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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MOISES BAUTISTA, Defendant and Appellant.	B257014 (Los Angeles County Super. Ct. No. VA126827)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas I. McKnew, Jr., Judge. Affirmed.

Randy Short, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Moises Bautista was convicted of several sex crimes. The victim of each was his former girlfriend's daughter. On appeal, he argues he received the ineffective assistance of counsel requiring the reversal of his criminal conviction. We disagree and affirm the judgment.

FACTS AND PROCEDURE

The victim L. was born in 2001. Defendant was the father of L.'s half brother. He lived with L.'s mother, beginning when L. was three years old and before moving in with a new girlfriend.

In an interview prior to trial, defendant initially denied any sexual conduct with L. and repeatedly denied penetrating her. But over the course of the interview, he admitted kissing her. He acknowledged licking and touching her vagina. He expressed remorse for "something" he did that was wrong.

The officer who interviewed defendant told him that his DNA was found in L.'s underwear. At trial, she acknowledged that this was a ruse. In reality, the nurse who examined L. reported that everything appeared normal including L.'s hymen.

At trial, L. testified that, on multiple occasions, defendant touched her sexually. She testified he touched her more than two times. The first time he touched her legs, and the second time he grabbed her butt. One time L. tried to avoid going into the apartment with defendant. He pulled her inside the apartment, and then pulled down her jeans and underwear. Defendant also removed his jeans and underwear. Defendant then put his penis inside L.'s anus. L. did not tell anyone because she was afraid defendant might hurt her brother or her mother. L. previously had seen defendant hit her brother and her mother.

L. testified that defendant put his penis inside her anus a second time. Another time, when they were sleeping defendant touched her vagina. L. repositioned herself so that she was sleeping between her mother and her brother. At that time, they all slept in the same bed.

L. testified that after they moved she had her own bed. In the new location, defendant touched her legs, and removed her pajamas and underwear. He also grabbed

her buttocks. On one occasion, after defendant took her brother to soccer practice, defendant returned home and pulled down L.'s jeans and underwear. He removed his pants, and put his penis inside her vagina. On other occasions he touched her vagina with his hands.

L. moved again with her mother and brother, and defendant no longer lived with them. Defendant visited regularly, and he touched her inappropriately several times. One time after dropping her brother off at school, defendant took L. back home and removed her clothing. Defendant put his penis inside her vagina. Defendant put his penis in her vagina more than one time.

L. testified that her family moved again to a two-story house, and while they were living there, defendant licked her vagina several times. One time, L. tried to run away and defendant held her waist. After they moved from that home, defendant never touched her inappropriately again.

L.'s mother testified that she started living with defendant when L. was three years old. First they lived in an apartment in South Gate. Sometime in 2009, they moved to another apartment. In May 2010, they moved to a third apartment and defendant did not move with them. Then in December 2011, or January 2012, they moved to a two-story house. When defendant did not live with them, he often babysat L. and her brother. Defendant sometimes drove the children to school.

During cross-examination, L.'s mother testified that L. did not complain about defendant while they lived in the first three homes. L. complained after she saw defendant hit her brother. L. told her mother that she did not want defendant to take her to school because he was touching her buttocks. Prior to that, L.'s mother had not suspected any inappropriate conduct.

The parties stipulated that if called to testify nurse Jan Hare would testify she conducted an anal and genitalia examination of L., and that the result was normal. Further, a normal result can neither confirm nor negate sexual abuse. The stipulation was entered to avoid a delay in trial to wait for Ms. Hare to testify.

Deputy Sheriff Susana Jimenez testified for the defense. When she interviewed L., L. reported only two incidents of sexual touching—anal sex, and vaginal penetration with fingers. L. did not remember any other incidents.

Defendant's brother also testified for the defense. Defendant's brother never observed inappropriate conduct between defendant and L. even though he lived with them and worked at home.

Defendant testified that L.'s accusations were not true. He only admitted inappropriate conduct during his pretrial interview because officers pressured him.

Defense counsel argued that this was a "he said/she said" situation. According to counsel defendant should be believed because no physical evidence supported L.'s testimony. Her hymen was intact. Counsel emphasized that when L. first disclosed the abuse she described only two incidents. Counsel also argued that defendant was pressured to admit inappropriate behavior during his pretrial interview and did so only after repeatedly professing his innocence.

