunt's house, defendant entered the victim's bedroom, at times while she was asleep, but other times when she was awake. Defendant removed the victim's pants, and pulled his pants down to his thighs. Defendant placed his hands on the victim's hips, from behind the victim, and then placed his penis in her anus. Defendant sodomized the victim "lots of nights," but not every night. At times, defendant also used his hand to touch the victim's vaginal area over her clothing.

At Prieto's house, defendant entered the victim's bedroom and placed his penis in her anus. Defendant ejaculated, and then the victim showered. The ejaculation followed by showering occurred "a lot of times." The victim told defendant to stop and threatened to "tell" on him. Defendant told the victim, "If you do tell, I'm going to hit you." The victim did not tell anyone about the sexual contact because she feared being hit.

Shawnee was one of Aunt's children with whom the victim lived at Aunt's house. Shawnee was the victim's cousin. Dailen was Shawnee's friend and often visited Aunt's house. Shawnee, Dailen, the victim, and the victim's friend, DeShawn,

were in a shed in a backyard. While in the shed, Dailen said to Shawnee, ““Let’s play moms and dads.’” Dailen pulled down his pants, held onto the victim’s head, and “made [her]” orally copulate him. Dailen ejaculated.

The victim told another cousin, Isaiah, about the incident in the shed. Prieto learned about the incident in the shed, and “whooped” the victim, Isaiah, and Shawnee with a belt. The victim did not tell Prieto about defendant’s sexual conduct because she feared being hit by Prieto and/or defendant. Dailen was contacted by police, admitted to sexually battering the victim, and was placed on probation. At defendant’s trial, Dailen, who was in sixth grade at the time of the oral copulation, explained that the seven-year-old victim initiated sexual contact with Dailen and DeShawn by placing her mouth on their bodies. Dailen explained that, while in the shed, after the victim orally copulated him, the victim said defendant “was having sex with her at nighttime.”

On April 18, Mother picked up the victim and they went to Mother’s sister’s home in Los Angeles. Mother noticed blood in the victim’s panties. Mother assumed it was related to the victim’s prior urinary tract infection. On April 25, Mother again saw blood in the victim’s panties. The victim said to Mother, ““[Defendant has] been sticking his pee-pee . . . his “D” in my pee-pee, private.’” Mother took the victim to a hospital. Police were contacted. A doctor diagnosed the victim with a urinary tract infection. An examination of the victim’s body did not reveal any injuries. A forensic pediatrician explained that it is “very common” to not find physical sexual abuse injuries on a child’s body due to the rapid healing and elasticity of the genital and anal

areas. Detective McWilliams interviewed defendant. Defendant said he lived with, or stayed with, Prieto from approximately June 2012 to February 2013.

B. DEFENDANT'S CASE

Prieto, Prieto's girlfriend (Hopes), and defendant's half sister, Leanna Prieto (Leanna),² testified that defendant did not live at Hopes's and Prieto's house between August 2012 and April 2013. Prieto and Hopes estimated that, during that time period, defendant stayed at their residence approximately five times. Leanna shared a bedroom with the victim from August to October 2012. Leanna was a light sleeper and never woke to find defendant in the bedroom. Prieto and Hopes spent time with the victim and defendant, and opined the victim did not appear to be afraid of defendant.

A nurse practitioner examined the victim on April 25, 2013. The victim told the nurse practitioner that defendant "would come to her room every night and touch her in her private area with his finger and with his private part." When the nurse practitioner asked the victim what she called "her private parts," the victim pointed to her vaginal area and her chest. The nurse practitioner did not think the victim said defendant had touched the victim's anus. The victim told the nurse practitioner that defendant's ejaculate "got on her underwear," she did not say the ejaculate "got on her butt." The nurse practitioner did not find any evidence of sexual abuse when examining the victim. However, the nurse practitioner explained that genital areas "heal very fast."

² We use Leanna's first name for the sake of clarity, because she shares a last name with her brother, Anthony Prieto. No disrespect is intended.

