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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.

JON ANDRE BORBON,

Defendant and Appellant.

G045085

(Super. Ct. No. 08WF0426)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed.

Law Offices of William J. Kopeny and William J. Kopeny 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 Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Jon Andre Borbon of three counts of committing lewd acts on a child (M.W.) and one count on another child (A.D.), both under the age of 14. (Pen. Code, § 288, subd. (a).) The court sentenced defendant to 12 years in state prison.

Defendant contends the court erred in sustaining the prosecutor's objections during defense questioning of a social worker, M.W., and M.W.'s friend, and excluding both evidence M.W.'s mother was sexually abused and expert testimony on the effects of improper questioning on a child. Finding no error, we need not address defendant's claim of cumulative error and affirm the judgment.

FACTS

The facts relating to count 4 are irrelevant to the issues raised in this appeal and we omit them. As to counts 1 through 3, M.W. testified she lived with her mother, her two brothers, and defendant, her stepfather in 2006 when she was 10 to 11 years old. Defendant's children from a previous marriage stayed with them occasionally.

About once a month for about a year, defendant entered M.W.'s room at night, rubbed her back until he thought she was asleep, then rolled her over and rubbed her breast and vagina under her clothes for about 5 to 10 minutes with his hand. He also did this once to M.W. when she fell asleep on the couch and another time after he unfastened her bra and jeans after she went to bed with her clothes on.

M.W. felt defendant treated his own children better, including giving them more food, money and privileges, than he gave to her and her brothers. This upset her and her mother, who fought with defendant about it and at one time separated from defendant for six or seven months. After they reconciled and M.W.'s mother moved back into defendant's house with her children, defendant did not resume touching M.W.

During the time defendant was touching her, M.W. opted not tell her mother about it because she was scared and did not want to ruin her mother's relationship with defendant. Also, M.W. watched *Law & Order* on television and the thought of going to court "freaked [her] out." She later disclosed the touching to her friend, A.G., and asked her to keep it a secret, but A.G. informed her own mother, who contacted the authorities.

M.W. was called to the counselor's office at school, where a social worker inquired if defendant "did anything to" her. Scared and not knowing how the social worker knew, M.W. asked if her mother had sent her. The social worker questioned "why" and M.W. said because her mother had wanted to know the reason she disliked defendant. M.W. admitted not liking defendant but denied several times he inappropriately touched her.

The social worker followed up at M.W.'s grandparents' house that afternoon and asked M.W. the same questions. She also talked to M.W.'s mother and brothers. When M.W. continued to say "everything was fine," the social worker requested M.W.'s mother talk to her.

M.W.'s mother questioned if defendant did anything to her and "kept trying to see if there was anything wrong." She told M.W. not to worry because she trusted her, "would believe . . . and . . . be there for [her]," and they could live with M.W.'s grandparents. M.W. ultimately admitted defendant had touched her 10 to 12 times when he went into her room to rub her back at night and answered "yes" when her mother asked if "he touched [her] in [her] private areas." M.W. later told the police and the social worker what happened because her mother wanted her to, not because defendant treated his children better than her and her brothers.

DISCUSSION

1. Sustaining of Prosecutor Objections During Examination of the Social Worker

Defendant contends the court's erred in sustaining the prosecutor's objections during examination of the social worker "prejudiced [his] efforts to present his defense theory . . . that [M.W.'s] accusations were the product of discord between her mother and [him], rather than rooted in fact." No abuse of discretion has been shown.

a. Questions During Direct Examination

1) Whether M.W. Indicated Defendant and Her Mother Frequently Fought

While examining the social worker on direct, defense counsel asked, "And [M.W.] told you that her mother and step-dad fought a lot; right?" The social worker answered, "Yes" but the prosecutor objected to the question as being leading and calling for hearsay. The court sustained the objection and struck the answer at the prosecutor's request.

