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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHARLES SMALL, Defendant and Appellant.	B283288 (Los Angeles County Super. Ct. No. MA068546)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kathleen Blanchard, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, and Noah P. Hill, Deputy Attorney General, for Plaintiff and Respondent.

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Charles Small (defendant) stands convicted of raping and orally copulating his girlfriend's 16-year-old daughter. On appeal, he argues that the trial court abused its discretion in admitting expert testimony that the victim's somewhat counterintuitive behavior during and after the sexual assault was "not inconsistent" with that of a person who had, in fact, been subject to an unwanted sexual assault. We conclude there was no abuse of discretion, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *The Incident*

On a Sunday in late April 2016, defendant moved in with his girlfriend and his girlfriend's 16-year-old daughter, T. That evening, T.'s mother left to get a Slurpee.

Moments later, defendant blocked T.'s path down the residence's hallway and pushed her into the game room. He then told her to "drop 'em," and when she did not immediately comply, pushed her onto the futon sofa behind her and removed her knee-length sweats and her panties. He proceeded to put his mouth on her vagina, and for several seconds, "kiss[ed]," "suck[ed]," and "lick[ed]" her vagina. He then pushed her onto the floor, "forced his [erect] penis" into her vagina, and, while pinning her wrists to her sides, thrust his hips back and forth. While he was doing this, he said "something like," "If you tell somebody, you're dying. If you tell somebody, we're all dying." T. turned to the side, and his penis came out of her. Defendant asked, "You want to try it from this position?" and reinserted his penis into her vagina. Within minutes, he pulled his penis out of her and, while "hovering" over her, ejaculated all over her exposed midriff. Defendant then told T. to get cleaned up, and left the room.

Throughout the entire incident, T. was crying and "kept saying 'no' and 'no' and 'no.'" T. also attempted to squirm away from defendant as he held her down. When she succeeded in part and defendant's penis came out of her, she did not respond to his question "You want to try it from this position?" before he reinserted his penis. At no point did T. cry out for help or attempt to hit or kick defendant.

B. *The Aftermath*

Immediately after the incident, T. took a shower because she "felt nasty" and like she was going to vomit. When she was getting dressed in her bedroom, defendant came in and asked, "Are we good? You okay? We good?" Scared, T. responded, "Yes."

T. thereafter called a classmate named Josh, and, crying, told him that defendant had raped her. Josh told T. that he and his mother would pick up T. at a nearby grocery store. T. told her mother, who had since returned home, that she needed to go next door to get her cell phone charger from her friend, Brooke; T. did not at that time tell her mother about the incident. T. went next door, and she and Brooke left for the grocery store. T. ran; as Brooke ran to keep up with her, T. told Brooke what had happened. Josh and Josh's mother then picked up T. and drove her to a nearby Carl's Jr. At Carl's Jr., T. called her mother, told her that defendant had raped her, and asked her mother to pick her up. On the drive home, T. explained the incident in detail.

T.'s mother called the police. One officer interviewed T. on a video. At the beginning of that video, she giggled before relaying what had happened to her. Blood and tissue samples were collected from defendant and T.; later testing revealed that sperm with defendant's DNA had been on T.'s midriff.

II. Procedural Background

A. *Charges*

The People charged defendant with (1) two counts of forcible rape with a child victim over 14 years of age (Pen. Code, § 261, subd. (a)(2)),[1] one for each time defendant inserted his penis into T.; (2) forcible oral copulation with a child victim over 14 years of age (§ 288a, subd. (c)(2)(C)); (3) two counts of unlawful sexual intercourse (§ 261.5, subd. (c)), one for each time defendant inserted his penis into T.; and (4) oral copulation of a person under 18 years of age (§ 288a(b)(1)), as a lesser included offense to forcible oral copulation.

B. *Trial*

1. *Opening statements*

In his opening statement, defendant noted that the videotaped interview would show T. to be "giggling" and "devoid of emotion." Such "demeanor," defendant told the jury, was "largely inconsistent with someone being forcibly raped within a short period of [the] time of taking that video."

