Filed 10/16/19 P. v. Kardel CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. HANS JORGEN KARDEL, Defendant and Appellant.	2d Crim. No. B292451 (Super. Ct. No. 1482791) (Santa Barbara County)

Hans Jorgen Kardel appeals from judgment after a jury convicted him of 12 counts of sex offenses he committed on his granddaughter, Jane Doe, (counts 3-14) and one count of intimidating a witness, A.V. (Jane's mother and Kardel's daughter) (count 15). (Pen. Code, §§ 136.1, 288, 288.7, 289.)[1] The trial court sentenced Kardel to a prison term of 15 years to life (count 3) plus 14 years 8 months (counts 4-15).

[1] Further unspecified statutory references are to the Penal Code.

Kardel contends (1) there was insufficient evidence to prove Jane was the requisite age at the time of counts 3-13; (2) the trial court erred when it allowed the prosecution to add counts 5-14 to the information during trial; (3) his conviction of count 15 should be reversed because of insufficiency of the evidence and erroneous jury instructions; (4) the trial court erred in limiting impeachment evidence, and (5) there was cumulative error. We affirm.

FACTS AND PROCEDURAL HISTORY

Jane Doe's Trial Testimony

Jane Doe was born on June 24, 1999. At the time of trial, Jane was 18 years old.

When Jane was younger, she and her sister (Sister) visited Kardel's house at least once a week. Jane testified that Kardel "inappropriate[ly]" touched her "over 50 times" throughout the years. She said the touching happened "almost every time [she and Sister would] go visit."

The first time Jane remembered Kardel touching her was when she was in the third grade. Kardel tickled her, touched the top of her vagina, and put his finger inside her vagina. Jane testified he touched her in a similar way "more than once" when she was in the third grade.

When Jane was in the fourth grade, she recalled a woman coming into her classroom to talk about sexual molestation. She realized for the first time that Kardel had been molesting her.

When Jane was in the fifth grade, she got a bladder infection. Kardel had been molesting her for "more than a year" at the time. A doctor asked Jane if anyone was touching her "down there." She said "no."

Jane testified regarding four specific instances when Kardel molested her in the toolshed behind his house. The first occurred when Jane was in junior high. Kardel lifted up her shirt, put his mouth on her breasts, and put his fingers inside her vagina.

The second toolshed incident occurred when she was 14 years old and a freshman in high school. Kardel put his mouth on her breasts and his fingers inside her vagina. He pulled down his pants and began touching his penis. He then forced her to touch his penis.

The third toolshed incident occurred when she was a sophomore. Kardel put his mouth on her breasts and his fingers inside her vagina. He forced her to touch his penis until he ejaculated.

The fourth toolshed incident was also the last molestation that Jane recalled. It occurred around August 2014 when she was a sophomore. Kardel lifted up her shirt, put his mouth on her breasts, and put his fingers inside her vagina.

Sister's Trial Testimony

Sister is three and a half years younger than Jane. She testified that when she was five or six years old, she was playing hide-and-seek in Kardel's house. She heard Jane say "help, help" and went to Kardel's room. She saw Kardel with his hands down Jane's pants.

Sister testified that when she was six years old, she saw Kardel and Jane on a bed with the covers over them. Kardel told Sister to act as a lookout and to tell him when A.V. was coming up the driveway.

In 2015, when Sister was in seventh grade, Child Protective Services went to her school and talked about "good

touches and bad touches." She realized Kardel had molested her when she was younger. Sister told A.V. that Kardel molested her. A.V. asked Jane if Kardel touched her, and Jane responded "yes."

