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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. LEWIS ADKINS, JR., Defendant and Appellant.	E060699 (Super.Ct.No. FVI1302170) OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed.

Melissa Hill, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Parag Agrawal, and Christen E. Somerville, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION[1]

Defendant Lewis Adkins, Jr., age 69, molested his cousin's six-year-old great-granddaughter, Z.S., for several months, causing her to contract genital herpes. He claimed he rubbed his penis against her vagina for the medical purpose of applying Vaseline.

A jury convicted defendant of five sex crimes against a child: sodomy (§ 288.7, subd. (a)); sexual penetration (§2 88.7, subd. (b)); rape (§ 261, subd. (a)(1)(2)); forcible lewd act (§ 288, subd. (b)(1)); and lewd act (§ 288, subd. (a)). The court sentenced defendant to 67 years to life in state prison.

On appeal, defendant asserts multiple claims of error related to testimony and evidence about herpes and one argument about impeaching the victim's mother, S.D., with a misdemeanor prostitution offense. We conclude there was no prejudicial error and affirm the judgment.[2]

II

FACTUAL AND PROCEDURAL BACKGROUND

Z.S. was born in 2006. When she testified in 2013, she was seven years old.

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[1] All statutory references are to the Penal Code unless stated otherwise.

[2] We deny the related petition for writ of habeas corpus (case No. E063399).

Between March and May 2012, Z.S, her mother, S.D., and her older brother, lived temporarily in a Victorville apartment with defendant, whom they called "Uncle Butch." Defendant had agreed to provide the family with a place to live while mother was attending job training. Defendant was Z.S.'s great-grandmother's cousin.

A. The Victim's Testimony

At trial, Z.S. testified that defendant rubbed Vaseline on himself and her. Defendant put his fingers and his penis in her "pagina"[3] and would not stop when she screamed. Afterwards, Z.S. had a white, sticky substance on her genitals. She also experienced bleeding. Defendant told her to wash the affected area. Later she had trouble urinating and developed genital bumps and sores.

Defendant repeated the same conduct about 10 times. Z.S. specifically remembered one incident occurring on the living room couch and another in the bedroom her family shared.

Defendant forced Z.S. to touch his penis. Z.S. told an interviewer that defendant's penis was black, nasty, and filthy. She drew a picture of how the penis looked. Defendant also once engaged in anal intercourse with Z.S. and took photos of her genitals when she was naked in the bathtub.

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[3] During her testimony, Z.S. used the word "pagina" to describe both hers and defendant's sexual organs.

Z.S. did not tell her mother because she was scared and defendant had said he would blame her. Defendant once hit her with a belt.

B. The Mother's Testimony

S.D. testified that she and her two children lived with defendant in Victorville from March 9, 2012, to May 17, 2012, while she was in a job training program. She was gone most of the day until 6:00 p.m. Z.S. was in school during part of the day but she was alone with defendant about 20 hours a week. On weekends, defendant volunteered to babysit when S.D. was spending the night with her boyfriend.

On May 15, while S.D. was in Los Angeles, defendant called to say Z.S. was experiencing burning when she urinated. S.D. assumed it was a urinary tract infection because Z.S. had infections before. S.D. moved out of defendant's apartment on May 17. When S.D. observed that Z.S. had genital sores and swelling, she photographed the sores and took her to a doctor. When S.D. asked Z.S. if anyone had touched her, Z.S. demonstrated how defendant had touched her, using a toy monkey. S.D. called the police. S.D. found defendant had been taking Cephalexin, the same medication prescribed for her daughter for herpes. S.D. did not have herpes. S.D. admitted she had a misdemeanor conviction for petty theft.

C. Brendan Mahoney

Deputy sheriff Brendan Mahoney testified that he responded to a call about a sex crime involving a child on May 25, 2012. He interviewed the victim and her mother. Z.S. told him that defendant had inserted his fingers and his penis in her vagina about 10

times, using a stuffed toy to demonstrate. She said the acts occurred on the couch in the living room. She screamed at him to stop because it hurt. Defendant slapped her face and warned her not to tell anyone. The last time it happened was when they had called her mother about the painful urination. The next day Deputy Mahoney questioned defendant.