Defendant was convicted of sex/sodomy with a child under 10 (Pen. Code, § 288.7, subd. (a));[1] forcible lewd act upon a child (§ 288, subd. (b)(1)); aggravated sexual assault of a child—oral copulation (§ 269, subd. (a)(4)); aggravated sexual assault—sexual penetration (§ 269, subd. (a)(5)); aggravated sexual assault sodomy (§ 269, subd. (a)(3)); oral copulation with a person under 14 (§ 288a, subd. (c)(1)); sexual penetration with a foreign object (§ 289, subd. (j)); and sodomy of a person under 14 (§ 286, subd. (c)(1).)

The trial court denied defendant's motion for a new trial based on ineffective assistance of counsel. Defendant was sentenced to 70 years to life in state prison and timely appealed.

DISCUSSION

The sole issue on appeal is whether defendant received the ineffective assistance of counsel. Defendant bears the burden to show both that his counsel's performance was

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[1] All further statutory citations are to the Penal Code.

deficient and that he suffered prejudice as a result of the deficient performance. (*People v. Centeno* (2014) 60 Cal.4th 659, 674.) Prejudice in this context means a "'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (*Id*. at p. 676.)

"'Unless a defendant establishes the contrary, we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy."' [Citations.] When the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, defendant must show that there was '"'no conceivable tactical purpose'" for counsel's act or omission.'" (*People v. Centeno, supra*, 60 Cal.4th at pp. 674-675.) "Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts." (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)

"When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation." (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

1. Cross-examination of L.

Defendant first argues his counsel failed to effectively cross-examine L. "Although in extreme circumstances cross-examination may be deemed incompetent [citation], normally the decision to what extent and how to cross-examine witnesses comes within the wide range of tactical decisions competent counsel must make." (*People v. Cleveland* (2004) 32 Cal.4th 704, 746.)

a. Questioning Regarding Preliminary Hearing Testimony

Defendant argues that his trial counsel failed to question L. regarding inconsistencies between her testimony at trial and her testimony at the preliminary hearing. For example, defendant argues that the following preliminary hearing testimony should have been used to impeach L.: "I remember the first time when I was outside waiting for my mom and I was scared and he was dragging me inside and I was holding

on to the stairs, and so he took me inside the house." "Then he was trying to pull down my jeans, and after he did that, he pulled down my underwear and then he took out his private part and put it inside my butt." Defendant argues that L. was inconsistent with her trial testimony because at the preliminary hearing she testified the first time was when defendant dragged her; whereas at trial, she testified that first time was when defendant touched her legs.

Defense counsel could have concluded that emphasizing L.'s preliminary hearing testimony, which was damaging to defendant, would be harmful. Evidence that L. previously testified that defendant put his private part inside her butt is not helpful to the defense.

Defendant also argues that defense counsel should have impeached L. with the following testimony from the preliminary hearing: another incident occurred when "we were going to go pick up my brother, before that we were going to pick up my brother and so he got in the room before me, my mom and my brother slept and I was just laying down and he just came in, opened the door, he grabbed me from my legs and pulled down my jeans and he pulled down his jeans halfway down and then he put his private part inside my butt." According to defendant, her preliminary hearing testimony conflicted with the following trial testimony: "He was taking me and my brother to school and—my mom had gone to work early, and he was there so my mom asked him to take us to school. . . . He only dropped off my brother and he told me not to get off [*sic*] the car. [¶] . . . Then after that he took me home and I didn't go to school. [¶] . . . [¶] I ran upstairs and he went upstairs, too. Then he started taking off my clothes. But I didn't want to take off my clothes."

Again, assuming that there were material inconsistencies between L.'s preliminary hearing testimony and trial testimony, counsel had sound tactical reasons for refraining from highlighting the preliminary hearing testimony. The preliminary hearing testimony was damaging to defendant. Defendant identifies no preliminary hearing testimony that completely undermined L.'s credibility for which no tactical reason could be given for

the failure to introduce it. Defendant also demonstrates no prejudice from the failure to impeach L.'s with her testimony at the preliminary hearing.

