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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL PIMENTEL, JR.,

Defendant and Appellant.

G052240

(Super. Ct. No. SWF10000508)

ORDER DENYING PETITION  
FOR REHEARING AND  
MODIFYING OPINION; NO  
CHANGE IN JUDGMENT

On the court's own motion, it is ordered that the opinion filed herein on August 30, 2016, be modified in the following particulars:

1. On page 1, first paragraph, replace "Reversed" with "Reversed and remanded."
2. On page 6, in the disposition section, delete the last sentence that begins "The clerk of the superior court . . . ." Replace with the following sentence:  
"The matter is remanded for resentencing on count 7."

This modification does not effect a change in the judgment.  
The petition for rehearing is DENIED.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.

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O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Larrie R. Brainard, Judge. (Retired judge of the San Diego Super. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Mary Woodward Wells, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Lynne G. McGinnis and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

## **INTRODUCTION**

This appeal presents one issue: the exclusion of evidence in a trial for child molestation. Appellant Daniel Pimentel, Jr., argues that the trial court improperly excluded evidence that one of the children he was convicted of molesting, his daughter, Jane Doe #2 (Jane), had accused someone else of molesting her several years before. The truth of this accusation was never determined because the charge was withdrawn before it went as far as the police. Pimentel wanted to introduce this evidence to show either that Jane knew about sex acts from this prior molestation (that is, the prior accusation was true) or that she had made a false accusation in the past.

After a jury trial, Pimentel was convicted of 10 sexual offenses against 2 children. He was sentenced to 7 consecutive terms of 15 years to life, or 105 years to life, plus 10 years. He has not appealed from the life terms. Thus, we are called upon to determine whether Pimentel was wrongly sentenced to 10 years, that is, whether he should serve 105 years to life or 115 years to life.

We reverse the trial court's decision to exclude the evidence. Pimentel should have been given an opportunity to examine Jane to ascertain whether she had or had not been molested at an earlier age. The evidence produced by this examination might then have been admitted at trial.

## **FACTS**

In March 2010, Pimentel's live-in girlfriend, Tara, reported to the Hemet Police Department that her seven-year-old daughter, who lived in the same household, said Pimentel had been molesting her. Tara confronted Pimentel, who denied the charge. Pimentel had a biological daughter, nine-year-old Jane, with another woman, Marlene. After Marlene heard of Tara's accusations against Pimentel, Marlene took Jane to be interviewed by Child Protective Services (CPS). At this interview, on March 22, 2010, Jane stated that Pimentel had molested her. Pimentel was arrested and eventually charged with 10 counts of sexual offenses relating to both children.

The issue on appeal centers on a charge of molestation Jane allegedly made when she was somewhere between four and six years old, against an ex-boyfriend of Marlene.<sup>1</sup> She reportedly made this accusation to her grandmother, Pimentel's mother, who took her to CPS to report it. At the interview with CPS, Jane recanted her accusation, and the matter was not pursued any further. No determination was ever made as to whether the former boyfriend had or had not molested Jane.

Before trial began in October 2013, defense counsel moved to introduce evidence of Jane's prior accusation of being molested as require by Evidence Code section 782.<sup>2</sup> The offer of proof was that Jane had told Pimentel's mother in 2006 that Marlene's then-boyfriend touched her sexually, had recanted when taken to CPS, and had said she recanted because she was told the boyfriend would go to prison. The theory was that if the accusation was true and Jane had been molested, it explained where Jane had learned the details of sexual molestation. If false, it impeached Jane's credibility as to the current charge against Pimentel.

In the absence of any evidence of the truth or falsity of the prior accusations, defense counsel planned to propound questions to Jane, who was then 13 years old, about what she had said at age four or five or six and to see what happened. As the court stated, "It's kind of a [C]atch-22. Whichever way it goes, you have something to argue." To which defense counsel responded, "Absolutely." Nonetheless, the trial court denied the motion, finding the proffered testimony both irrelevant and too remote.