A.V.'s Trial Testimony

A.V. called the police after Jane and Sister told her that Kardel had molested them. The police arranged two pretext calls between A.V. and Kardel. In one phone call, Kardel admitted he touched Jane's vagina, but said that she consented. Kardel stated that "if it gets out, it's gonna ruin everybody. . . . I don't want to ruin . . . our family." Kardel also left a voice message, in which he expressed "remorse" to Jane and said he would buy Jane a car. In another voice message, Kardel said that his "remorse was shown in [his] offer to buy" Jane a car and that his "remorse to [A.V.] would be for [her] to tell [him] what [she] want to pay in rent" for the house that A.V. and her daughters lived in, but Kardel owned. Kardel said that "if this mess is not personally taken care of, . . . a massive tragedy will occur." He said they would have to pay an attorney and sell the "Harmony house," and he had "planned this home to be for [A.V.]" and her retirement. He also mentioned "jail time" at his age (82) "would be certain death."

The Amended Information

The prosecution filed an information charging Kardel with seven counts of child molestation (counts 1-4 with respect to Sister and counts 5-7 with respect to Jane) and one count of intimidating a witness (count 8).

After Jane, Sister, and A.V. testified at trial, the prosecutor amended the information as follows: counts 1-2 alleged sexual molestation of Sister, counts 3-14 alleged sexual

molestation of Jane, and count 15 alleged intimidation of a witness (A.V.). The jury convicted Kardel on counts 3-15, but was unable to reach a verdict on counts 1-2.

DISCUSSION

Evidence of Jane Doe's Age

Kardel contends there is insufficient evidence of Jane's age when he committed counts 3-13. We disagree.

Where a defendant challenges the sufficiency of evidence supporting a conviction, we review the record in the light most favorable to the judgment to determine whether it contains substantial evidence from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Jennings* (1991) 53 Cal.3d 334, 364.) We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Little* (2004) 115 Cal.App.4th 766, 771.)

Substantial evidence supports each of counts 3-13. Count 3 charged Kardel with sexual penetration of Jane when she was 10 years old or younger (§ 288.7, subd. (b)). Count 4 charged Kardel with committing a lewd or lascivious act (§ 288, subd. (a)) between August 14, 2007 and June 11, 2008 (when Jane was eight or nine years old). Here, Jane testified that she was in third grade and approximately eight or nine years old when Kardel put his fingers in her vagina. She testified that similar incidents happened "more than once" during the same year. She also testified that when she was in fourth grade (when she was nine or 10 years old), she first realized Kardel had been molesting her.

Moreover, she testified that Kardel had been molesting her for over a year by the time she was in fifth grade

(when she was 10 or 11 years old) and got a bladder infection. In addition, Sister testified that she saw Kardel put his hands down Jane's pants when Jane was eight to 10 years old. Substantial evidence thus supports counts 3 and 4.

Counts 5 and 6 charged Kardel with committing a lewd or lascivious act and sexually penetrating Jane with a foreign object (§§ 288, subd. (a), 289, subd. (j)) between August 16, 2011 and June 12, 2013 (when Jane was 12 or 13 years old). Kardel touched her breasts and put his finger inside her vagina when they were in the toolshed. She testified this occurred when she was in junior high school. Substantial evidence thus supports counts 5 and 6.

Counts 7-12 charged Kardel with committing six lewd and lascivious acts (§ 288, subd. (c)(1)) between August 13, 2013 and June 10, 2015 (when Jane was 14 or 15). Jane described two other incidents in the toolshed that occurred when she was a freshman and sophomore in high school (14 or 15 years old). In both instances, Kardel touched her breasts, put his fingers in her vagina, and then forced her to touch his penis (i.e., three counts per incident). Substantial evidence thus supports counts 7-12.

Count 13 charged Kardel with committing a lewd and lascivious act (§ 288, subd. (c)(1)) between August 12, 2014 and June 10, 2015 (when Jane was 15 years old). Jane testified the last incident occurred around August 2014. She said that Kardel put his mouth on her breasts and put his fingers inside her vagina. Substantial evidence thus supports count 13.

Kardel contends the evidence was insufficient to prove counts 3 and 4 because Jane was "not sure" of her age. When Jane was asked when the first incident took place, she

replied "in third grade, I think." But Jane also testified that she realized she had been molested in the fourth grade, and that by the fifth grade she had been molested for "more than a year." Sister also testified she saw Kardel molesting Jane when Jane was eight to 10 years old.