D. The Recorded Interview

The jury watched a child abuse interview recorded with Z.S. on June 6, 2012. Z.S. said "[w]hen I pee, it hurts," "my private has a lot of open pimples," "[a]nd I'm leaking there." She said defendant had hurt her, putting his finger and penis in her for "ten or twenty" days. When he would not stop, she screamed. There was "white sticky stuff" on her genitals. Defendant told her to wash herself so no one would know. Z.S. drew a picture of defendant's penis, which she described as "black and nasty and filthy." Defendant also made her touch his penis. Once defendant inserted his penis into her "booty." Defendant's conduct caused bleeding. Defendant also photographed Z.S.'s genitals in the bathtub. Once he punched her in the face.

E. Defendant's Interview

Sergeant Brett Zour testified he served a search warrant at defendant's residence and arrested him. Zour interviewed defendant and the recording was played for the jury.

Defendant explained that S.D. and her children slept in the bedroom and he slept on the couch. He admitted that he had two photographs on his phone of Z.S. naked but

he had deleted them. At first he denied taking the photos but then he admitted taking the photos while she was having a bath.

Defendant also explained he had helped wash Z.S.'s back and put lotion on her to treat a burn and eczema. He denied accidentally penetrating her digitally while he was rubbing her.

Defendant said Z.S. had watched sexually explicit television and pornography on the computer and S.D. was involved in prostitution. He also claimed Z.S. had tried to grab him in the shower and he spanked her with a belt. He often used a belt to discipline her for being "aggressive" and misbehaving. Defendant said Z.S.'s behavior was sexually provocative. Defendant suggested S.D. could obtain emergency housing if she could prove sexual or domestic abuse was occurring where she lived.

When Z.S. was in pain while urinating, defendant called S.D. who said it was probably a bladder infection. Defendant purchased some pills, cranberry juice, and yogurt. He rubbed Z.S.'s genitals with Vaseline to soothe the burning but he did not digitally penetrate her. Because she was still complaining, he rubbed her with his nonerect penis which was softer than his fingers. Defendant denied that he was sexually aroused, that his penis was erect, or that he ejaculated. Instead, he was "shamed." He mused, however, that "I didn't have no thoughts like that at first. And then I said, well, let me do this here. And then I said, wait a minute. This is all wrong. This is all wrong. I ain't even supposed to be doing this here. [¶] . . . [¶] . . . and it could've been that . . . I got caught up, putting it on there, . . ."

F. Expert Evidence

Marcia Arnold-Bernard is a pediatric forensic nurse practitioner with specialized training in child sexual abuse. When she examined Z.S. she observed an ulcer or lesion on the labia minora and majora. The photographs taken by S.D. of Z.S.'s genitals also appeared to depict genital herpes. To confirm the diagnosis, Arnold-Bernard ordered laboratory blood tests. The tests were positive for HSV 1, oral herpes, and HSV 2, genital herpes, which is usually related to sexual abuse. The document from which Arnold-Bernard testified was a single page, "Flowsheet Print Request," bearing Z.S.'s name and three categories of positive herpes results. The document was unsworn and uncertified. Defendant's tests were also positive for herpes.

The examination was conducted about a month after Z.S. had lived with defendant. Arnold-Bernard did not expect to see "bruising, tearing, or redness" after that period of time. She stated the hymen could return to a normal state after four weeks.

G. Defense Witnesses

Two witnesses testified that they knew defendant from church. They did not see him behave inappropriately with children or Z.S. Defendant's son testified that his father never behaved inappropriately with children, including his seven-year-old daughter. Defendant's daughter and sister also testified favorably about defendant.

Defendant testified on his own behalf. He was living in Victorville in section 8 low-income housing when he agreed to let S.D. and her children stay with him. Once Z.S. was scorched on her torso by hot water from a microwave. He photographed Z.S. at

her request, when she having a sitz bath because she was experiencing burning while urinating. He admitted hitting Z.S. with a belt when she was looking for an X-rated movie on television.

Defendant explained that, after he was arrested, he falsely told the police that he used his penis to apply lotion on Z.S. He was upset and confused and felt he did not have a choice because he was being tricked, deceived, and pressured. When asked what he meant in saying "I got caught up," he said was not responsible because he was angry. He lied because he did not want to admit a crime.

