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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.

JESUS ROQUE MATEO,

Defendant and Appellant.

G047761

(Super. Ct. No. 11NF2522)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed as modified.

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

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, William M. Wood and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jesus Roque Mateo was sentenced to prison for committing a lewd act and aggravated sexual assault on a child. He argues the trial court erred in admitting evidence that sperm from an unknown source was found around the victim's anus. He also challenges the amount of certain fines the court ordered him to pay. We agree with appellant that the amount of the fines must be reduced slightly. In all other respects, we affirm the judgment.

### FACTS

In 2011, 11-year-old Uriel G. and his family were subletting a room in appellant's apartment. Appellant was considered a friend of the family and sometimes spent time alone with Uriel. One day in April 2011, Uriel was playing catch with appellant in their garage. Uriel's little brother Israel was there, too, but eventually he left and Uriel fell asleep on a couch that was in the room. When he awoke, appellant was on top of him, pulling off his clothes. He removed Uriel's pants and put his penis inside his "butt." Uriel resisted and said "no," and within a short time, appellant stopped and got up. Uriel threatened to tell his mother, but appellant told him in a deep voice not to do so. Afraid appellant might hurt him if he disobeyed, Uriel kept the incident to himself.

Uriel's family subsequently moved out of appellant's apartment. However, on July 30, 2011, Uriel returned to the apartment because appellant had agreed to let him store his bike there. When Uriel arrived, appellant was watching a scary movie with naked people in it. After watching the movie for a few minutes, Uriel "got dirty from [his] pants" (the meaning of which was never clarified at trial), and appellant allowed him to take a shower. Uriel then went back to the bedroom, where appellant was still watching the movie.

Eventually, Uriel took a seat on the floor and appellant joined him there. Because the movie had "nasty stuff" in it, Uriel moved forward on his hands and knees to reach for the remote controller. At that point, appellant reached for Uriel, stretched him forward, and held his head down so he could not get away. He then asked Uriel if he

“wanted to do it again,” and if “he wanted [appellant’s] ‘wee-wee’ in his butt.” Uriel told him, “No,” adding, “I told you I didn’t like that last time. No!” However, appellant pulled Uriel’s pants down and forced his “dick” into Uriel’s “butthole.” According to Uriel, appellant’s penis was erect and it went in “all the way,” causing him pain. Uriel could not get away, and when he told appellant to stop, he refused.

The incident lasted about a minute. Appellant had not “put anything on,” e.g., protection or lubricants, and Uriel did not feel anything wet or sticky on him afterward. As before, appellant told Uriel in a deep voice not to say anything. Uriel was even more afraid of appellant after this second incident, so when he returned home that day, he did not tell his mother what had happened.

However, Uriel’s mother had a suspicion something was going on. She had observed appellant treating Uriel differently than her other children, by giving him toys and other gifts. Uriel was also starting to act out at school and around the house. Accordingly, late that night, Uriel’s mother checked both of her sons for signs of sexual abuse while they were sleeping. While Israel seemed fine, Uriel appeared to have redness and cuts around his anus.

The next morning, Uriel’s mother asked him about his “bottom” and his relationship with appellant. Through tears, Uriel told his mother about both incidents. She then brought him to the Anaheim police station, where he was interviewed by Officer Aaron Lahmon. While Uriel was telling him about the incidents, Lahmon asked him about body part terms to make sure he understood what he was saying. Uriel answered correctly and said he was sure what happened.

Following his interview with Lahmon, Uriel was transported to the hospital where he was examined by Jan Hare, a certified forensic nurse. Uriel described to her how appellant had sexually molested him in April 2011 and on the previous day. He also informed Hare he had bathed once since the most recent incident had occurred.

Upon examining Uriel's anal area, Hare noticed two small tears on the gluteal fold between his buttocks. He also had three more tears around the external portion of his anus. Hare believed that, taken together, the tears were consistent with Uriel's claim of sexual penetration.

Hare swabbed Uriel's anal area for microscopic evidence of sexual contact. The swabs were sent to the Orange County Sheriff's Crime Lab for examination. Testing of the external anal swab revealed the presence of a single sperm head. The sperm head was tested for DNA identification, but there was insufficient DNA for typing purposes. Because of this, the source of the sperm could neither be identified nor narrowed to any particular segment of the population.

A week after Uriel spoke to the police, he was interviewed by a member of the Orange County Child Abuse Services Team (CAST). While he was describing the first incident, he was asked, "[Did] it hurt . . . or tickle or feel like something else?" Uriel said, "It felt like something else." He did not say it hurt. Explaining the second incident, Uriel said appellant forced him to lie down on the bed, not the floor. He also said appellant did not show him any movies with naked people in them.

