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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.

JOSE LUIS ESQUIVEL FARFAN,

Defendant and Appellant.

G050464

(Super. Ct. No. 13HF0298)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W.

Michael Hayes, Judge. Affirmed.

Jill M. Klein, 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, Theodore M. Cropley and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Jose Luis Esquivel Farfan of one count of orally copulating his then three-year-old grandniece, A.H. (Pen. Code, § 288.7, subd. (b).) The trial court sentenced him to 15 years to life in state prison.

Defendant contends the court erred by allowing A.H.'s grandmother and primary caregiver, Cecilia, to testify about statements A.H. made to her immediately after the crime occurred and instructing the jury it could use his false and misleading statements to the police to infer consciousness of guilt. He also argues the two errors cumulatively require reversal. We disagree and affirm the judgment.

FACTS

Defendant lived in a two bedroom apartment with numerous other relatives including his two brothers, Rafael and Benito, Sr.; Benito, Sr.'s wife, Cecilia; Benito, Sr. and Cecilia's son, Benito Jr.; and their grandchildren, one of whom was then three-year-old A.H. Around 5:45 p.m. one afternoon, Cecilia was cooking dinner in the kitchen while defendant was alone in the bedroom he shared with Rafael, who was in the living room watching television.

Cecilia sat A.H. down in her chair in the kitchen and did not pay attention for a few minutes. When she looked again, A.H. was no longer in her chair. Cecilia asked Rafael if he had seen A.H., but he had not. Rafael called out for A.H. and knocked on the bedroom door where defendant was. A.H. opened the door, walked out to where Rafael was waiting, then "came fast towards" Cecilia, followed by defendant.

Cecilia brought A.H. to the kitchen to eat while defendant went to the living room to eat dinner. When Cecilia placed a plate in front of A.H., A.H. said, "Wait for me, grandma. I'm going to lift my underpants because my uncle didn't lift them, put them up." Cecilia went to where A.H. was standing and saw A.H.'s underpants were

down by her upper thighs just below the crotch area while her pants were at the middle of her waist.

Cecilia brought A.H. to a bedroom and asked her what happened. Pointing to her vagina and buttocks, A.H. told Cecilia defendant had “kissed her part down there, that he had kissed her here and here.” Defendant told A.H. he would allow her to watch television if she allowed him to do that.

Cecilia did not allow A.H. to change clothes, shower, or take a bath and stayed in the bedroom with her until her son Benito Jr., arrived home, at which point A.H. ran to and hugged him, and told him what she had told Cecilia. Cecilia waited until her husband Benito Sr., arrived home and after A.H. told him the same thing, they called the police. When officers arrived, Cecilia gave them the clothing A.H. was wearing at the time of the incident. Upon interviewing family members, the officers arrested defendant.

Prior to this incident, Cecilia would not allow A.H. to be alone with defendant. On one occasion, defendant had tried to lure A.H. to follow him with a bag of cookies and on several other occasions he tried to take her to the market without permission but family members stopped him and took “her away from him.”

After defendant was arrested, defendant told a police investigator A.H. came into his room between 5:30 and 6:00 p.m. and “play[ed] over him” “on his bed.” He stated he did not kiss A.H., and there would be no reason his saliva or DNA to be found on A.H. He also denied changing A.H.’s clothing or taking her to the bathroom, and claimed the only time he touched A.H. was when he grabbed her around the waist to put her on the ground.

DISCUSSION

1. Erroneous Application of Spontaneous Statement Exception

At trial, Cecilia testified about what happened after A.H. came out of defendant's bedroom. According to Cecilia, when she placed a plate of food on the table for A.H., A.H. said, "Wait for me, grandma. I'm going to lift my underpants because my uncle [referring to defendant] didn't lift them, put them up." Cecilia looked in A.H.'s pants and saw her underwear was down by her upper-thigh area, "just below the crotch level." Cecilia took A.H. to the bedroom to talk to her and asked what defendant had done.

