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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL GALICIA,

Defendant and Appellant.

B239665

(Los Angeles County  
Super. Ct. No. VA119552)

APPEAL from the judgment of the Superior Court of Los Angeles County.

Robert J. Higa, Judge. Affirmed.

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

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Elaine F. Tumonis, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Miguel Galicia was charged by information with three counts of forcible lewd act upon a child (Pen. Code, § 288, subd. (b)(1)), one count of assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)), one count of corporal injury to cohabitant (§ 273.5, subd. (a)), and one count of making criminal threats (§ 422). A jury convicted defendant of one count of forcible lewd act on a child, assault, and corporal injury to a cohabitant. Defendant was sentenced to seven years in state prison. Defendant's sole contention on appeal is that his conviction on count 3 (forcible lewd act on a child) must be reversed because the trial court improperly admitted prejudicial hearsay evidence under the "fresh-complaint" doctrine. We find no evidentiary error and affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

In 2010, Maria P. and her four children were living with defendant on 89th Street in the City of Los Angeles. They rented a bedroom in a home they shared with another family. Maria's three older children, J.M.F, E.F., and J.R.F. were from her former marriage with Roberto F. Defendant was the father of her youngest child, M.G. Maria and defendant had been in a relationship for about four years. E.F. was the only female child.

In their rented bedroom, defendant and Maria had a bunk bed and a double bed. The oldest boy, J.M.F, slept in the top bunk. E.F. and her two younger brothers slept in the bottom bunk. Defendant and Maria slept in the bed.

During the summer of 2010, J.M.F, E.F. and J.R.F. were in the bedroom with defendant watching television. Maria had gone to the store. Defendant told the boys to go outside. The boys obeyed, but shortly thereafter, J.M.F. went back inside and tried to get into their bedroom but the door was locked. When his mother came home from the store, he told her the door was locked. Maria unlocked the door and J.M.F. saw that his sister, E.F., was crying. His mother started crying, and closed the door. J.M.F. then heard arguing.

Several months later, on the evening of April 20, 2011, defendant and Maria got into an argument. Defendant grabbed her, even though she was holding their young son,

and pushed her against the wall. Defendant choked her, and then punched her in the mouth. Defendant also threatened Maria multiple times, telling her he would kill her and take their son away. J.M.F. witnessed the argument.

J.M.F. took his mother's cell phone, went outside and called 911. He told the operator that defendant had been arguing with his mother, had punched her in the face, and her lip was bleeding. J.M.F. said he had seen defendant hit his mother on other occasions as well.

Deputy Victor Lemus of the Los Angeles County Sheriff's Department was dispatched to the home on 89th Street in response to J.M.F.'s 911 call. Deputy Lemus and his partner went into the home and found defendant and Maria in one of the bedrooms. She was crying, had red marks on her neck, and blood on her bottom lip. Deputy Lemus took statements from Maria and J.M.F. He contacted the Department of Children and Family Services (DCFS) because the domestic violence incident occurred in front of minor children. Deputy Lemus then placed defendant under arrest.

Ana Vargas, a social worker with DCFS, reported to the home the following morning. Ms. Vargas interviewed each of the children in private, as well as Maria. During her interview of E.F., E.F. disclosed that defendant had touched her inappropriately on three separate occasions. Ms. Vargas spoke to Maria about it and she began crying, acknowledging she had walked in on an incident several months earlier and had not reported it because she was scared of defendant.

Deputy Adam Borges arrived at the home and re-interviewed the children. E.F. confirmed the sexual abuse during a private interview with Deputy Borges. The children were then removed from the home. J.M.F., E.F., and J.R.F. were placed with their biological father, Roberto F. M.G. was placed in foster care.

Defendant was charged with three counts of forcible lewd acts against E.F., a child under the age of 14, as well as assault, corporal injury to a cohabitant, and criminal threats against Maria. Defendant pled not guilty to all six charges.

Trial by jury proceeded in August 2011. During pretrial argument, the prosecutor moved to have E.F.'s statement to the social worker, Ms. Vargas, admitted under the "fresh-complaint" doctrine. Defense counsel argued it was not relevant if E.F. was going to testify. The court ruled the testimony admissible.

During his opening statement, defense counsel stated that Maria was "instigating a conspiracy against" defendant through the children.

The prosecutor presented the testimony of Deputy Lemus and then called the oldest boy, J.M.F., who described the domestic violence incident on April 20, 2011. An audio recording of his 911 call was played for the jury. J.M.F. also described the day in the summer of 2010 when he found the door to their bedroom locked with defendant and his sister inside.