Defendant argues the question did not ask for hearsay because it was not seeking the truth of M.W.'s statement but her state of mind, on which he was relying to support his defense she had fabricated her allegations "based on an adversarial dynamic" between him and her mother. But if so, whether M.W.'s mother fought often with defendant was a necessary prerequisite and the question called for inadmissible hearsay as it sought a statement "made other than by a witness while testifying at the hearing and . . . offered to prove the truth of the matter stated." (Evid. Code, § 1200; all further statutory references are to this code.)

Moreover, defendant never informed the court he was trying to establish M.W.'s state of mind. A properly made hearsay objection shifts the burden to the proponent of the hearsay to "alert the court to the exception relied upon and . . . lay[] the

proper foundation.” (*People v. Livaditis* (1992) 2 Cal.4th 759, 778 (*Livaditis*).

Defendant’s failure to do either forfeits the issue on appeal. (*Id.* at pp. 779-780.)

Defendant asserts the issue of M.W.’s state of mind “was clearly set out in his pretrial motions.” But he offers no explanation or supporting authority establishing how that satisfies his burden to make that point at the time the question was asked, forfeiting the issue. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

2) *Reaction When Asked if M.W.’s Mother Had Sent Her*

The court sustained a relevance objection when defense counsel asked the social worker what her reaction was upon being asked by M.W. if her mother had sent her. Defendant contends this was error “because the answer was clearly foundational to establishing [M.W.] was aware of and expressing her own feelings about the fact that her mother and [defendant] were fighting.”

On the contrary, defendant’s purpose in asking for the social worker’s reaction was not clear and on its face any response would not “hav[e] any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (§ 210.) Because defendant made no offer of proof when the court sustained the prosecutor’s objection, no abuse of discretion occurred. (*People v. Thornton* (2007) 41 Cal.4th 391, 448 [no abuse of discretion where “[c]ounsel made no offer of proof, did not attempt to lay any factual foundation for the view she expressed, and was not speaking on a subject on which judicial notice could be taken”].)

Defendant claims, but does not explain how, the social worker’s “reaction would reveal what [M.W.] saw and/or heard,” which would have “bor[n]e on [M.W.’s] credibility” Because no “legal argument with citation of authorities” is furnished, the point is forfeited. (*People v. Stanley, supra*, 10 Cal.4th at p. 793.)

3) *M.W.'s Explanation for Asking if Her Mother Sent the Social Worker*

The social worker testified she asked M.W. why she thought her mother had sent her. When defense counsel inquired how M.W. responded, the court sustained a hearsay objection.

Defense counsel requested to be heard and in chambers asserted M.W.'s response was admissible as a prior consistent statement. The prosecutor countered they did not qualify for admissibility under section 791, subdivision (a), requiring the statement be inconsistent with the witness's prior testimony or subdivision (b), requiring the making of "[a]n express or implied charge . . . 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." The court agreed with the prosecutor neither of these provisions was satisfied, as the proposed testimony would be consistent with M.W.'s stated reason for asking the social worker if her mother had sent her. Defense counsel added the evidence was admissible for the nonhearsay purpose of showing how the answer, which he anticipated to be her "mother asked her all the time why she doesn't like" defendant, affected the social worker's questions. But the court agreed with the prosecutor M.W. already testified to that and ruled the testimony did not fall within the nonhearsay purposes propounded by defense counsel.

Defendant asserts the court erred in so ruling because his attorney was attempting to show M.W.'s state of mind "regarding her mother's animosity toward [defendant]," not that what M.W. said was true. But defense counsel never actually "alert[ed] the court" (*Livaditis, supra*, 2 Cal.4th at p. 778) he was relying on the state of mind exception. Rather, he first claimed it was admissible as a prior consistent statement, then argued it was admissible to show how it affected the social worker. Even if the exception had been made, defendant has not shown he was prejudiced by the

exclusion of the social worker's answer given that her anticipated response was something to which M.W. had already testified.

b. Questions During Cross-Examination

During cross-examination by the prosecutor, the social worker testified M.W. appeared nervous during the interview; her eyes “dart[ed] around” and she laughed nervously when asked about private parts. The prosecutor then asked if the social worker thought M.W. had been truthful. Defense counsel objected on the basis the question called for speculation and the court ruled, stating, “Not on those grounds, but sustained.” The court thus overruled the objection based on speculation while excluding the evidence on an unknown ground – possibly because it concluded the proffered testimony would not be helpful to the jury or would invade its province.