Counsel moved for reconsideration of the court's ruling just before the defense put on its case. This time counsel wanted to introduce the evidence through Pimentel's mother. The trial court refused to change its ruling, stating "I think it's chasing a red herring in this case." As a result, although Pimentel's mother testified for

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<sup>1</sup> The year in which this incident took place, and thus Jane's age, was not definitely established. In his offer of proof, Pimentel stated the year was 2006; Jane was born in July of 2000, so she would have been five or six at the time. The prosecutor stated the incident took place in 2005, when she would have been four or five.

<sup>2</sup> All further statutory references are to the Evidence Code.

the defense, she was not allowed to mention the accusation Jane made against Tara's former boyfriend.

Pimentel was sentenced to a total of 10 years on the three counts relating to molesting Jane, counts 8, 9, and 10 of the amended information, filed May 28, 2013. As to the other child, he was sentenced to seven consecutive terms of 15 years to life. Pimentel appeals only from the convictions for molesting Jane.

### DISCUSSION

On appeal, Pimentel argues the evidence regarding Jane's prior accusation was admissible under either section 1103 or section 782, and it was not excludable under section 352. Its exclusion denied him his constitutional right to confrontation.

Section 782 applies "if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness under Section 780."<sup>3</sup> If Jane had actually been molested as a small child, Pimentel could introduce this evidence to attack Jane's testimony that he had molested her, by showing that she could have learned about the sex acts she described from her former abuser. (See *People v. Daggett* (1990) 225 Cal.App.3d 751, 757 (*Daggett*)). If, on the other hand, Jane's prior accusation was false, the evidence of this false accusation was admissible under section

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<sup>3</sup> Section 780 provides: "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: [¶] (a) His demeanor while testifying and the manner in which he testifies. [¶] (b) The character of his testimony. [¶] (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies. [¶] (d) The extent of his opportunity to perceive any matter about which he testifies. [¶] (e) His character for honesty or veracity or their opposites. [¶] (f) The existence or nonexistence of a bias, interest, or other motive. [¶] (g) A statement previously made by him that is consistent with his testimony at the hearing. [¶] (h) A statement made by him that is inconsistent with any part of his testimony at the hearing. [¶] (i) The existence or nonexistence of any fact testified to by him. [¶] (j) His attitude toward the action in which he testifies or toward the giving of testimony. [¶] (k) His admission of untruthfulness."

1103<sup>4</sup> to attack Jane’s credibility by showing she had a “character or trait of character” for lying about being molested.

Before evidence of sexual conduct can be presented at trial, section 782, subdivision (a), mandates a procedure the defendant must follow. If the defense offer of proof is sufficient, the court must hold a hearing out of the presence of the jury, “and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.” (§ 782, subd. (a) (3).) No such hearing was held here.

But on the present record, the court’s initial instinct – that either way the defense had an argument – would have been the basis for a correct ruling. Either way, the evidence had probative value and would not have resulted in an undue consumption of time or in jury confusion. (See *People v. Cudjo* (1999) 6 Cal.4th 585, 609.)

Pimentel’s offer of proof was sufficient to warrant a hearing. (See § 782, subd. (a)(3).) After the section 782 hearing, it was the trial court’s task to determine whether the prior accusation was true or false, that is, whether Jane had actually been molested or whether she had falsely accused Marlene’s former boyfriend. At that point the court could have exercised an informed discretion in deciding whether or not to admit the evidence. But the exclusion of this evidence without a hearing – given the fact it had some probative value either way – was sufficiently prejudicial to warrant reversal of the convictions from which Pimentel appeals.

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<sup>4</sup> Section 1103, subdivision (a)(1), provides, “In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character.” Section 1103, subdivision (c)(1), provides, “Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under section . . . 288a . . . of the Penal Code . . . , opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness’ sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness.” Section 1103, subdivision (c)(5), provides, “Nothing in this subdivision shall be construed to make inadmissible any evidence offered to attack the credibility of the complaining witness as provided in Section 782.”

## **DISPOSITION**

Pimentel's convictions on counts 8, 9, and 10 are reversed, and his sentence on each of those counts is vacated, resulting in a 10-year reduction of his sentence. The clerk of the superior court is directed to prepare an abstract of judgment reflecting these changes, and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.