With respect to the other counts, Kardel argues the evidence is insufficient to prove the acts occurred between the relevant time periods for each count. We disagree. Jane testified Kardel molested her in the toolshed on four separate occasions: in junior high, freshman year, sophomore year, and around August 2014. "Even when there is . . . countervailing evidence, the testimony of a single witness . . . is sufficient to uphold the finding." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.)

Moreover, the jury (and later the trial court) found Jane's testimony credible. In ruling on posttrial motions, the trial court noted that Jane remembered "that the abuse occurred consistently, and her willingness on cross-examination to accept the possibility of uncertainty only served to enhance her credibility." We do not assess a witness's credibility. That is a matter for the trial court, who has the "'opportunity to observe [a witness's] demeanor and manner of testifying'" and is in the best position to assess credibility. (*In re Cox* (2003) 30 Cal.4th 974, 998.) Substantial evidence supports the conclusion that Jane was the requisite age for each of counts 3-13.

Amended Information

Kardel contends the trial court erred when it allowed the prosecution to amend the information to add counts 5-14 during trial. He argues the amendment prejudiced his defense and violated his due process rights. We disagree.

We review the trial court's decision to allow an amendment of the information for abuse of discretion. (*People v. Hamernik* (2016) 1 Cal.App.5th 412, 424 (*Hamernik*).) Section 1009 provides the trial court "may order or permit an amendment of an . . . information . . . for any defect or insufficiency, at any stage of the proceedings . . . ." However, an information may not be amended "so as to charge an offense not shown by the evidence taken at the preliminary [hearing]." (*Ibid.*) If the substantial rights of the defendant are prejudiced by the amendment, the trial court may grant a reasonable postponement of the proceedings. (*Ibid.*)

Due process of law requires that an accused be advised of the charges against him to prepare and present his defense and not be taken by surprise. (*Hamernik*, *supra*, 1 Cal.App.5th at p. 426.) "So long as the evidence presented at the preliminary hearing supports the number of offenses charged against defendant and covers the timeframe(s) charged in the information, a defendant has all the notice the Constitution requires." (*People v. Jeff* (1988) 204 Cal.App.3d 309, 342 [time, place, and circumstances of the charged offenses are left to the preliminary examination transcript].)

Here, the evidence at the preliminary hearing was slightly but not materially different from the evidence presented at trial. At the preliminary hearing, a police detective testified that Jane reported Kardel molested her when she was in the second grade. She described how Kardel touched the top of her vagina and put his finger inside it. She also told the detective that Kardel molested her "over 50 times." Jane described specific sexual acts and said there were incidents in which Kardel forced her to touch his penis. She described one incident in June 2015

where she and Kardel were in the toolshed and he forced her to touch his penis while he was touching her. She also said there were instances where he would put his mouth on her breasts. Jane said the most recent incident occurred in approximately October 2015. She said Kardel touched her breasts and inserted his finger in her vagina. The evidence at the preliminary hearing also established that Sister saw Kardel touch Jane on three separate occasions, when Jane was about 11 to 12 years old. The evidence also showed Kardel admitted in a pretext call that he touched Jane multiple times and that "it always happened in the tool shed."

The prosecution originally alleged three counts with respect to Jane: count 5 alleged an act of sexual penetration with a child 10 years old or younger (§ 288.7, subd. (b)) between June 24, 2005 and June 23, 2009; count 6 alleged a lewd or lascivious act with a child under the age of 14 years old (§ 288, subd. (a)) between June 24, 2005 and June 23, 2013; and count 7 alleged an act of sexual penetration by a foreign object (§ 289, subd. (a)(1)(A)) between June 1, 2015 and November 9, 2015 (15 or 16 years old). After Jane, Sister, and A.V. testified, the court permitted the prosecution to amend the information to allege counts 5-14 with respect to Jane.