DISCUSSION

A. PRELIMINARY HEARING

1. *PROCEDURAL HISTORY*

On May 13, 2013, the prosecutor filed a First Amended Felony Complaint against defendant alleging one count of continuous sexual abuse of a child (§ 288.5, subd. (a)). Defendant's preliminary hearing took place on May 23. Los Angeles Police Officer Cardenas (Cardenas) testified at the preliminary hearing. Cardenas and his partner interviewed the victim at the hospital on April 25. The victim said defendant "had penetrated her numerous times with his penis while erect, and also she couldn't describe exactly which hands or fingers, but had also placed fingers inside her vagina, as well." The victim said the sexual contact occurred at night, and that defendant placed his hands inside her underwear and rubbed "the outer area of her vagina in a circular motion."

When the victim was speaking with the police officers, she referred "to her vagina as private part, her private part." In regard to penetration by defendant's penis, the victim said "it was hard and that he would penetrate her at times where he—she would feel something inside." Specifically, the victim said "she felt something hard inside her . . . [¶] . . . [¶] . . . private part."

San Bernardino County Sheriff's Detective McWilliams (McWilliams) also testified at the preliminary hearing. On May 9, McWilliams interviewed defendant. Defendant said the victim was lying.

The trial court concluded there was probable cause to believe defendant committed the charged offense, and therefore held him “to answer to stand trial for that offense and any other offenses shown by the evidence in this preliminary hearing.” On May 29, the prosecution filed an information charging defendant with one count of continuous sexual abuse of a child (§ 288.5, subd. (a)), and one count of sexually penetrating a child who is 10 years of age or younger (§ 288.7, subd. (b)).

Opening statements in the case were given on December 3 and the victim testified that same day. The following day, December 4, the prosecutor moved to amend the information to change Count 2 from sexually penetrating a child who is 10 years of age or younger (§ 288.7, subd. (b)) to sodomizing a child who is 10 years of age or younger (§ 288.7, subd. (a)). The prosecutor explained that the motion to amend was being made for the purpose of “comply[ing] with or conform[ing] to the evidence that was presented.”

Defense counsel said, “I would object to that, your Honor. [Defendant] has a right to have notice of what he’s being charged with, and to change the Information midstream of trial, I think, is inappropriate.” The trial court said it would grant the motion, allowing the amendment. The court explained, “This is form over substance. I don’t see any new information that would cause the defense to be surprised or not to defend what the evidence was. It’s basically what it is. And so that’s granted.”

On December 4, 2013, the prosecution filed a First Amended Information charging defendant with one count of continuous sexual abuse of a child (§ 288.5, subd. (a)), and one count of sodomizing a child (§ 288.7, subd. (a)). During closing argument,

the prosecutor said to the jury, “Count II is [a] violation of [section] 288.7[, subdivision] (a). That’s sodomy.” The prosecutor explained, “When we’re looking at the [section] 288.7, sodomy, that’s something more [than Count I]. You can have both of these charges. The something more with sodomy means that he actually penetrated her”

2. ANALYSIS

Defendant contends the trial court abused its discretion by permitting the prosecutor to amend the information to charge an offense that was not presented at the preliminary hearing.

A trial court may permit an information to be amended at any stage of the proceedings; however, an information may not be amended “so as to charge an offense not shown by the evidence taken at the preliminary examination.” (§ 1009.) We review the trial court’s decision for an abuse of discretion. (*People v. Miralrio* (2008) 167 Cal.App.4th 448, 458.) A court abuses its discretion when its “ruling ‘falls outside the bounds of reason.’ [Citation.]” (*People v. Famalaro* (2011) 52 Cal.4th 1, 34.)

At the preliminary hearing, Cardenas testified that, in regard to penetration, the victim said “it was hard and that [defendant] would penetrate her at times where he—she would feel something inside.” Specifically, the victim said “she felt something hard inside her . . . [¶] . . . [¶] . . . private part.” The victim referred to her vagina as her “private part.”

Thus, the issue is as follows: If the victim referred to her vagina as her “private part,” did the trial court exceed the bounds of reason by concluding “private part” also included the victim’s anus? The victim was seven years old when she was interviewed

by Cardenas. The trial court could reasonably conclude that a child, who is seven years old, also included her anus among her “private parts.” Notably, the victim did not specifically say defendant penetrated her vagina. Rather, she said she felt something “inside” and she felt something in her “private part.” While the victim included her “vagina” among her “private parts,” it does not mean she excluded her anus. The ambiguity of the terms “inside” and “private part,” could logically refer to the victim’s vaginal and anal areas. Accordingly, we conclude the trial court acted within the bounds of reason by concluding the sodomy amendment to the information fell within the evidence presented at the preliminary hearing.

