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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.

RUSSELL LEE ENGLEMAN,

Defendant and Appellant.

G045039

(Super. Ct. No. 08CF1578)

OPINION

Appeal from a judgment of the Superior Court of Orange County, Francisco
P. Briseno, 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, Steve Oetting and
Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Russell Lee Engleman of nine counts of committing lewd and lascivious acts on a child under age 14 (Pen. Code, § 288, subd. (a); all statutory references are to the Penal Code unless noted), three counts of using a minor to create pornography (§ 311.4, subd. (c)), and possession of child pornography (§ 311.11, subd. (a)). The jury also found Engleman committed a lewd act against more than one victim (§ 667.61, subs. (b) & (e)(5)), and engaged in substantial sexual conduct (§ 1203.066, subd. (a)(8)). Engleman contends the trial court abused its discretion by admitting over objection prior consistent statements (Evid. Code, §§ 1236, 791) by one of the testifying minor victims. For the reasons expressed below, we affirm.

I

FACTUAL AND PROCEDURAL HISTORY

Three young women testified at Engleman's trial that he took, or directed the taking of, nude photographs of them when they were under 14 years of age. They also described lewd acts committed or instigated by him.

D., 16 years old at the time of trial, testified Engleman began dating D.'s mother, Maria, when D. was nine years old. At the time, Engleman lived in Santa Ana with his 18-year-old daughter, Jamie.¹ D. and Maria would occasionally stay at Engleman's house.

When D. was nine years old, Engleman began asking her to remove her clothing and take pictures of herself. Engleman began molesting D. when she was around 10 years old. He touched and rubbed her breasts and vagina with his hands, lips, and penis, both over and under her clothing. He touched her in this manner "a lot," the

¹ Before trial, Engleman pleaded guilty to four counts of incest involving Jamie when she was 17 and 18 years old (§ 285). Jamie did not testify at Engleman's trial.

last time when she was 13 years old. He sometimes penetrated her vagina with his fingers, and attempted to have her touch his penis. Most of the molestations occurred in Engleman's bedroom, although one incident occurred in his car. Engleman instructed D. how to pose for the camera. Jamie sometimes took nude photos of D. when D. objected to Engleman taking the pictures.

Engleman gave D., her brother, and Jamie toys, electronic items, and clothes. He took her mom out, and took the family to Disneyland and other places. He often promised D. new toys and the use of his computer if D. posed for nude photographs, and agreed to let her use the computer one hour for each photograph. When she was 11 or 12 years old, Engleman bought her a digital camera and asked her to take nude pictures of her friends. He also showed her photos of naked children on his computer. D. stated she and her friend J., who she met through Jamie, took pictures of each other at Engleman's behest. Jamie also took pictures of both girls.

Around the time Jamie left for college in August 2007, Jamie threatened D. she would "kick [her] ass" if D. "ever ratted out her dad." After Jamie left, Engleman continued to take pictures of D.

D. reported the abuse to her mother on May 16, 2008, because she "was finally tired of it" and knew her mom was considering whether to move in with Engleman. She had been afraid her mother would not believe her, and told a police officer she believed Engleman would harm her or her mother if she revealed the molestations. D., accompanied by her uncle, Juan, retrieved a computer flash drive from Engleman's home and turned it over to the police. The drive contained hundreds of nude photos of D., J., and another girl, M. Most of the photos were taken in Engleman's

bedroom, and showed the girls spreading their labia, and at least one photograph showed Engleman's fingers next to D.'s bare vagina.

Less than a week after D.'s family took the flash drive and reported the abuse, the police arranged for D. to make a covert call to Engleman at work. During the call, Engleman did not deny taking nude photos and apologized for touching D. He said he lacked self-control, was "fucked in the head" and he had "some serious mental issues." He also said he "loved [D. m]ore than anything in this world. More than my own life." He advised D. to destroy the photos, and threatened that both Jamie, who had called D. the night before, and D. would also suffer if she complained to the police. He accused D. of using drugs, warned her it was "traceable" and in her "bloodstream," and she would end up in juvenile hall, separated from her mother.