2. *Expert testimony*

The People called an expert witness on the topic of the "variety" of "emotional or physical" "responses" that children have both during and after a sexual assault. With respect to a child victim's conduct during an incident, the expert explained that some victims "play[] possum," others lay awake but do not "fight back," and still others make "very futile kinds of attempts to get away" or to stop the sexual abuse. With respect to a child victim's conduct after an incident, the expert explained that some victims have an "immediate outcry," others are "quite numb or

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1 All further statutory references are to the Penal Code unless otherwise indicated.

detached," while still others experience an "oscillation of emotions" that fluctuate from being distressed to being numb to "maybe giggling nervously." The expert further testified that some child victims immediately report the abuse to an adult, while others will tell a teenage friend first. When presented with a hypothetical question mirroring the facts of the case, the expert opined that the hypothetical child victim's behaviors were not "inconsistent with someone who's been sexually assaulted." During cross-examination, the expert reaffirmed that she was not "giv[ing] a diagnosis of the occurrence of sexual abuse," but was instead "help[ing] people understand the behaviors of people who've been sexually victimized."

3. *Jury instructions*

The trial court specifically instructed the jury that the expert's testimony was "not [to] be considered . . . as proof that the alleged victim's sexual assault claim is true." Instead, it was admissible "only for the limited purpose of showing . . . that the alleged victim's reactions, as demonstrated by the evidence, are not inconsistent with her having been sexually assaulted."

4. *Closing argument*

During closing argument, the prosecutor argued that "there's nothing unusual about" T.'s reaction to the sexual assault, and emphasized to the jury that "You're making the credibility decision." Defendant argued that T. was lying because it was "patently obvious" that her giggling and lack of emotion on the videotape was "not a consistent reaction" and not what "you would expect from" a person who "had been visibly, forcibly, [and] violently raped." "The reaction that we have here," defendant told the jury, "is unreasonable or inconsistent with what she is alleging to have occurred."

5. *Verdict*

The jury found defendant guilty of all of the charged crimes except the lesser included offense of oral copulation with a minor.

C. *Sentencing*

The trial court imposed a 28-year prison term. Specifically, the court imposed an 11-year sentence on the first rape count, a consecutive 9-year sentence on the second rape count, and an 8-year sentence on the forcible oral copulation count. The court imposed, but stayed under section 654, three-year sentences on each of the unlawful sexual intercourse charges.

D. *Appeal*

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant argues that the trial court erred in admitting the expert testimony on how child victims can react to sexual assault. We review the admission of expert testimony for an abuse of discretion. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.)

Testimony regarding child victims' reactions to abuse is commonly referred to as child sexual abuse accommodation syndrome. Its admissibility turns on *why* it is being admitted. It *is not admissible* to prove that sexual abuse occurred. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 391-393; see *People v. Jeff* (1988) 204 Cal.App.3d 309, 338 (*Jeff*) [expert testimony not admissible to show sexual abuse occurred on the logic that the victim in a particular case acted "how typical child molest victims act"].) But it *is admissible* "to dispel common" "myths" and "misconceptions the jury may hold as to how such children react to abuse." (*People v. Stark* (1989) 213 Cal.App.3d 107, 116; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1095 (conc. opn. of

Brown, J.); *People v. McAlpin* (1991) 53 Cal.3d 1289, 1301.) Even then, a court may admit the expert testimony only if (1) the testimony is "tailored to address the specific myth[s] or misconception[s] suggested by the evidence," and (2) the jury is instructed that "the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true." (*Bowker*, at pp. 393-394; *People v. Wells* (2004) 118 Cal.App.4th 179, 188; *Humphrey*, at pp. 1095-1096 (conc. opn. of Brown, J.).)

As a threshold matter, the People argue that we need not address the merits of defendant's challenge because he never objected to the expert's testimony at trial. Challenges to evidence are forfeited if no objection is made. (Evid. Code, § 353; *People v. Seumanu* (2015) 61 Cal.4th 1293, 1328.) Defendant seeks to avoid this bar by asserting that any objection would have been futile because appellate courts "routine[ly]" admit and approve of this type of expert testimony. (See *People v. Johnson* (2015) 60 Cal.4th 966, 994 [futility excuses duty to object].) We disagree. As noted above, the admission of this type of testimony is subject to carefully delineated boundaries that continue to be monitored and enforced by the courts (e.g., *Jeff*, *supra*, 204 Cal.App.3d at p. 338); where, as here, a defendant believes those boundaries have been transgressed, an objection is not futile.

Even if we overlook the forfeiture, however, the trial court did not abuse its discretion in admitting the expert testimony. That is because the People established both prerequisites for its admission. First, the testimony was narrowly tailored to address several instances of T.'s conduct that, at first blush, seem inconsistent with her being the victim of sexual assault.