In support of his argument, defendant cites the case of *People v. Pitts* (1990) 223 Cal.App.3d 606. In *Pitts*, the appellate court explained that, if a defendant were charged with two counts of oral copulation and two counts of lewd touching, but the prosecution then amended the information during trial to charge two counts of sodomy and two counts of sexual intercourse, then the defendant would be denied adequate notice of the specific acts of which he needed to defend against. The appellate court explained such a change in charges “would affect medical testimony, cross-examination of the alleged victim(s), etc.” The court concluded such a change would violate a defendant’s right of due process. (*Id.* at pp. 905-906.)

The instant case is distinguishable from *Pitts*. In *Pitts, supra*, the court discussed amending an information from non-penetration crimes to penetration crimes. In the instant case, the preliminary hearing revealed evidence of penetration of a “private part.” Defendant was charged with the offense of sexual penetration. (§ 288.7, subd.

(b.) Then, at trial, the victim explained that defendant sodomized her, and the charges were amended to reflect the act of sodomy. (§ 288.7, subd. (a).)

So, in *Pitts*, the court discussed an information being amended to allege a different offense, non-penetrative verses penetrative. In the instant case, the information was amended to be more specific—from sexual penetration to sodomy. The change made in the instant case was from the general to the precise—not to a completely different act. Accordingly, we are not persuaded by defendant’s reliance on *Pitts*.

B. INEFFECTIVE ASSISTANCE

Defendant asserts if the foregoing contention, concerning the amended information, was forfeited due to the lack of a specific objection, then his trial counsel was ineffective. We have addressed the merits of the amended information issue. Accordingly, defendant’s contention regarding forfeiture and ineffective assistance of counsel is moot because we did not treat the issue as forfeited. (See *People v. Travis* (2006) 139 Cal.App.4th 1271, 1280 [purely academic questions are moot].)

C. DEFENSE EVIDENCE

1. *PROCEDURAL HISTORY*

Leanna, defendant’s half sister, was called to testify by the defense. During the direct examination of Leanna, defense counsel (Slater) asked if Leanna recalled an incident that occurred with the victim at a Motel 6 in 2009. The prosecutor objected. The attorneys approached the bench. Slater explained the victim had denied seeing

pornographic movies, but Leanna witnessed the victim, Mother, and a man, in bed, watching pornography at a Motel 6.

The trial court said, “That doesn’t mean that [the victim] saw the movie. If [the victim] said no, she didn’t see it, a movie could be on and she could not have seen it.” The prosecutor noted the victim was four years old in 2009. Slater explained she did not have Leanna as a witness prior to trial, but Leanna “show[ed] up when we started trial,” so Slater had an investigator speak to Leanna. The prosecutor objected based upon lack of discovery and lack of relevance. The prosecutor asserted that, if the victim were in the motel room, the victim would have been four years old, so the evidence could not impeach the victim. Slater asserted the evidence was relevant because it provided “another way other than the shed incident for [the victim] to have had exposure as to what penises look like, what they do, the white stuff [(ejaculate)], things like this.”

The trial court said, “That’s not—the fact that she may have gone in there and there was a pornographic movie on is not—it’s just barely circumstantial evidence that [the victim] even saw it. [The victim] was four years old. It’s not even disputed that [the victim] was exposed to—I think it’s Donell’s [*sic*] penis in the shed. Any probative value is outweighed by the prejudicial effect—strike that—not the prejudicial effect but confusing the jury, wasting the time, making this case about something other than whether [the victim] had any information from any other source. [¶] She said she had not seen it. So saying that I saw [the victim] in a motel room when she was four years

old and there was a movie on does not mean [the victim] saw the movie, it even registered.”