J. testified her father and Engleman became acquainted when she was nine years old. She also met Jamie and they became friends. Both Engleman and Jamie took nude pictures of her. Jamie took the "really exposed" (explicit) photos. Jamie told her she wanted the pictures to obtain things from her father. Engleman was not present when Jamie took the nude pictures, but J. heard Engleman direct Jamie to obtain the photos. Jamie took J.'s pictures about eight times; Engleman took her picture about three times. J. did not completely disrobe for Engleman, but lifted her shirt and pulled her pants down slightly. He gained her cooperation by buying her CD's and other things and gave her access to his computer. She submitted to having the pictures taken because she feared something would happen to her father or her. Engleman and Jamie stopped asking J. to pose for photos after she complained they should not be taking pictures of her.

M. met Engleman at her father's work when she was 13 years old, and later met Jamie at Engleman's house. Jamie and Engleman took pictures of M. in exchange for going with them to the movies and restaurants. Engleman directed her how to pose and how to "get down and dirty," often while Jamie was in the room. He also grabbed M.'s private parts and made her grab him.

The police executed a search warrant and seized Engleman's computers, hard drives, cameras and videotapes, many containing child pornography. The flash drive contained 425 pictures of D., 69 photos of J., and 10 photos of M. The forensic examiner found some of the same photos in the deleted areas of the camera memory cards. Most of the photos were taken with an Olympus digital camera like the one found in Engleman's home.

Following trial in February 2011, the jury convicted Engleman as charged. In March 2011, the trial court imposed an aggregate prison term of 20 years and eight months to life.

II

DISCUSSION

The Trial Court Did Not Abuse Its Discretion by Admitting D.'s Statements to Officer Slayton and the CAST Interviewer

Engleman seeks reversal of his six lewd act convictions involving D. He contends the trial court erred by admitting D.'s statements to Officer Slayton during her initial interview on May 16, 2008, and D.'s statements during the Child Abuse Services Team (CAST) interview on May 27, 2008. The trial court admitted the statements under Evidence Code sections 1236 and 791 as prior consistent statements.

As noted above, D. testified Engleman began touching her when she was around 10 years old. According to D., he touched and rubbed her breasts and vagina with

his hands, lips and penis, both over and under her clothing. Engleman touched her in this manner “a lot,” the last time when she was 13 years old. He sometimes penetrated her vagina with his fingers, and attempted to have her touch his penis. Other than one incident in Engleman’s car, all the molestations occurred in Engleman’s bedroom.

In her interview with Slayton on May 16, 2008,² D. described how Engleman put his hand down the front of her pants and underwear and rubbed her vagina “many times,” often inserting his finger into her vagina and moving it around. She agreed to do this because Engleman promised to let her use the internet and buy things for her at the store. She told him to stop, but he did it anyway. On many occasions, he removed his penis from his pants, placed it against her vagina and moved it back and forth. He also put his mouth on her vagina numerous times.

In her CAST interview on May 27, 2008,³ D. revealed that Engleman touched and kissed her vaginal area, and put his mouth on and digitally penetrated her vagina. The digital penetration and oral copulation she described happened more than once. On one occasion, Engleman inserted his penis into her vagina while she was on her back. His penis was “on” or “in” the slit of her vagina, but when he tried to insert his penis into her vagina, it hurt and she pushed him away. Engleman also grabbed her breasts when molesting her. Engleman last touched her on Easter 2008. He purchased a camera for her and asked her to take pictures of her friends, but she refused.⁴

² The parties conditionally examined Slayton before trial. D.’s statements to Slayton were admitted at trial through a stipulation. Engleman preserved a hearsay objection.

³ Detective Jaime Rodriguez attended D.’s CAST interview on May 27, 2008, and testified concerning D.’s statements.

⁴ The prosecutor argued to the jury the evidence supported two lewd act convictions each for digital penetration (counts 1 and 2), oral copulation (counts 3 and 4)

The prosecutor offered D.'s statements to Slayton to "rehabilitate [her] credibility." The prosecutor argued defense counsel had questioned D.'s uncle "extensively . . . about what was told to him" by D., and D. had been "cross-examined and basically . . . accused of lying about" Engleman "actually touching her and doing more than just photographs of her." The prosecutor explained "the fact [D.] did inform Officer Slayton right there at the police department when she was giving a statement to him, the fact that the defendant did many times put his hand down her pants and rub her vagina [and] that he inserted his fingers into her vagina and moved it around" were "legally admissible as prior consistent statements." The trial court concluded Engleman had attacked D.'s credibility and therefore her statements to Slayton and the CAST interviewer were admissible.