Defendant denied having vaginal or anal intercourse with Z.S. or engaging in digital penetration although he did apply Vaseline manually. Defendant claimed that S.D. was a prostitute and a drug addict who had created a trap for him as part of the "ways of the ghetto." Defendant described Z.S. as "flirty" and acting sexually toward him, including showing him her genitals.

III

DISCUSSION

A. Herpes Evidence

Defendant primarily challenges the admission of testimony and evidence that Z.S. contracted genital herpes using various arguments: the confrontation clause was violated; Arnold-Bernard should not have testified as an expert; the photographs of Z.S.'s genitals should not have been admitted; the court failed to instruct the jury specifically about the herpes blood test; and, consequently, there was ineffective assistance of counsel (IAC).

Arnold-Bernard based her opinion that Z.S. had genital herpes on photographs and a physical inspection of Z.S.'s genitals, confirmed by laboratory blood tests.[4] The one-page report of the tests was not admitted into evidence. Defendant argues that admitting the herpes evidence violated the confrontation clause because defendant was denied his right to confront and cross-examine the individuals who performed the blood test. (*Crawford v. Washington* (2004) 541 U.S. 36.) Based on *Crawford* and its progeny (*Williams v. Illinois* (2012) 567 U.S. ___, 132 S.Ct. 2221, 2012 U.S. LEXIS 4658; *Bullcoming v. New Mexico* (2011) 564 U.S. ___, 131 S.Ct. 2705, 2011 U.S. LEXIS 4790; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305), defendant claims his confrontation rights were violated when the medical examiner testified based partly on the blood tests.

We agree defendant forfeited this claim by not objecting at trial based on the Confrontation Clause. (*Melendez-Diaz v. Massachusetts* , *supra*, 557 U.S. at pp. 313-314, fn. 3; *People v. Redd* (2010) 48 Cal.4th 691, 730.) Notwithstanding defendant's forfeiture of the issue, we agree the subject testimony was not "testimonial" within the meaning of *Crawford*.

Crawford held that the admission of "testimonial" out-of-court statements violates a criminal defendant's confrontation rights unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Crawford v.*

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[4] A medical technologist also testified about defendant's positive herpes tests.

Washington, *supra*, 541 U.S. at pp. 53-55, 59.) Three United States Supreme Court cases have applied *Crawford* to forensic evidence at trial. *Melendez-Diaz* found the confrontation clause was violated by the admission of forensic evidence of cocaine. (*Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. 557 U.S. at p. 311.) *Bullcoming* disapproved the admission of testimony about a blood alcohol test and admission of the report by a laboratory analyst who did not perform the test. In *Williams*, the court allowed testimony to be admitted about a DNA match, which relied on a DNA profile from a second laboratory, because it served to explain the basis for the expert's opinion.

California cases have also addressed the admissibility of DNA laboratory reports prepared by a person who does not testify at trial. In *People v. Holmes* (2012) 212 Cal.App.4th 431, the court held that the forensic evidence lacked the requisite formality to be considered testimonial because they were unsworn, uncertified records of objective fact. The court in *People v. Barba* (2013) 215 Cal.App.4th 712, 742, agreed, holding: "So long as a qualified expert who is subject to cross-examination conveys an independent opinion about the test results, then evidence about DNA tests themselves is admissible."

Most recently, the California Supreme Court has held: "Although the Supreme Court has not settled on a clear definition of what makes a statement testimonial, we have discerned two requirements. First, 'the out-of-court statement must have been made with some degree of formality or solemnity.' (*People v. Lopez* (2012) 55 Cal.4th 569, 581.) Second, the primary purpose of the statement must 'pertain[] in some fashion to a

criminal prosecution.' (*Id.* at p. 582; accord, *People v. Dungo* (2012) 55 Cal.4th 608, 619.)" (*People v. Leon* (2015) 61 Cal.4th 569, 602-603.) "[T]estimony relating the testifying expert's own, independently conceived opinion is not objectionable, even if that opinion is based on inadmissible hearsay. (Evid. Code, § 801, subd. (b); *People v. Montiel* (1993) 5 Cal.4th 877, 918.) A testifying expert can be cross-examined about these opinions. The hearsay problem arises when an expert simply recites portions of a report prepared by someone else, or when such a report is itself admitted into evidence. In that case, out-of-court statements in the report are being offered for their truth. Admission of this hearsay violates the confrontation clause if the report was created with sufficient formality and with the primary purpose of supporting a criminal prosecution. (*Dungo, supra,* 55 Cal.4th at p. 619.)" (*Leon,* at p. 603.)