Slater responded, “What about if we did a 402 and we could have an opportunity to—you know, for her to give some testimony about exactly what did she see, can she say that [the victim] was watching? I mean, did [the victim] make—[.]” The court said, “Did [the victim] understand what she’s watching, she has no foundation for that, I’ve made my ruling.” Slater responded, “Okay. Okay.”

Later, after the close of evidence, and outside the presence of the jury, the trial court said, “Regarding . . . Leanna Prieto . . . the Court ruled that there was little probative value to impeach the young girl. The incident that was asked about occurred when she was four years old, and really there was no foundation that this witness could have as to what the four-year-old perceived, what she understood. It would open up another door, a host of problems, undue consumption of time. Also, there was no discovery to the People. At this late hour, there’s no opportunity to even verify whether or not the parties were in what motel, in what year, in getting those records, and that was over defense objection.”

2. ANALYSIS

a) Contention

Defendant contends the trial court erred by excluding the defense evidence reflecting Leanna witnessed the victim watching a pornographic movie in 2009. First, defendant contends the trial court erred by excluding the evidence as a sanction for untimely disclosure. Second, defendant asserts the trial court erred by excluding the

evidence due to the evidence being more prejudicial than probative. (Evid. Code, § 352.)

b) Evidence Code section 352

“‘[Evidence Code s]ection 352 permits the trial judge to strike a careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue time consumption. That section requires that the danger of these evils substantially outweigh the probative value of the evidence. This balance is particularly delicate and critical where what is at stake is a criminal defendant’s liberty.’ [Citation.] Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and his right to present all relevant evidence of significant probative value to his defense. [Citations.] Of course, the proffered evidence must have more than slight relevancy to the issues presented. [Citations.]” (*People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599.)

Leanna would have testified that she saw the victim, when the victim was four years old, in a room where a pornographic movie was playing. The probative value of this evidence is slight because it is unknown (1) if the victim was watching the movie; and (2) if, due to the victim’s age, she understood what she was watching, if she was watching the movie. Further, there was already evidence that the victim had learned about male anatomy and sexual contact from a source other than defendant. In particular, the evidence of the victim’s interactions in the shed provided an alternate source for her sexual and anatomical knowledge.

The pornography evidence was prejudicial because if the victim's credibility were attacked for a movie she may have watched when she was four years old, then the prosecutor may have sought to rehabilitate her credibility, thus causing the trial to devolve into a mini-trial over the victim's credibility regarding a movie she may or may not have watched at age four. Given the slight probative value of the evidence, and the risk of undue consumption of time the evidence could cause, we conclude the trial court acted within the bounds of reason by excluding the evidence. Accordingly, the trial court did not abuse its discretion.

c) Discovery Sanction

Defendant contends the trial court erred by excluding the pornographic movie testimony as a sanction for the defense not providing timely discovery. We have concluded *ante*, that the trial court properly excluded the evidence pursuant to Evidence Code section 352, which was the trial court's initial reason for excluding the evidence. Because the trial court did not err in excluding the evidence pursuant to Evidence Code section 352, we do not review the trial court's secondary reason related to discovery rules. (See *People v. Travis, supra*, 139 Cal.App.4th at p. 1280 [issue is moot when no effective relief can be granted].)

d) Constitutional Rights

Defendant contends the trial court's exclusion of the pornographic movie testimony violated his constitutional right to present a complete defense.

“[A] criminal defendant has a constitutional right to present all relevant evidence of significant probative value in his favor [citations], “[t]his does not mean

that an unlimited inquiry may be made into collateral matters; the proffered evidence must have more than ‘slight-relevancy’ to the issues presented.” [Citation.]’ [Citation.]” (*People v. Homick* (2012) 55 Cal.4th 816, 865.)

As explained *ante*, the pornographic movie testimony had slight probative value because it only reflected the victim was present in a room while a pornographic movie was playing. The evidence did not establish (1) the victim was watching the movie; or (2) the victim, at the age of four years old, understood the movie, if she was watching it. Further, the trial evidence already included an alternate means by which the victim could have gained knowledge of sexual contact and male anatomy, i.e., the shed incident, which took place during the same time frame as the victim’s sexual contact with defendant. Thus, due to the slight probative value of the pornographic movie testimony, we conclude defendant’s constitutional rights were not violated by the exclusion of the evidence.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.