Engleman contends the trial court erred in admitting D.'s prior consistent statements because D.'s motive to lie about the lewd acts "existed at the time she first told her mother and uncle about the photographs that had been taken of her." He argued at trial D. "concocted the [touching] allegations . . . because she was angry with him about not getting any more gifts," and relies on D.'s cross-examination testimony that the last item she received from Engleman was a camera, and he did not buy her anything else after he had the camera repaired. Shortly afterward, she informed her mother and uncle about the nude photographs.

The Attorney General responds D.'s "prior consistent statements were admissible to rebut the implication that her failure to report the lewd acts to her uncle [Juan] suggested that her testimony at trial was fabricated." On cross-examination, D.

and penile/vaginal contact (counts 5 and 6) because D. testified each of the acts occurred more than once. The dates in the information (between September 2003 and May 2008) corresponded with D.'s ninth birthday and the date she reported the incidents.

acknowledged her uncle asked her what happened, but she did not remember whether she told her uncle that Engleman put his mouth on her vagina, put his fingers on her vagina, or put his penis on or in her vagina. Juan testified D. told him Engleman had been taking pictures of her. He asked if other abuse had occurred, but D. did not answer and began to cry. Juan asked whether Engleman touched her, and she said “he tried to touch her [several times], but she wouldn’t” She also told him Engleman tried to put his penis on her vagina. Juan did not press D. to tell him everything that happened, and did not recall whether he told Slayton that D. accused Engleman of attempting to put his penis on her vagina. The parties later stipulated Juan did not tell Slayton that D. told him that Engleman put his penis on her vagina, or tried to, or that Engleman ever tried to touch her.

Evidence Code section 1236 provides, “Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791.” Evidence Code section 791 provides, “Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.” We review the trial court’s evidentiary ruling for an abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113 (overruled on

another point by *People v. Rundle* (2008) 43 Cal.4th 76, 151 [“trial court’s ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice”].)

“[R]ecent fabrication may be inferred when it is shown that a witness did not speak about an important matter at a time when it would have been natural for him to do so,” and in such a circumstance, “it is generally proper to permit rehabilitation by a prior consistent statement. [Citations.]” (*People v. Riccardi* (2012) 54 Cal.4th 758, ___ [slp. opn. at p. 28].) As explained in *People v. Gentry* (1969) 270 Cal.App.2d 462 (Gentry), if the consistent statement occurs after an improper motive is alleged to have arisen, the statement is inadmissible because “when there is a contradiction between the testimony of two witnesses it cannot help the trier of fact in deciding between them merely to show that one of the witnesses has asserted the same thing previously. ‘If that were an argument, then the witness who had repeated his story to the greatest number of people would be the most credible.’ [Citation.] . . . Different considerations come into play when a charge of recent fabrication is made *by negative evidence* that the witness did not speak of the matter before when it would have been natural to speak. His silence then is urged as inconsistent with his utterances at the trial. The evidence of consistent statements at that point becomes proper because ‘the supposed fact of not speaking formerly, from which we are to infer a recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story.’” (*Id.* at p. 473, original italics; see *Riccardi, supra*, 54 Cal.4th at p. ___ (slp. opn. at p. 28).)

Here, during cross-examination of D. and her uncle, defense counsel suggested the lewd acts had not occurred because D. had not told her uncle about the

abuse. The trial court reasonably could conclude defense counsel implicitly accused D. of fabricating her testimony at trial. Engleman argues D.'s "motive to fabricate existed at the get-go before she made her report to police." But he ignores the rule stated in *Gentry* that when "silence . . . is urged as inconsistent with [the witness's] utterances at the trial," evidence of statements consistent with the witness's trial testimony, made before trial and after the silence, are admissible to rehabilitate the witness. The trial court did not abuse its discretion in permitting the prosecutor to elicit D.'s statements to Slayton and the CAST interviewer that were consistent with her testimony. Engleman did not raise a due process claim in the trial court but, in any event, because the trial court did not err in admitting the statements under Evidence Code sections 1236 and 791, the trial court did not violate Engleman's "due process right to a fair trial," as he now contends.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P.J.

FYBEL, J.