The *Leon* court explained that the *Dungo* majority concluded that statements which merely record objective facts "are not sufficiently formal or litigation related to be testimonial under the high court's precedents. ([*People v. Dungo, supra,* 55 Cal.4th] at pp. 619-621.) Accordingly, *Dungo* found no confrontation clause violation when a testifying pathologist expressed forensic opinions based on the medical observations in a nontestifying pathologist's autopsy report. (*Id.* at p. 621.)" (*People v. Leon, supra,* 61 Cal.4th at pp. 604-605.)

Arnold-Bernard's forensic opinion was based on objective medical information contained in an informal flowsheet. The primary purpose of the information and flowsheet was to confirm a medical diagnosis. The primary purpose was not to support a

criminal prosecution. Also, as in *Dungo*, the medical report was not admitted into evidence. Therefore, Arnold-Bernard's testimony did not violate the confrontation clause.

Even assuming the testimony was erroneously admitted, however, the error was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Rutterschmidt* (2012) 55 Cal.4th 650, 661.) Z.S. testified credibly, consistently, and specifically about defendant's offenses against her. Her mother provided corroborating evidence. Defendant himself admitted his conduct for the most part—although he tried to characterize his statements as being false but compelled by the circumstances of the interrogation. It is therefore not reasonably possible that admission of the testimony about the herpes blood test could have affected the verdict.

We also reject the various other challenges raised by defendant against the herpes evidence. Arnold-Bernard was well-qualified as a pediatric forensic nurse to testify as an expert on child sexual abuse concerning matters beyond common experience. (Evid. Code, §§ 720, subd. (a), and 801, subd. (a).) The genital photographs were certainly more probative than prejudicial in that they corroborated the mother's testimony and provided foundation for Arnold-Bernard's testimony. (Evid. Code, § 352; *People v. Williams* (1997) 16 Cal.4th 153, 213; *People v. Schied* (1997) 16 Cal.4th 1, 18.) Unquestionably, the trial court did not commit a manifest abuse of discretion by admitting the photos. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1207; *People v.*

Jones (2012) 54 Cal.4th 1, 57.) The jury could then decide what weight to accord the expert testimony. (*People v.Bolin* (1998) 18 Cal.4th 297, 322.)

The jury was also properly instructed based on CALCRIM No. 332 on how to evaluate an expert's testimony. (*People v. Felix* (2008) 160 Cal.App.4th 849, 859.) Defendant's reliance on *People v. Housley* (1992) 6 Cal.App.4th 947, involving instruction on child sexual abuse accommodation syndrome (CSAAS) is irrelevant in this case. Defendant's strained argument about possible confusion caused by the limiting instruction (CALCRIM No. 303), given about Sergeant Zour's testimony, is also irrelevant. As to all these claims, we repeat our conclusion that any error was harmless beyond a reasonable doubt. For the foregoing reasons, defendant can also not demonstrate IAC. (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

B. S.D.'s Prostitution Offense

S.D. admitted at trial that she had a theft conviction. The court granted the prosecutor's motion to exclude impeachment evidence that S.D. had been arrested on a misdemeanor prostitution offense. It was not an abuse of discretion to exclude such evidence. (*People v. Clark* (2011) 52Cal.4th 856, 931-932.)

Defendant proposes several theories about how evidence of a prostitution arrest was relevant to show that S.D. used her daughter to trap defendant with false accusations of molestation and that S.D. herself (or someone else) may have given her daughter herpes. These improbable and tangential claims were irrelevant to any pertinent issue. Even if S.D. had been arrested for prostitution, that would not prove that Z.S. contracted

herpes from her or that S.D. had coerced Z.S. into falsely accusing defendant in order to achieve some kind of public benefits.

In any event, any error on this issue was harmless beyond a reasonable doubt. Defendant admitted using his fingers and penis to rub Z.S.'s vagina. The victim, her mother, and an expert testified about the nature and extent of the abuse. The credibility of all the witnesses, including S.D., was rigorously challenged by defense. There was no prejudicial error or IAC.

IV

DISPOSITION

No error occurred involving the herpes evidence or the evidence of S.D.'s prostitution offense. We affirm the judgment.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

MILLER
J.