Maria testified to her relationship with defendant, the domestic violence incident, and the time when she came home from the store and found defendant and E.F. locked in the bedroom. She said she unlocked the door with the key, and when she went into the room she saw E.F. lying on the bed with her pants and underwear pulled down to her knees, and defendant was on top of her. E.F. looked frightened and eventually started crying. Defendant said nothing was going on and threatened Maria that he would take their son away if she told anyone what she had seen. She did not report the abuse to any authorities because she was frightened.

Maria further stated that she continued living with defendant after the incident because she had nowhere to go, she had no family in the United States, and she was financially dependent on him. She slept with her daughter and did not let defendant near her. Defendant continued to hit her and threaten her, but she never made any report to law enforcement because she believed his threats.

After Maria's testimony, the prosecutor told the court she planned to call Deputy Borges and Ms. Vargas as witnesses. Defense counsel objected and requested an offer of proof. The prosecutor argued that because the defense had put forward the theory in opening statement that Maria was conspiring with her children about the charges against

defendant, the testimony was necessary to show how and when the sexual abuse of E.F. was reported to authorities. The court ruled the testimony admissible.

Thereafter, Deputy Borges testified. He reported to the home on 89th Street to investigate the report of a possible lewd act on a child. Upon arriving, he interviewed E.F. privately. She cried a lot during the interview. Deputy Borges also interviewed J.M.F. and Maria. After completing those interviews, he contacted the Special Victims Bureau because he believed E.F. was a victim of a sex crime. Defense counsel did not raise any objections to any specific question asked of Deputy Borges, and did not cross-examine the deputy.

Ms. Vargas testified that she was referred to the home on 89th Street in April 2011 because of an incident of domestic violence between the mother and her boyfriend which took place in front of minor children. She said she interviewed Maria and the three older children individually and in private. The youngest boy was too young to give a statement.

Before Ms. Vargas testified about her interview of E.F., the court instructed the jury that any statements made by E.F. to Ms. Vargas “are admitted for a limited purpose, the fact that [E.F.] did make a complaint or this complaint to Ms. Vargas, it’s not offered for the truth of the statements that were made, the truth of the facts included in the statement.”<sup>1</sup>

Ms. Vargas then explained that she assessed all children for all possible forms of neglect and abuse. When she asked E.F. if anyone had ever inappropriately touched her, E.F. looked nervous, and looked away from her. She repeated the question, and E.F. stated that defendant had touched her “ ‘down there’ ” three different times. Ms. Vargas

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<sup>1</sup> At the close of evidence, the jury was also instructed with CALJIC No. 2.09, which provides: “Certain evidence was admitted for a limited purpose. At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. Do not consider this evidence for any purpose except the limited purpose for which it was admitted.”

clarified that E.F. indicated her vagina was where the touching occurred. When Ms. Vargas asked her specifically what happened, E.F. told her that defendant would make sure no one else was in their bedroom, he would lock the door, and then push her on the bed, and touch her, either while lying next to her or on top of her.

E.F. told Ms. Vargas that defendant would put his hand over her mouth and tell her not to tell her mother. E.F. said that the last time, her mother walked in and saw defendant trying to pull her underwear and pants back up. E.F. told Ms. Vargas that she was too scared to explain to her mother what happened. Defense counsel only raised a couple of objections to specific questions posed to Ms. Vargas, none of which are material to the issue raised on appeal.

E.F. testified to the three incidents of sexual abuse, including the last incident in which her mother came into the room and discovered what was happening. She explained defendant's pattern of waiting for the boys to leave the room to go play, then locking the door and pushing her on the bed. Defendant would pull her pants and underwear down and touch her private parts. E.F. said she tried to scratch and push him, and even tried to bite him, but she could not make him stop. She said defendant would put one of his hands over her mouth to prevent her from screaming. E.F. said defendant stopped touching her after the last incident when her mother came into the room and saw what he was doing. E.F. said she was telling the truth, and denied that her mother told her what to say or that it was made up.

Defendant took the stand in his own defense. He denied any sexual abuse of E.F. and denied ever hitting Maria. He said that during the argument with Maria on April 20, 2011, she was trying to hit him and he put up his hand to block her and may have cut her lip with his fingers. He testified that everything she said was a lie. Defendant explained that he treated all four of the children as his own, took care of them financially, made sure they did their homework, and would never hurt them.

Defendant also called Roberto F., the biological father of the three older children. Roberto said he asked E.F. once about what happened, and that she verified there were incidents of domestic violence, but said that defendant had not touched her.

The jury was unable to reach a verdict as to counts 1 and 2 (forcible lewd act on a child). Those counts were dismissed. The jury found defendant guilty of count 3 (forcible lewd act on a child), count 4 (assault), and count 5 (corporal injury of cohabitant). The jury found defendant not guilty on count 6 (criminal threats). The court sentenced defendant to an aggregate state prison term of seven years. This appeal followed.