A few days after the CAST interview, on August 10, 2011, Anaheim Police Investigators placed a covert call from Uriel to appellant. Initially, appellant avoided questions and endeavored to find out if Uriel was home alone. Once convinced of this, his voice became softer. He repeatedly told Uriel, "I love you a lot," addressing him as "papito."

Appellant told Uriel to ask his mother to let him come over to his apartment. He told Uriel to create a story to tell his mother, such as, "we're going to watch movies and that's it." Uriel asked him, "Are you going to do that to me again, what you did to me . . . on Saturday?" Appellant responded, "Whenever you come over."

Uriel also asked, “[W]hy did you touch my butt the other day?” Appellant responded, “Well, you know [why]. You know [why].” Appellant told Uriel he liked touching his butt and everything else they did.

Appellant said his favorite part was “[y]ou kissing me like that . . . us kissing, taking a shower . . . me kissing your little butt.” When Uriel told him, “my butt hurt the other day when you did that,” appellant asked, “But I mean, you liked it, no?” Uriel said he did not know but asked if they did do it again, would he get movies. Appellant said yes. He told Uriel, “I want to be with you again so I can kiss you.” He also told Uriel he wanted to “stick it in” him. When Uriel asked what that meant, appellant said there was no need to explain because he already knew.

One week after the covert call, on August 17, 2011, Anaheim Police arrested appellant and interviewed him. Appellant initially said that Uriel was lying and that he never kissed or attempted to have sex with him. When confronted with the covert call, appellant denied saying anything sexual or wanting to “stick it in” Uriel. He also said he was 62 years old, diabetic, and incapable of getting an erection. Later in the interview, appellant claimed Uriel showed his penis to him several times and repeatedly asked to have sex with him. Appellant told the police that at first he refused to do so, but eventually he gave in and tried to have sex with Uriel. However, he was unable to do so, because of his diabetes.

Appellant was charged in count one with committing a lewd act upon Uriel in April 2011. (Pen. Code, § 288, subd. (a).) A special allegation of substantial sexual conduct in the form of sodomy was alleged in conjunction with that count. (Pen. Code, § 1203.066, subd. (a)(8).) Count two alleged appellant committed aggravated sexual assault against Uriel by sodomizing him in July 2011. (Pen. Code, §§ 269, subd. (a)(3), 286, subd. (c)(2).)

At appellant’s request, the trial court instructed on several lesser included offenses, including attempted aggravated sexual assault in the form of attempted sodomy.

The trial court also instructed the jury that ejaculation is not required for the crime of sodomy. In closing argument, defense counsel admitted appellant had “nasty” desires and may have inappropriately touched or attempted to sodomize Uriel. However, counsel insisted there was insufficient evidence to prove appellant actually committed the crime of sodomy against Uriel.

The jury convicted appellant on both counts but found the substantial sexual conduct allegation in count one not true. The court sentenced appellant to 17 years to life in prison.

## I

Appellant contends the trial court erred in admitting the sperm evidence. Because the source of the sperm was unknown, he contends the evidence was irrelevant and unduly prejudicial. We find the evidence was properly admitted.

It is undisputed that a single sperm head was found around the external area of Uriel’s anus, and that not enough DNA could be extracted from it to identify whose sperm it was. In objecting to that evidence, appellant argued it would sway the jury to convict him even though it could have been produced by someone else and did not, in and of itself, prove penetration had occurred. However, given that appellant admitted some interplay with Uriel, the court overruled his objection. The court found the sperm relevant given its location and Uriel’s age. It reasoned, “When you look at an 11-year-old boy and sperm is on his back side and not on his leg or his arm, and even though there’s no DNA to connect it to the defendant, it still tends to show sodomy or at least attempted sodomy.”

Trial courts have considerable discretion in determining the relevance of evidence. (*People v. Clark* (2011) 52 Cal.4th 856, 922 (*Clark*)). As long as the evidence in question has a tendency in reason to prove a material fact in the case, we will not disturb the trial court’s decision to admit it. (*Ibid.*)

In *Clark*, the California Supreme Court determined evidence of a semen stain on the defendant's boxer shorts was relevant in his murder/attempted rape prosecution, even though the source of the semen could not be scientifically established. Because the defendant was wearing the shorts when the police arrested him hours after the killing, the court found it was reasonable to infer he was wearing the shorts at the time of the alleged crimes, he was the source of the semen, and he harbored the intent to rape the victim. (*Clark, supra*, 52 Cal.4th at pp. 922-923.)