Defendant contends the court's words informed the jury the social worker would not be speculating if she gave an opinion on whether M.W. was telling the truth, was capable of doing so, and believed M.W. was not truthful in telling the social worker she had not been molested “because in fact she *had* been molested, as she later testified at trial.” But this argument hinges on the assumptions the question improperly called for speculation and that the court erred in concluding it did not, neither of which defendant has shown.

Generally, “[l]ay opinion about the veracity of particular statements by another is inadmissible on that issue” in part because the jury is the one charged with determining credibility based on demeanor and other factors. (*People v. Melton* (1988) 44 Cal.3d 713, 744-745.) If a jury, consisting of lay persons, can make such a determination without it being speculative, it would be anomalous to say it is inherently speculative for a nonexpert witness to form such an opinion about another person's credibility in that same fashion. Moreover, “[a] lay witness may testify to an opinion if it is rationally based on the witness's perception and if it is helpful to a clear understanding

of his testimony.” (*People v. Farnam* (2002) 28 Cal.4th 107, 153; see also *People v. Chatman* (2006) 38 Cal.4th 344, 384 [questions asking if another person was telling the truth permissible in court’s discretion if “witness to whom [questions] are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions”]; § 800.) The social worker’s opinion testimony would not have been speculative because it would have been based on her firsthand aural and visual observation of M.W.’s demeanor during the interviews. (§ 702.)

In any event, the social worker never answered the prosecutor’s question because the court sustained the objection and instructed the jury to ignore questions to which it sustained an objection and “not guess what the answer might have been or why [the court] ruled as [it] did.” We presume the jury understood and followed that instruction. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.) Under these circumstances, a party generally is not prejudiced. (*People v. Pinholster* (1992) 1 Cal.4th 865, 943, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.) *People v. Sergill* (1982) 138 Cal.App.3d 34, 39, cited by defendant, is distinguishable because the trial court there allowed a police officer to testify a sex offense victim was credible.

Because the social worker did not respond to the prosecutor’s question, we reject defendant’s claim the jury undoubtedly understood her answer to mean, “in her opinion, [M.S.] was not telling the truth in denying she had been molested.” Nor are we persuaded the court could have minimized the harmfulness of its ruling by informing the jury “a social worker is not competent to form or express an opinion on the truthfulness or lack of it in the children she interviewed, and further that she has no expertise in that area.” In our view, that would have drawn unnecessary attention to an unanswered question the court ordered the jury to ignore and, in any event, defendant did not request

such an instruction and provides no authority imposing such a duty on the court, forfeiting the issue. (*People v. Stanley, supra*, 10 Cal.4th at p. 793.)

2. *Exclusion of Evidence During Cross-Examination of M.W.*

Defendant argues the court's erroneous rulings sustaining a number of objections during his counsel's cross-examination of M.W. deprived him of his Sixth Amendment right to present a defense. We disagree.

First, defendant asserts the court "*sustained* the prosecution objection to counsel's question regarding how many times [M.W.] spoke to her mother regarding the allegations against" defendant. But the query objected to relates to the number of times M.W. talked her *counselor*, not her mother, about the issue.