## DISCUSSION

Defendant's sole contention on appeal is that the court committed prejudicial error in admitting the hearsay statement of E.F. to the social worker, Ms. Vargas, and that even if the statement was admissible, Ms. Vargas's testimony went beyond the permissible scope of "fresh-complaint" evidence. "A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) We find no abuse of discretion or error in the trial court's admission of the testimony.<sup>2</sup>

The "fresh-complaint" doctrine was explained in *People v. Brown* (1994) 8 Cal.4th 746 (*Brown*), in which the Supreme Court concluded that "*under principles generally applicable to the determination of evidentiary relevance and admissibility, proof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose—namely, to*

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<sup>2</sup> Defendant also asserts the admission of the testimony deprived him of his constitutional right to a fair trial, although concedes no objection on this ground was stated at trial. The argument is forfeited. (See Evid. Code, § 353; *People v. Burgener* (2003) 29 Cal.4th 833, 869.) In any event, the record plainly shows defendant was not deprived of a fair trial.

establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others—whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred.” (*Brown*, at pp. 749-750.) Under the doctrine, the timing of the report of abuse and the voluntariness of the report are “not necessarily determinative of the admissibility of the evidence of the complaint. Thus, the ‘freshness’ of a complaint, and the ‘volunteered’ nature of the complaint, should not be viewed as essential prerequisites to the admissibility of such evidence.” (*Id.* at p. 750.)

Here, defense counsel told the jury in his opening statement that Maria was “instigating a conspiracy” against defendant through her children—a plain challenge to the veracity of the report of sexual abuse by E.F. As such, the trial court properly allowed the prosecutor to rebut the claimed fabrication by offering evidence of the circumstances surrounding the reporting of the sexual abuse to the authorities.

As for the scope of the testimony admitted, we also find no error. Defendant correctly argues the specific details surrounding the nature of a complaint reported to a third party are not properly admitted. “[O]nly the fact that a complaint was made, and the circumstances surrounding its making, ordinarily are admissible; admission of evidence concerning details of the statements themselves, to prove the truth of the matter asserted, would violate the hearsay rule.” (*Brown, supra*, 8 Cal.4th at p. 760.) “But limiting the testimony to the ‘bare fact’ of the complaint is unwarranted.” (1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 169, p. 884.)

Evidence may be properly admitted “ ‘that the complaint related to the matter being inquired into, and not a complaint wholly foreign to the subject’ [citation]; that is, the alleged victim’s statement of the nature of the offense and the identity of the asserted offender, without details, is proper.” (*People v. Burton* (1961) 55 Cal.2d 328, 351 (*Burton*), italics omitted; see also *People v. Meacham* (1984) 152 Cal.App.3d 142, 159-160.)

The testimony elicited from Ms. Vargas did not exceed these acceptable parameters. Given the manner in which E.F. struggled to relay the information to Ms.



Vargas, some explication of the circumstances surrounding her statement was necessary for context. The testimony received into evidence consisted only of such facts necessary to show that E.F.'s disclosure to Ms. Vargas "related to the matter being inquired into," identified the "nature of the offense" and was "not a complaint wholly foreign to the subject." (*Burton, supra*, 55 Cal.2d at p. 351, italics omitted.) And, Ms. Vargas, Deputy Borges, Maria and E.F. all testified at trial. The jury was able to judge their credibility based on their firsthand direct testimony about how and when the sexual abuse was reported (a fact put in issue by the defense theory), with defense counsel having a full and fair opportunity to cross-examine all four witnesses on the details of their testimony.

Defendant argues it was prejudicial error and Ms. Vargas's testimony necessarily affected the jury's verdict unfairly because the fresh-complaint testimony served to reinforce E.F.'s version of events. Defendant contends the fact the jury could not reach a verdict on counts 1 and 2 suggests the hearsay testimony was the "tipping point" for the jury on count 3. We are not persuaded. Ms. Vargas's testimony was relevant to all three counts under Penal Code section 288. The fact the jury did not reach a verdict on counts 1 and 2 shows the jury was not unduly prejudiced by Ms. Vargas's testimony, but rather, weighed the evidence pertaining to each count separately and fairly. Ms. Vargas and E.F. testified in person and were available for cross-examination. The jury was not left to rely solely on the extrajudicial statements concerning the occurrence of the abuse. Moreover, the jury was properly instructed regarding the limited purpose of the evidence, both before the testimony was received, and at the close of evidence. The evidence was not unfairly prejudicial.

**DISPOSITION**

The judgment of conviction is affirmed.

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GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.