In so ruling, our Supreme Court distinguished the case of *People v. Schulz* (1987) 154 Ill.App.3d 358 (*Schulz*), which appellant relies on here. *Schulz* was similar to *Clark* in that the source of the semen in question (which was found on a murdered woman's rectum) could not be identified with scientific certainty. The prosecution's medical experts could only narrow the pool of potential donors down to 20 percent of the population. (*Id.* at p. 363.) Even though the defendant came within that population, there was only marginal circumstantial evidence connecting him to the murder, and the defendant presented considerable evidence, including expert medical testimony, that he was not the source of the semen. (*Ibid.*) Under those circumstances, the *Schulz* court determined the semen evidence should have been excluded because it was "totally lacking in probative value." (*Id.* at p. 366.)

The present case is more like *Clark* than *Schulz*. Despite the state's inability to scientifically establish appellant was the source of the sperm found around Uriel's anus, there was considerable circumstantial evidence it came from him. Uriel testified appellant sodomized him the day before the semen was found, and during the covert phone call with Uriel, appellant admitted kissing and touching Uriel and wanting to "stick it in" him. While the sperm *could* have come from someone other than appellant, we have to keep in mind that, being only 11 years old, Uriel was far less likely to be sexually active than the adult victim in *Schulz*. Indeed, there was no evidence Uriel was involved in any sexual activity outside the scope of this case. Even if we assume

appellant's claim about being unable to obtain an erection was true, the sperm evidence was relevant to corroborate Uriel's testimony and to show that some form of sodomy — either attempted or completed — had occurred.

As far as prejudice is concerned, appellant correctly points out evidence is subject to exclusion “if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) However, just because a particular piece of evidence may be damaging to the defendant's case does not mean it is unduly prejudicial. Rather, exclusion is only required when the subject evidence “““uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [Citations.]”” [Citation.]” (*People v. Benavides* (2005) 35 Cal.4th 69, 96.)

In the context of this case, we do not believe the sperm evidence was likely to sway the jury on an emotional level. The charges against appellant were by definition sexual in nature, and the jury heard explicit testimony about the alleged acts appellant committed. Indeed, the content and tone of the covert phone call, and appellant's own admission about wanting to have sex with Uriel were likely to have a greater impact on the jury than the sperm evidence, which was clinical in nature and did not stand out in Uriel's memory of the alleged assault.

Appellant fears the jury may have misused the sperm evidence to satisfy the force or fear element of aggravated sexual assault. However, the prosecutor did not have to rely on the sperm evidence as proof of force or fear, because Uriel's description of the assault amply established that element. In discussing the sperm evidence in closing argument, the prosecutor focused not on that element, but on the issue of penetration, claiming it corroborated Uriel's allegation appellant had sodomized him. The prosecutor also pointed out, and the jury was instructed, that ejaculation is not required for the crime of sodomy. That lessened the likelihood of the jury misusing or placing undue emphasis

on the sperm evidence. Although relevant, the evidence was simply not a crucial aspect of the prosecution's case.

For all of these reasons, we find the trial court properly admitted the sperm evidence. We discern no abuse of discretion in the court's decision to do so.

## II

At sentencing, the trial court ordered appellant to pay restitution and parole revocation fines in the amount of \$240 each. In so doing, the court noted the applicable statutes then in effect, which set \$240 as the minimum amount for such fines. (See Pen. Code, §§ 2102.4, subd. (b)(1), 1202.45, subd. (a).) However, at the time appellant committed his crimes, the minimum fine allowable under each of these statutes was only \$200. We agree with appellant that ex post facto principles compel a \$40 reduction in each of his fines.

First, there is no dispute appellant's fines constitute punishment for purposes of the prohibition against ex post facto laws. (*People v. Souza* (2012) 54 Cal.4th 90, 143-144; *People v. Saelee* (1995) 35 Cal.App.4th 27, 30-31.) And while the Attorney General argues appellant forfeited his right to challenge the fines by failing to object to them at the time they were imposed, appellate courts will not hesitate to intervene in the first instance when, as here, the alleged sentencing error is clear and easily correctable. (*People v. McCullough* (2013) 56 Cal.4th 589, 594; *People v. Scott* (1994) 9 Cal.4th 331, 354.)

The Attorney General points out that, even under the statutes in effect at the time of appellant's crimes, the trial court had the discretion to fine appellant up to \$10,000. Because appellant's fines did not exceed that amount, the Attorney General argues appellant has no right to complain about them. However, by explicitly referring to the minimum fine allowable, we believe the trial court evidenced his intent to impose the statutory minimum. Since the statutory minimum at the time appellant committed his offenses was only \$200, we will reduce his fines to that amount.

DISPOSITION

Appellant's restitution fine and parole revocation fine are each modified from \$240 to \$200. The clerk of the superior court shall prepare an amended abstract of judgment reflecting this modification and send a certified copy thereof to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.