Second, defendant challenges the court's sustaining of a series of hearsay objections, the first two of which occurred when his counsel asked M.W. if her mother (1) talked to defendant about his favoring his children and (2) "told [defendant] she wanted [his daughter] to leave" after she hit M.W.'s brother. He contends the out-of-court statements were not offered for their truth but to show M.W. had "a motive to falsely accuse" defendant to make him leave because she believed her mother wanted his daughter out of the house and thought he treated his own children better than hers. But defendant's failure to present this theory to the trial court at the time the objection was sustained forfeits the issue. (*Livaditis, supra*, 2 Cal.4th at p. 778.) We reject his claim he adequately raised the issue in a pretrial motion for the reason expressed in section 1(a)(1) of our discussion above.

Another hearsay objection was sustained to defense counsel's inquiry whether M.W.'s brother "told somebody at school what had happened." Defendant argues the question did not call for hearsay because it "only asked whether something was said, not whether the thing said (i.e., what happened) was true." But even if so, defendant has not attempted to explain how he was prejudiced by the exclusion of such

testimony given its apparent lack of relevance to any issue in the case. The record shows M.W.'s mother moved her children out of defendant's house when he refused to do anything about his daughter hitting M.W.'s brother, whereas the molestation claims did not arise until after defendant reconciled with M.W.'s mother and they moved back six or seven months later. Because defendant has not shown it was reasonably probable a result more favorable to him would have resulted if the testimony had been allowed, reversal is not required. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125.)

Finally, defendant contests two sustained relevancy objections. The first occurred when defense counsel asked M.W. if her mother called the social worker the night she told her about the touching. Defendant claims the objected to evidence was relevant to establish M.W.'s perception of her mother's belief in and approval of her allegations because if she did call that night, M.W. may have seen that as her mother's "satisfaction that this was what she wanted [M.W.] to say." But defendant forfeited this argument by failing to assert it at the time the objection was made. He also has not shown how this ruling prejudiced him given M.W.'s testimony the social worker returned to the house the following afternoon.

The second sustained relevancy objection occurred when defense counsel asked M.W. what her mother did when M.W. informed her A.D. (count 4) claimed defendant had molested her as well. Defendant argues the evidence "was highly relevant, because this too would provide a motive for [M.W.] to come to trial and testify to things she initially told the social worker did not happen, because in her mind, it pleased her mother." But M.W. had already told her mother, the social worker, and the authorities defendant had inappropriately touched her before A.D. came forward with her allegations. Defendant provides no explanation how M.W.'s motive for doing so would be affected by what her mother did with regard to A.D.'s subsequent claims. Nor has he shown prejudice from the ruling since the record shows M.W.'s mother advised A.D.'s parents upon being informed by M.W. of A.D.'s molestation.

3. Exclusion of Evidence M.W.'s Mother was Sexually Abused and Dr. Brodie's Expert Testimony

Prior to trial, the defense moved to introduce evidence M.W.'s mother had been sexually abused and Dr. Laura Brodie's expert opinion testimony that an interviewer's improper leading and repetitive questions can taint a child's account of an event. The court found M.W.'s mother's past sexual abuse was "irrelevant and . . . more prejudicial than probative" and ruled that Dr. Brodie's proffered testimony was premature because it "presuppose[d] unknown facts" and was based on a discussion between M.W. and her mother they knew "nothing about" It also noted the scientific evidence on the effect of "improper interviewing techniques" was based on investigative interviews, not a parent and child discussion, and was not convinced the latter fell under Dr. Brodie's "investigative umbrella." But the court left the issue open in the event defense counsel believed the testimony at trial showed "the issue has become ripe for Dr. Brod[ie]'s expertise to come into play." Defendant did not raise the issue again until his new trial motion, which the court denied.

Defendant contends neither the trial court nor the prosecution identified how the evidence relating to M.W.'s mother would be prejudicial, and asserts the evidence was relevant to show she "knew about being molested, and . . . may well have projected that onto [M.W.] when [she] showed signs of not liking [defendant]." He also argues Dr. Brodie should have been allowed to "offer expert testimony to show the jury the effect of the suggestive manner of questioning." We are not persuaded.