The trial court overruled defense counsel's hearsay objection, finding A.H.'s response fell "within the spontaneous statement exception. It's close in time. The mere fact that a question is asked of somebody doesn't mean the statement is not spontaneous." Cecilia then testified A.H. told her defendant "had kissed her part down there, that he had kissed her here and here," pointing to her vagina and buttocks. When asked if A.H. told her why she allowed defendant to do so, Cecilia responded, "Because he told her that if she let him, he would allow her to watch T.V."

Defendant contends A.H.'s response to Cecilia questions did not fall within the spontaneous exception to the hearsay rule "because there was no evidence [A.H.] was under the stress of any nervous excitement and the statements were made in response to Cecilia's suggestive questioning." We disagree.

Under Evidence Code section 1240, for an out-of-court statement to be admissible under the spontaneous statement exception to the hearsay rule, ""(1) [t]here must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the

utterance must relate to the circumstance of the occurrence preceding it.””” (*People v. Merriman* (2014) 60 Cal.4th 1, 64 (*Merriman*).)

“A number of factors may inform the court’s inquiry as to whether the statement in question was made while the declarant was still under the stress and excitement of the startling event and before there was ‘time to contrive and misrepresent.’ [Citation.] Such factors include the passage of time between the startling event and the statement, whether the declarant blurted out the statement or made it in response to questioning, the declarant’s emotional state and physical condition at the time of making the statement, and whether the content of the statement suggested an opportunity for reflection and fabrication. . . . [N]o one factor or combination of factors is dispositive. . . . [¶] Whether an out-of-court statement meets the statutory requirements for admission as a spontaneous statement is generally a question of fact for the trial court, the determination of which involves an exercise of the court’s discretion. [Citation.] We will uphold the trial court’s determination of facts when they are supported by substantial evidence and review for abuse of discretion its decision to admit evidence under the spontaneous statement exception.” (*Merriman, supra*, 60 Cal.4th at pp. 64-65.)

We agree with defendant that *People v. Trimble* (1992) 5 Cal.App.4th 1225 (*Trimble*) is instructive regarding whether A.H. was under the stress of nervous excitement when she described what defendant said and did. There, a two-and-one-half-year-old child witnessed her father murder her mother. Nearly two days later, as soon as the defendant left the child’s presence and an aunt’s arrival, the child “became ‘completely hysterical’” and described to the aunt how her father had stabbed her mother nearly two days earlier. (*Id.* at p. 1229.) *Trimble* concluded the trial court did not abuse its discretion in finding the child’s statements “were spontaneous rather than the product of reflection.” (*Id.* at p. 1235.) Despite “[t]he appreciable interval between the incident and the subject statements,” the arrival of the aunt and departure of the child’s father, with whom she had been sequestered for two days, “was a triggering event, startling

enough to provoke an immediate, unsolicited, emotional outpouring of previously withheld emotions and utterances.” (*Ibid.*) Until then, the child “had no trustworthy person in whom to confide.” (*Ibid.*)

Similarly, in *In re Emilye A.* (1992) 9 Cal.App.4th 1695 (*Emilye A.*) a nearly three-year-old child was playing with her mother when the child said her father had given her an “owie” inside her vagina “a day or two” earlier. (*Id.* at pp. 1700, 1713.) At a subsequent juvenile dependency hearing, the mother testified to these statements, but the daughter did not testify. (*Id.* at pp. 1700-1701). The appellate court determined the mother’s statements were properly admitted as a spontaneous declaration: “These circumstances, i.e., that the statements were made spontaneously, while in the midst of play, that they were made by a child sufficiently young that her reflective powers would be relatively unsophisticated, and that they were made while the minor was in pain [citation] all indicate that they were made under stress or excitement, while the declarant’s reflective powers were still in abeyance.” (*Id.* at p. 1713.)