The trial court did not abuse its discretion when it permitted the amendment. In cases in which a child molestation victim provides "generic testimony" of sexual acts that occurred over a period of time, our Supreme Court reasoned that "particular details surrounding a child molestation charge are not elements of the offense and are unnecessary to sustain a conviction." (*People v. Jones* (1990) 51 Cal.3d 294, 315 (*Jones*).) The victim "must describe *the kind of act or acts committed* with

sufficient specificity," must "describe the *number of acts* committed with sufficient certainty . . . (e.g., 'twice a month' or 'every time we went camping')," and must "describe *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us')." (*Id.* at p. 316, original italics.) "Additional details regarding the time, place or circumstances of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction." (*Ibid.*)

Here, the "generic testimony" regarding the numerous incidents of molestation was sufficient to place Kardel on notice. (*Jones*, *supra*, 51 Cal.3d at p. 318 ["child molestation charges based on generic testimony does not, of itself, result in a denial of a defendant's due process right to fair notice of the charges against him"].) Jane's testimony showed the molestation began when she was younger than 10 years old (when she was in second or third grade), specified the types of sexual acts Kardel committed, described specific instances that occurred in the toolshed when she was 15 or 16 years old (ending sometime between August 2014 and October 2015), and established that sexual acts occurred "over 50 times" throughout her childhood. (See *Jones*, at p. 316.)

Kardel did not demonstrate he was prejudiced by the filing of the amended information. Under either version of the information, Kardel was required to defend against sexual acts committed against Jane when she was younger than 10 years old, under 14 years old, and 15 or 16 years old.

For the same reasons, Kardel does not establish he was prejudiced by the timing of the filing of the amended

information. (See *People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1582 [prosecution permitted to amend information before the close of the prosecution's case-in-chief].) Had Kardel believed his substantial rights were prejudiced by the timeliness of the amendment, he could have requested a continuance or postponement of the proceedings, but he did not do so. (§ 1009.)

Kardel relies on *People v. Graff* (2009) 170 Cal.App.4th 345 and *People v. Pitts* (1990) 223 Cal.App.3d 606 to support his position. But these cases are distinguishable. In both *Pitts* and *Graff*, the prosecution attempted to convict a defendant on charges based on specific acts, where there was insufficient evidence of these acts at the preliminary hearing. (*Graff*, at p. 367 [testimony regarding two specific incidents of masturbation could not support a conviction of § 288, subd. (c) (lewd or lascivious act with a child 14 or 15 years old) where a magistrate judge found insufficient evidence of the victim's age at the preliminary hearing and dismissed the charges]; *Pitts*, at pp. 908-914 [defendant could not be convicted of specific acts between specific perpetrators and victims, where there was no evidence of these acts presented at the preliminary hearing].) Here, in contrast, the preliminary hearing established with sufficient specificity the types of acts, the number of times these acts were committed, and the general time period in which they occurred. (*Jones*, *supra*, 51 Cal.3d at p. 317.)

Kardel also contends counsel was ineffective for not objecting to the addition of count 14 (sexual penetration with a foreign object of a minor under 18 years old [§ 289, subd. (h)]). To prevail on an ineffective assistance of counsel claim, Kardel must show that his counsel rendered defective performance and that he

was prejudiced as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) Kardel cannot show defective performance or prejudice. The evidence at the preliminary hearing and at trial showed that Kardel digitally penetrated Jane in the toolshed during the relevant time period. Thus, there is no evidence that the court would have prohibited the addition of count 14 had counsel objected.

Intimidation of a Witness

Kardel argues his conviction for intimidating a witness must be reversed because (1) the evidence was insufficient to show he prevented A.V. from reporting; (2) A.V. was not a witness; (3) the charged offense applies only to victims; (4) the jury instruction omitted an element of the offense; and (5) the offense could only be an attempt. We reject these arguments.

To convict Kardel for intimidation of a witness, the prosecution was required to prove Kardel attempted to "prevent or dissuade another person who . . . is witness to a crime from" "[m]aking any report of that victimization to any peace officer or state or local law enforcement officer" or any prosecuting agency. (§ 136.1, subd. (b)(1).) It is not a defense that he was not successful at preventing or dissuading the witness. (§ 136.1, subd. (d).)