b. Report to Deputy Jimenez

Defendant next contends that his counsel's failure to cross-examine L. regarding her report of *only* two incidents to Detective Jimenez constituted the ineffective assistance of counsel. Again, there was a sound tactical reason for this decision. L. may have had an explanation for the inconsistency which counsel did not want to highlight. Counsel may have chosen to refrain from asking L. questions in order to emphasize the absence of any explanation during closing argument. Counsel argued: "I also ask you to consider the discrepancy between the account that L[.] gives here. She gives two very distinct accounts I submit to you, her initial account and her later accounts. In her initial account which we learned through the testimony of Deputy Jimenez, we learn from her that she interviewed L[.] She interviewed L[.] the same day that she first raised these allegations. She interviewed L[.] and she asked L[.] about the details of these allegations. [¶] What we learned about this initial account given by L[.] is that there were . . . only two incidents according to L[.] That's what she told Deputy Jimenez. There were only two incidents." Because there was a sound tactical reason, the defendant does not show that he received the ineffective assistance of counsel. Even if the failure to question L. about the inconsistency between her first report and her trial testimony was deficient, defendant identifies no prejudice. Jimenez testified there were only two incidents and defendant's counsel emphasized this testimony during closing argument. It is not reasonably probable that additional cross-examination of L. would have led to a different result.

c. Additional Evidence Regarding Penetration

Defendant faults his counsel for failing to asking L. specific questions regarding the penetration of her anus and the penetration of her vagina. A tactical choice for this is readily apparent as the prosecution had the burden to prove the offenses. Asking additional questions may have assisted the prosecution. Moreover, defense counsel's questions may have led to additional questions by the prosecutor. "To determine

prejudice from [the] failure to introduce additional evidence, 'it is necessary to consider *all* the relevant evidence that the [trier of fact] would have had before it if [counsel] had pursued the different path—not just the mitigation evidence [counsel] could have presented, but also the [damaging] evidence that almost certainly would have come in with it.'" (*In re M.D.* (2014) 231 Cal.App.4th 993, 1003.) Defendant fails to demonstrate either deficient conduct or prejudice.

d. Alleged Failure to Make an Evidence Code Section 352 Objection

Defendant also argues defense counsel failed to object to evidence of L.'s fear of him based on physical abuse of her mother and brother.

While the failure to object to evidence rarely demonstrates incompetence (*People v. Centeno, supra*, 60 Cal.4th at p. 663), here defendant simply ignores the portions of the record in which defense counsel objected to this evidence. Prior to trial, defense counsel argued: "So it's my understanding that the complaining witness in this case has indicated that she has either heard or has witnessed domestic violence by my client against her mom. I am seeking to exclude any prior acts of domestic violence, any statements or testimony relating to any acts of domestic violence under [Evidence Code section] 352." The prosecutor explained that L. did not disclose the events earlier because she was afraid after seeing defendant hit her mother. The court concluded that the evidence was more probative than prejudicial.

Defendant fails to show any error in the court's conclusion. Nor does he show that the admission of the evidence prejudiced him. Although evidence of violence against L.'s mother and brother is disturbing, L.'s testimony was brief. The brief testimony was far less inflammatory than the allegations in this case of sexual abuse of a child under 10. It is not reasonably probable defendant would have obtained a more favorable verdict had the evidence been excluded.

e. Failure to Ask Other Questions

In an argument related to the prior one, defendant contends his counsel should have asked L. if she fabricated defendant's sexual abuse because she was upset that defendant hit her brother and mother. No evidence supported this question, and

defendant's assumption that L. had such a motive to fabricate is pure speculation. His speculation does not support a claim of the ineffective assistance of counsel. Defendant does not show he would have received a response favorable to him or that he suffered any prejudice from the failure to ask this question.

Defendant also seeks to imply that L. fabricated the abuse because she was upset defendant broke up with her mother and was dating another woman. But asking these questions would not have been helpful because counsel asked them at the preliminary hearing and they did not lead to any evidence helpful to defendant. At the preliminary hearing, L. testified she was not upset defendant was dating a woman other than her mother and she was not upset defendant had children with this other woman. L. testified that even after defendant no longer lived with them he was still friends with her mother. While defendant may wish L. had a motive to fabricate, he fails to identify any evidence supporting this inference and therefore fails to show his counsel should have asked questions regarding any alleged motive to fabricate. Defendant also fails to show that he suffered any harm from counsel's failure to ask these questions.

