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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRES VASQUEZ NAVARRETE,

Defendant and Appellant.

G044677

(Super. Ct. No. 09NF3619)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Patrick Marion, Judge. Affirmed.

David P. Lampkin, 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, Emily R. Hanks and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Andres Vasquez Navarrete of lewd acts on a child under 14 (Pen. Code, § 288, subd. (a)),¹ and oral copulation or sexual penetration of a child 10 years or younger by a person 18 years or older (§ 288.7, subd. (b)). The trial court sentenced Navarrete to an indeterminate term of 15 years to life for sexual penetration and imposed a concurrent determinate term of six years for lewd acts with a child.

Navarrete argues the court abused its discretion by refusing to hold a hearing outside the presence of the jury to determine the admissibility of the victim's hearsay statement. We disagree and affirm the judgment.

FACTS

In December 2009, then five year old J.P. lived with his mother and two sisters, his sister's boyfriend, M.R., and a non-relative roommate. Navarrete was a mechanic and sometimes worked on M.R.'s Chevrolet Suburban. During his visits, Navarrete always spent time with J.P., and J.P. called him by the nickname El or the Chino.

On December 17, M.R. asked Navarrete to come to the house and work on his car. Navarrete arrived at his home around 10:30 a.m. and spent the next several hours working on M.R.'s car. Around 4:30 p.m., Navarrete asked M.R. to get him a prepaid phone card and some beer, which he did and then returned to the house.

In the evening, Navarrete asked J.P.'s mother if the child could come outside, but his mother said no. Less than 20 minutes later, the family noticed J.P. was no longer in the house. They went outside and found J.P. and Navarrete in the Suburban.

J.P. ran around Navarrete to get to his mother. Navarrete was adjusting his pants and tucking in his shirt. He looked nervous and quickly left the house, leaving his mode of transportation, a bicycle, behind.

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

J.P.'s mother took him inside the house and he started to cry. She noticed his belt was loose, and his underwear had been pulled down to expose his bottom. His mother became upset and examined him further. J.P. said, "Mommy, the Chino poked me on my little tail. The Chino poked me. It hurts me a lot." His mother noticed his anus was red and irritated, and there appeared to be some type of cream on his bottom and in his anus.

J.P.'s mother called the child's father and then contacted the La Habra Police Department. Police officers found and detained Navarrete at a nearby apartment complex. They searched him and found a jar of Pond's dry-skin lotion in his pocket. After he waived his *Miranda*² rights, Navarrete told the investigating officer that he had been at M.R.'s house from around noon to about 6:00 p.m. waiting for the Suburban's battery to charge. While he was waiting, M.R. bought him the hand cream. He knew J.P. and the family well, and J.P. called him El Chino. He denied being alone with J.P. at any time and denied poking J.P. in the anus.

J.P. was taken to a hospital for examination by a registered nurse who specialized in forensics and sexual assault. He complained of rectal pain but would not tell the nurse what happened. She noticed a white stain on his shirt and a brown stain on his underwear. She also detected fluid around his anus. The nurse stated her findings were abnormal and consistent with what J.P. had told his mother.

DNA samples were collected from Navarrete and J.P. A swab of J.P.'s scrotum contained DNA from two individuals: J.P. was the major contributor, but Navarrete could not be excluded as the minor contributor. A swab from J.P.'s anus was negative for foreign DNA.

A Child Abuse Services Team (CAST) social worker interviewed J.P. several days after the incident. J.P. did not complain of any sexual abuse, but he did

² *Miranda v. Arizona* (1966) 384 U.S. 436.

complain the doctor who examined him had hurt his butt. He said his butt hurt before the examination, but he would not disclose what had happened. He said something happened to him in a car, but then denied that anything happened. He also said “Andre” pulled down his underwear. When asked if someone had put something in his anus, J.P. said yes, but then said no. At trial, J.P. testified he sometimes referred to Navarrete as El Chino and sometimes as Andre. He said Navarrete touched his penis, but not his bottom or anus.

Defense counsel conceded his client committed a lewd act with J.P., but argued the evidence was insufficient to prove anal penetration. He called a forensic nurse to testify on Navarrete’s behalf. She opined the mark on J.P.’s perianal area was not a laceration but an abrasion of non-specific origin. She stated that although there is a 60 percent likelihood of physical findings with anal penetration, the absence of these findings does not necessarily rule out penetration.

DISCUSSION

During pretrial discussions, defense counsel asked for an evidentiary hearing outside the presence of the jury to determine if J.P.’s statement “the Chino poked me” qualified under the spontaneous declaration exception to the hearsay rule. The trial court denied the request and tentatively ruled in the prosecutor’s favor. The statement was introduced through J.P.’s mother’s testimony and over defense counsel’s hearsay objection.