Defendant mentioned two of them in his opening and closing arguments—namely, that T. giggled and looked devoid of emotion during her videotaped interview. Others were elsewhere suggested by the evidence, including that T. did not cry out or physically fight back during the sexual abuse; that she did not respond when defendant asked her about trying a different sexual position; that she said, "yes" when defendant asked if they were "good" and "okay"; and that she did not immediately report the abuse to her mother, and instead told her friends Josh and Brooke. What is more, this type of testimony is relevant in this case because defendant attacked T.'s credibility from the outset. (See *People v. Patino* (1994) 26 Cal.App.4th 1737, 1745 (*Patino*) [this type of testimony is admissible once "an issue has been raised as to the victim's credibility"].) Second, the trial court clearly instructed the jury to use the expert testimony only to evaluate the victim's reaction, and not as proof that the sexual abuse occurred.[2]

Defendant raises three objections to the expert testimony.

First, he asserts that the People never articulated what myths and misconceptions the expert's testimony sought to dispel, and that "nothing in [T.'s] testimony" "run[s] afoul of anyone's common sense understanding of how a [16 year old] might act after being raped by her mother's boyfriend." These assertions ignore both the law and the record in this case.

The law does not "requir[e] the prosecution to expressly state on the record the evidence which is inconsistent with the finding of molestation"; it is enough "if the victim's credibility is

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2 Defendant argued in his opening brief that the trial court did not give such an instruction, but subsequently acknowledged that the trial court *had* done so and withdrew that argument.

placed in issue due to . . . paradoxical behavior" in evidence at trial. (*Patino*, *supra*, 26 Cal.App.4th at pp. 1744-1745.) We have outlined, above, the evidence of T.'s seemingly inconsistent behavior, and defendant certainly placed T.'s credibility in issue based on some of that behavior.

Further, defendant's contention that "nothing" in T.'s reaction "run[s] afoul" of what a jury would expect from a sexual abuse victim ignores his own arguments to the jury, in which he said it is "patently obvious" that T.'s giggling and emotionless demeanor on the videotape were not the conduct of someone who had been raped. Defendant notes on appeal that T. exhibited *some* expected behaviors in that she said "no" and tried to squirm away during the sexual assault, and that she did tell her mother relatively soon after the attack. However, this overlooks that other aspects of T.'s behavior during the assault (which we have detailed above) *were* inconsistent with what a lay juror might expect, and that T. told her mother only after first *not* telling her mother and then telling two of her teenage friends.

Second, defendant contends that the expert testimony "overreached" insofar as it crossed the line into impermissible vouching as to T.'s credibility. It did not. The expert was careful to point out that she was only "help[ing] people understand the behaviors of people who've been sexually victimized," and was not "giv[ing] a diagnosis of the occurrence of sexual abuse." Her testimony was limited to an assessment of whether T.'s conduct was "inconsistent" with that of a sexual assault victim. And the jury was instructed that the expert's testimony was only relevant on the question of whether T.'s "reactions" were "not inconsistent with her having been sexually assaulted," and *not* "as proof that"

T. was telling the truth. We presume that the jury followed this instruction. (*People v. Wilson* (2008) 44 Cal.4th 758, 834.)

Lastly, defendant argues that the hypothetical question posed to the expert was improper because it incorporated the facts of this case, thereby running afoul of the language in several cases that "the better practice" is to "avoid testimony which recites either the facts of the case at trial or obviously similar facts." (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1383-1384; *People v. Gray* (1986) 187 Cal.App.3d 213, 218; *People v. Roscoe* (1985) 168 Cal.App.3d 1093, 1098-1100.) The concern expressed in these cases does not erect an absolute bar to hypotheticals involving the behavior of the alleged sexual assault victims; hypotheticals posed to experts are usually *required* to be rooted in the facts of the case (e.g., *People v. Vang* (2011) 52 Cal.4th 1038, 1045), and some cases have allowed expert testimony regarding sexual assault victim behavior to be linked to the facts of the particular case (e.g., *People v. Harlan* (1990) 222 Cal.App.3d 439, 450). The reason why it is "the better practice" to avoid specific facts is that it helps to avoid blurring the line between the permissible and impermissible uses of this type of testimony. (*Gilbert*, at pp. 1383-1384.) In this case, however, and for the reasons explained above, the expert's testimony fell comfortably on the permissible side of that line and that line was further demarcated by the court's jury instruction.

DISPOSITION

The judgment is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