Defendant's other suggestions for impeaching L. are not persuasive. For example, L. responded affirmatively when defense counsel asked her "[d]id you ever try to scream during these incidents?" On redirect L. testified that one time defendant covered her mouth. Defendant now argues that defense counsel should have asked why she screamed. Defendant argues that if L. were willing to scream she should also have been willing to admit the abuse. As a tactical matter, trial counsel may have concluded that he did not want further testimony regarding L.'s fear of defendant. Defendant fails to show the questions he argues should have been asked would have led to evidence helpful to him or that it is reasonably probable he would have received a better outcome if his counsel had further cross-examined L.

f. Failure to Object to Alleged Improper Leading Questions by the Prosecutor

Defendant argues that his counsel rendered ineffective assistance by failing to object to leading questions by the prosecutor. Defendant does not show that such leading questions were improper with this child witness who was testifying regarding difficult

subject matter. (See *People v. Collins* (2010) 49 Cal.4th 175, 214 [leading questions may be asked where interests of justice require it].) A trial court has broad discretion to determine when leading questions are permissible. (*Ibid*.) In addition to failing to demonstrate an objection was warranted, defendant fails to show he suffered prejudice as a result of the leading questions.

2. Cross-examination of L.'s Mother

Defendant argues that his counsel should have asked L.'s mother whether she and defendant fought in L.'s presence and whether L.'s mother was upset defendant had a new girlfriend.

Defendant fails to show either that counsel's conduct was deficient or that he suffered prejudice. The extent of cross-examination is an issue within trial counsel's sound discretion. (*People v. Bolin* (1998) 18 Cal.4th 297, 334.)

L.'s mother's feelings toward defendant were not relevant. But in any event, at the preliminary hearing, L.'s mother testified that she was not upset with defendant for breaking up with her. L. testified at the preliminary hearing that her mother never told her that she was upset because she and defendant separated. Defendant fails to explain how the questions he argues his counsel should have asked would have led to helpful evidence. He also fails to demonstrate any prejudice.

With respect to the domestic violence, defense counsel had a sound tactical reason for refraining from asking additional questions. A reasonable attorney may conclude that emphasizing the domestic violence would have bolstered L.'s credibility. To the extent defendant is trying to imply the domestic violence did not occur, no evidence in the record supported that inference.

Next, defendant contends his counsel should have probed L.'s mother by asking questions such as: Did she ever take L. to the doctor, did L. have any bruising, did L. complain of pain in her rectum or did she have blood in her stool or urine? Defense counsel elicited testimony that mother did not suspect the abuse. Defendant fails to show that asking additional questions would have led to evidence favorable to him or the failure to ask these questions prejudiced him.

3. Expert Testimony

Defendant argues his counsel should have presented expert testimony that "signs of physical injury would probably exist if a child was repeatedly the victim of rape, sodomy and digital penetration . . . ." There is no indication an expert would have so testified, and therefore defendant cannot show his counsel was deficient in failing to call such an expert.

Without support, defendant argues that if the nurse who examined L. had been called to testify she may not have had sufficient expertise to testify to the facts in the stipulation. Defendant theorizes that "it is highly unlikely that the many acts of molestation reported by L[.] would result in no damage to her genitals, nor signs of injury which could have been observed by her mother at the times of the sexual acts." Defendant's speculation does not support a claim of ineffective assistance of counsel. (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1147 ["In demonstrating prejudice, the appellant 'must carry his burden of proving prejudice as a "demonstrable reality," not simply speculation as to the effect of the errors or omissions of counsel.'"].) Defendant fails to show that if Ms. Hare had testified, her testimony would have benefitted him.

4. Defendant's Admissions

According to defendant, his counsel should have asked him additional questions regarding why the pressure of the detectives caused him to lie during his pretrial interrogation. There is no indication from the record that any additional questions would have led to evidence favorable to defendant. Counsel may have instead thought that additional questions would have undermined defendant's credibility. Defendant fails to show his counsel's failure to ask these questions was either deficient or caused him prejudice.

Defendant also argues his counsel should have presented expert testimony on false confessions. According to him, "[a]n expert would explain to the jury how false confessions occur; what type of people are more susceptible to police-induced false confessions; and why in the case at hand, there were indicators of a possible false confession." The problem with this argument is that defendant failed to show any expert

would have testified that there were indicators of a false confession. "Police officers are . . . at liberty to utilize deceptive stratagems to trick a guilty person into confessing." (*People v. Chutan* (1999) 72 Cal.App.4th 1276, 1280; see also *People v. Parrison* (1982) 137 Cal.App.3d 529, 537 [false statement that gunshot residue test was probative was not coercive].) Defendant's speculation that an expert would have assisted his case is insufficient to show his counsel was ineffective. Moreover, jurors must have credited L.'s testimony because defendant was convicted of crimes he did not admit in the pretrial interrogation.

5. Cumulative Error

Because we find no error, we need not consider defendant's argument that the cumulative error requires reversal.

DISPOSITION

The judgment is affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.