First, Kardel distinguishes "prevent" and "dissuade" and notes that the jury was only instructed on the "prevent" theory. He asserts that "prevent" means to render an event impossible and "dissuade" means to advise a person not to talk to authorities. He argues that the prosecution did not present substantial evidence of the "prevent" theory, but concedes the evidence "may satisfy a 'dissuade' theory."

The record reflects the two terms were used interchangeably during trial. The jury was instructed that the prosecution must prove Kardel "tried to prevent [A.V.] from making a report." Neither "prevent" or "dissuade" was defined in the instruction or during trial. The prosecutor argued in closing that the evidence proved Kardel used means to "manipulate and to dissuade [A.V.] from calling the police" and that the evidence shows "he's trying to prevent her from making a report." Despite the omission of the word "dissuade" in the jury instruction, the jury understood that it could convict Kardel for dissuading A.V. from contacting the police. Substantial evidence supports the conviction.

Second, Kardel argues A.V. was not a "witness" as used in section 136.1 because she did not directly observe a crime. But there is no requirement that a "witness" needs to be an eyewitness. A witness is someone who knows about "the existence or nonexistence of facts relating to a crime." (§ 136, subd. (2).) The jury was instructed of this definition. The jury properly found A.V. met the definition of a witness.

Third, Kardel argues section 136.1, subdivision (b)(1) applies only to victims of the underlying crime. We disagree. A defendant is in violation of subdivision (b)(1) if he attempts to prevent or dissuade a "witness" from "[m]aking any report of that victimization to any peace officer or state or local law enforcement officer" or any prosecuting agency. (§ 136.1, subd. (b)(1).) The plain language of this statute prohibits an attempt to dissuade *any* witness from reporting victimization. (*People v. Raybon* (2019) 36 Cal.App.5th 111, 121, review granted on other grounds Aug. 21, 2019, S256978.) Nothing in the statute requires the witness to be the victim of the underlying crime.

Fourth, Kardel contends the trial court erred when it omitted an element of the offense in its jury instruction. Here, the court instructed the jury that it must find the defendant "tried to prevent [A.V.] from making a report," but the court did not specify the list of government officials (as listed in section 136.1, subdivision (b)(1)) to whom the report could be made.

Even assuming the omission was error, the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Flood* (1998) 18 Cal.4th 470, 504-505.) The undisputed evidence showed Kardel tried to prevent A.V. from talking to law enforcement and prosecutorial authorities. The evidence showed Kardel told A.V. that if he had to pay an attorney, he would have to sell the house he had planned to give her. He also mentioned "jail time" at his age "would be certain death." The prosecutor argued at closing argument that the evidence showed Kardel was attempting to "dissuade [A.V.] from calling the police now that she knows what he has done." As the trial court noted, "[t]here's no other reason [Kardel] would need an attorney or fear spending time in jail." "[I]n view of the actual verdict returned by the jury in this case there is no reasonable or plausible basis for finding that the instructional error affected the jury verdict." (*Flood*, at p. 505 [omission of an element in a jury instruction was harmless error where undisputed evidence established the element].)

Lastly, Kardel argues he could only be liable for an attempt to violate section 136.1 because A.V. had already reported the crime. But a violation of section 136.1, subdivision (b)(1) requires only an attempt to dissuade the witness, not a successful action. "Proof of an attempt to prevent any future report to the police [is] sufficient to satisfy the statute." (*People*

v. Pettie (2017) 16 Cal.App.5th 23, 54-55.) The evidence showed Kardel was unaware A.V. reported the crime when he attempted to dissuade her from reporting to the police. That A.V. had already reported to the police was immaterial.

The December 2007 Letter

Kardel contends the trial court erred when it limited the admissibility of a December 2007 letter that A.V. wrote in relation to an unrelated court case, and evidence regarding the circumstances of that case, including her prior arrest for child endangerment. He argues that the court violated his constitutional rights to cross-examine and confront A.V. We are not persuaded.