Here, there was substantial evidence to support the trial court’s ruling that A.H.’s statements satisfied Evidence Code section 1240. Upon exiting defendant’s bedroom, A.H. “came fast towards” Cecilia, her primary caretaker and before eating, told her she was “going to lift my underpants because [defendant] didn’t lift them, put them up.” Cecilia immediately confirmed A.H.’s underpants were down by her upper thighs just below the crotch area. Just moments after that, in response to Cecilia’s question of what happened, A.H. told Cecilia defendant “had kissed her here and here,” pointing to her vagina and buttocks, and that defendant had said she could watch television if she allowed him to do so. This all occurred in significantly less time between the stressor and the statements than in *Trimble* and *Emilye A.*, while A.H. was under stress or excitement and her “relatively unsophisticated” “reflective powers were still in abeyance.” (*Emilye A., supra*, 9 Cal.App.4th at p. 1713.) The court did not abuse its discretion in admitting A.H.’s statements.

Defendant contrasts this case with *Trimble* on the basis “the record is devoid” of any evidence A.H. “was hysterical, jumpy and rambling” but instead was behaving “in a normal fashion” and did not “show[] signs of stress or mental agitation.” Those may be relevant facts, but they are not dispositive. (*People v. Poggi* (1988) 45 Cal.3d 306, 319 [“the fact that the declarant has become calm enough to speak coherently also is not inconsistent with spontaneity”].) Neither is the fact A.H.’s statements “were not blurted out . . . but made in response to questions posed by” Cecilia. Statements elicited by questioning do not ““deprive[] the statements of spontaneity if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance.”” (*People v. Thomas* (2011) 51 Cal.4th 449, 496, italics omitted; see *Poggi*, 45 Cal.3d at pp. 319-320 [victim’s identification of her attacker in response to police officer questioning 30 minutes after the incident held to be spontaneous].)

Defendant’s final contention in this regard is that unlike in *Trimble*, A.H.’s contact with Cecilia was not “her first opportunity to disclose,” as her first encounter after the incident was with Rafael. But in *Trimble, supra*, 5 Cal.App.4th at p. 1235, the child made her spontaneous statement to her aunt when she arrived because before then, she “had no trustworthy person in whom to confide.” Here, we infer Cecilia was that person in whom A.H. placed her trust, given Cecilia’s status as her primary caretaker and the absence of evidence of Rafael’s role in A.H.’s life other than being a relative residing in the same apartment. In any event, our review is limited to determining whether substantial evidence supports the trial court’s ruling and whether the court properly exercised its discretion. As set forth above, substantial evidence supports the ruling and there was no abuse of discretion.

2. Instructional Error

The trial court instructed the jury with CALCRIM No. 362, which provides in part: “If the defendant made a false or misleading statement before the trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt.” Defendant contends the court erred in giving this instruction because substantial evidence did not support the inference he willfully made false or misleading statements. According to him, he “did not give conflicting versions of the events or change his story when confronted with contradictory evidence” and his “statement was not necessarily inconsistent with the physical evidence, and instead offered an alternative explanation supported by defense expert opinion for the presence of the biological evidence.” No error occurred.

CALCRIM No. 362 specifically admonishes the jury: “*If you conclude that the defendant made the [false or misleading] statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself.*” (Italics added.) Because the jury was told it first had to find defendant made a false statement before it could consider it in determining his guilt, the instruction was a correct statement of the law on a subject relevant to this case. Additionally, the jury was instructed, in CALCRIM No. 200: “*Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts.*” (Italics added.) We presume the jury understood and followed these instructions. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) Thus, assuming there was no evidence of a false statement made by defendant, we must presume the jury concluded he made no such statement and therefore did not draw the inference permitted by CALCRIM No. 362, i.e., that he was conscious of his guilt. Accordingly, no error occurred in giving the instruction.

3. Cumulative Error

Defendant has not shown the trial court erred in any respect. Consequently, we need not consider his cumulative error argument.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.