"[W]hen a defendant has proffered evidence, the relevance (and therefore the admissibility) of which depends upon the existence of a preliminary fact, he . . . bears the burden of producing sufficient evidence of the preliminary fact. [Citations.] Sufficient evidence in this context means evidence strong enough to "support a favorable determination by the jury.'" [Citation.] The determination of the existence, or nonexistence, of sufficient evidence of a preliminary fact is committed to the sound

discretion of the trial court. [Citation.]” (*People v. Rundle* (2008) 43 Cal.4th 76, 130-131 (*Rundle*), disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

In *Rundle*, the defendant sought to introduce evidence his mother had been sexually abused, claiming that would confirm his claim she sexually abused him based on a psychiatrist’s earlier testimony “about a correlation between a person’s being the victim of incest as a child and later, as a parent, becoming the perpetrator of incest on his or her children.” (*Rundle, supra*, 43 Cal.4th at p. 130.) The preliminary fact “was whether there is an increased probability a child whose parent subjected her to incest will, as an adult, inflict similar abuse upon her own children.” (*Id.* at p. 131.) Because “there is no *inherent* logical connection between being a victim of incest and later engaging in incest with one’s own children, . . . proof of such a correlation would require . . . some type of ‘scientific’ support, for example, medical, psychological, or statistical studies.” (*Ibid.*) The defendant sought to make this showing based solely on the psychiatrist’s testimony, which *Rundle* noted “was remarkably equivocal and limited.” (*Ibid.*) *Rundle* concluded the “defendant failed to establish as a preliminary fact that a correlation exists between being a victim of incest as a child and later as a parent engaging in incest with her children. The trial court therefore did not abuse its discretion in excluding as irrelevant the proffered evidence of the incestuous relationship between defendant’s mother and grandfather.” (*Id.* at p. 133.)

The same analysis applies here. Defendant failed to establish the preliminary fact there was an increased likelihood that a mother, who herself was a victim of sexual abuse, would “project[] that onto her daughter,” or that M.W.’s mother questioned M.W. or commented in a manner that would render Dr. Brodie’s testimony relevant. He points to nothing in M.W.’s testimony about her approximately 15-minute conversation with her mother that would suggest her mother mentioned her own past sexual abuse. Although defendant maintains M.W.’s mother asked questions and made

comments before M.W. made the allegations against him, he has not shown she used the investigatory techniques employed by law enforcement and social workers or otherwise improperly interviewed M.W. Because defendant failed to carry his burden of showing the existence of these preliminary facts, the court was within its discretion in excluding the evidence and no violation of defendant's constitutional rights occurred.

4. Sustaining of Prosecutor Objections During Cross-Examination of A.G.

Defendant's final argument is the court erred in sustaining objections to two questions during his cross-examination of A.G. on the ground they were argumentative. We disagree.

Defense counsel was cross-examining A.G. about how the topic of molestation came up. When A.G. testified "[i]t was just something out of the blue," defense counsel asked, "Just out of the blue said, hey, by the way, my dad comes into my room at night and touches me?" The court sustained an objection that the question was argumentative.

A.G. then testified M.W. basically "just came right out with it," they did "not really" talk about it and M.W. did not offer any more information or want to talk about it. At that point, defense counsel inquired, "So she just kind of brought it up, threw it out there and just left it?" to which the court sustained an objection to the question as phrased on the basis it was argumentative.

"An argumentative question is a speech to the jury masquerading as a question. . . . [It] essentially talks past the witness, and makes an argument to the jury, [and] is improper because it does not seek to elicit relevant, competent testimony, or often any testimony at all." (*People v. Chatman, supra*, 38 Cal.4th at p. 384.) Because the two objected to questions sought information A.G. had already testified to, the court was within its discretion in determining defense counsel was not seeking to obtain relevant testimony but merely to make a speech to the jury. Contrary to defendant's

claim, the ruling thus did not defeat his ability to place his defense before the jury. No abuse of discretion has been shown.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

IKOLA, J.