Before trial, Kardel sought to introduce into evidence the letter pursuant to Evidence Code section 782 (evidence of sexual conduct of a complaining witness to attack the credibility of the witness). A.V. wrote the letter after her daughters were removed from her custody based on child endangerment allegations. In the letter, A.V. alleged that Sister told A.V. that her stepsister pulled on her labia, causing Sister to seek medical treatment. A.V. reported the incident to Child Welfare Services. Kardel also sought to introduce evidence of A.V.'s prior arrest, which was related to the same incident, for child endangerment.

The trial court found the letter was not admissible pursuant to Evidence Code section 782, but it found the letter's reference to a report of an injury to Sister's labia to have "very limited" relevance. The court stated that at trial, the defense could ask A.V. "if her child made such a complaint and if she took her child to the doctor . . . but I think that is the limit of it." The court found the evidence of A.V.'s prior arrest and the underlying

circumstances of the 2007 court case were not admissible pursuant to Evidence Code section 352.

At trial, defense counsel asked A.V. whether in 2007, Sister told A.V. that her stepsister pulled on her labia. A.V. responded "Never, no." Defense counsel showed her the letter, and A.V. said "I don't recall this." A.V. admitted she prepared the document with the help of Kardel, but she did not recall the incident. Nor did she remember taking Sister to the doctor. She explained that Kardel wrote most of the letter.

The defense requested the letter be admitted into evidence as a prior inconsistent statement. The court denied the request. The court explained that "[w]hether it's a prior inconsistent statement depends on whether or not her denial or her saying she didn't remember is contrived or not, and I didn't find it was contrived, and I think she was cross-examined at length about it." The court admitted a redacted version of the letter into evidence. It consisted only of the following statement: "[Sister] told me that [stepsister] pulled on her labia."

We review a trial court's decision to limit or exclude impeachment evidence for abuse of discretion. (*People v. Ledesma* (2006) 39 Cal.4th 641, 705 (*Ledesma*).) The trial court has "wide latitude" to exclude evidence offered for impeachment that is "collateral and has no relevance to the action." (*People v. Contreras* (2013) 58 Cal.4th 123, 152.) In exercising its discretion, the court determines, pursuant to Evidence Code section 352, whether the probative value of the evidence is "'substantially outweighed'" by its prejudicial, confusing, or time-consuming nature. (*Ibid.*) A court does not violate a defendant's constitutional right to confrontation where the evidence in question would impeach the witness on collateral matters that

are "only slightly probative of their veracity." (*People v. Jennings* (1991) 53 Cal.3d 334, 372.)

The trial court did not abuse its discretion when it limited the admissibility of the letter and excluded evidence of A.V.'s prior arrest and the circumstances of the unrelated court case. These matters were collateral to the instant case and had little probative value. They also had the potential to confuse the jury and result in the undue consumption of time.

To the extent Kardel challenges the finding that the letter was not a prior inconsistent statement (Evid. Code, § 1235), we conclude the trial court did not abuse its discretion. (*Ledesma*, *supra*, 39 Cal.4th at p. 705.) For evidence to qualify as a prior inconsistent statement pursuant to Evidence Code section 1235, the statement must be inconsistent with the witness's trial testimony. "'Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event.'" (*Ledesma*, at p. 711.)

Here, A.V.'s testimony was not inconsistent because she did not deny the incident occurred. Rather, she testified "I don't recall this" incident. The court made a credibility determination and found that A.V. was not evasive or untruthful. We defer to the trial court, who was in the best position to assess credibility. (*In re Cox*, *supra*, 30 Cal.4th at p. 998.)

Cumulative Error

Lastly, Kardel argues cumulative error. Because we have determined that his claims are meritless and that error, if any, was harmless, there is no cumulative error. (*People v. Avila* (2006) 38 Cal.4th 491, 608.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

John F. McGregor, Judge

Superior Court County of Santa Barbara

Coleman & Balogh and Benjamin L. Coleman, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stacy S. Schwartz, Paul M. Roadarmel, Jr., and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.