Navarrete argues the court refusal to conduct a pretrial evidentiary hearing before ruling on the admissibility of J.P.’s statement constitutes an abuse of discretion and a denial of his right to due process of law under state and federal Constitutions. We disagree.

“In determining the admissibility of evidence, the trial court has broad discretion. Thus, it is within the court’s discretion whether or not to decide admissibility questions under Evidence Code section 402, subdivision (b) within the jury’s presence.

[Citation.] A trial court's ruling on admissibility implies whatever finding of fact is prerequisite thereto; a separate or formal finding is, with exceptions not applicable here, unnecessary. [Citation.] A ruling on a motion under section [Evidence Code] 402, moreover, is not binding on the trial court if the subject evidence is proffered later in the trial. [Citations.] On appeal, a trial court's decision to admit or not admit evidence, whether made *in limine* or following a hearing pursuant to Evidence Code section 402, is reviewed only for abuse of discretion. [Citations.]” (*People v. Williams* (1997) 16 Cal.4th 153, 196-197.)

There was no abuse of discretion here. J.P. was six years old at the time of trial. The court had to determine both his competency to testify and the admissibility of his out of court statement. In consideration for the child's youth, the court decided to make both rulings when J.P. testified, in an effort to give both sides a fair trial. The court's decision to have J.P. testify a single time, in front of the jury, was not irrational, but based on several well-articulated factors.

With respect to the admissibility of J.P.'s statement, Evidence Code section 1240 provides: “Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.”

Navarrete contends J.P.'s excitement was not cause by the lewd acts and sexual penetration, but by his mother's emotional reaction to these events. In our view, the sequence of events cannot be viewed in such a myopic, disconnected way as if there were two separate incidents. What Navarrete did to J.P. upset the child and his family. The entire incident occurred within a short time span, one event following closely after another. Viewed this way, J.P.'s mother's reaction is directly linked to what had come before.

Furthermore, the preliminary facts for admission of a spontaneous statement need only be proved by a preponderance of the evidence. (*In re Damon H.* (1985) 165 Cal.App.3d 471, 476-477.) The prosecution did not have to prove beyond a reasonable doubt that J.P.'s statement was made as a result of Navarrete's acts, only that it was more likely than not his actions caused J.P. to tell his mother the Chino poked me. And there was more than sufficient evidence Navarrete did something to J.P. that made him cry and then withdraw.

Navarrete also complains because the prosecutor made references to J.P.'s statement during the opening statement, which in Navarrete's mind caused irreparable damage to his case. However, the trial court gave several pretrial instructions to the jury, one of which was "Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys will discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witness's answers are evidence." We presume the jurors understood and followed this instruction and disregarded the prosecutor's remarks in their determination of the facts. (*People v. Cox* (2003) 30 Cal.4th 916, 961, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

We need not discuss the numerous cases on which Navarrete relies. By and large, they deal with admissions, confessions, or in-court identifications, which present a different situation entirely. As stated in Evidence Code section 402, "The court may hear and determine the question of admissibility of evidence out of the presence or hearing of the jury in any party so requests; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests." (Evid. Code, § 402, subd. (b).) The difference between "shall" and "may" impacts the court's discretion in such matters. If anything, the court had greater discretion here when deciding how to

handle the child witness's incriminating out-of-court statement as opposed to the defendant's incriminating out-of-court statement.

Finally, Navarrete's constitutional claims must also fail. J.P.'s statement falls squarely under the excited utterance exception to the hearsay rule and was sufficiently reliable to meet due process standards. (See *Ohio v. Roberts* (1980) 448 U.S. 56, overruled on another ground in *Crawford v. Washington* (2004) 541 U.S. 36, 60.) "A person seeking to overturn a conviction on due process grounds bears a heavy burden to show the procedures used at trial were not simply violations of some rule, but are fundamentally unfair. [Citation.] Ordinarily, even erroneous admission of evidence does not offend due process unless it is so prejudicial as to render the proceeding fundamentally unfair. [Citations.]" (*People v. Esayian* (2003) 112 Cal.App.4th 1031, 1042.)

In short, we find no basis in state or federal law to reverse Navarrete's conviction because the court ruled J.P.'s statement "the Chino poked me" admissible without a pretrial, evidentiary hearing. Navarrete attempts to minimize the physical evidence because it was inconclusive. However, J.P. had a laceration of some type near his red and inflamed perianal area, and his anus looked like it had some type of cream applied inside and outside of the anal sphincter. He complained about rectal pain to the sexual assault nurse, not just his mother, although he was silent about exactly what had happened. Ultimately, the nurse's expert opinion was that the physical findings were consistent with anal penetration. Consequently, any error, had we found one, would be deemed harmless. (Evid. Code, § 353.)

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.