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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.

ELIAS T. SALAZAR,

Defendant and Appellant.

B282913

(Los Angeles County
Super. Ct. No. BA436343)

APPEAL from a judgment of the Superior Court of Los Angeles County. Katherine Mader, 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, Michael C. Keller, Supervising Deputy Attorney General, Timothy L. O'Hair, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Elias Salazar of numerous crimes related to sexual misconduct with his nieces-by-marriage, Johana O. and Jazmine F., which occurred while the victims were minors. On appeal, Salazar contends the trial court erred in excluding evidence that Jazmine stole \$5,000 from her mother. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Jazmine testified that Salazar, who was her uncle-by-marriage, inappropriately touched her more than 30 times over the course of several years. The first incident occurred when Jazmine was eight years old and at Salazar's house for a sleepover with his daughter, Giselle. While Giselle was taking a shower, Salazar approached Jazmine from behind and put his hands down her pants and underwear.

Jazmine described several other incidents where Salazar touched and inserted his fingers into her vagina, which occurred when she was between the ages of eight and eleven. On one occasion, Salazar inserted his penis into Jazmine's vagina. On another occasion, Salazar inserted his penis into her mouth. Occasionally, Salazar would masturbate in front of Jazmine. On six or seven occasions, Salazar played pornographic movies in front of Jazmine. Sometimes Salazar would touch Jazmine's vagina and breasts while watching the movies, and sometimes he would masturbate as well. These incidents primarily occurred during family functions, either at Salazar's or Jazmine's house. Jazmine did not report any of these incidents at that time because she was concerned she would no longer be allowed to see Giselle.

When Jazmine was around 13 years old, she decided to tell Salazar to stop abusing her. At a subsequent family function, Salazar entered Jazmine's bedroom, and Jazmine told him she did not want to "do it" anymore. Salazar called her "dumb" and blocked her from leaving the room. Salazar pinned Jazmine to the bed, put his arm over her mouth, and inserted his penis into her vagina while she attempted to kick him. This was the last time Salazar inappropriately touched Jazmine.

On August 6, 2014, when Jazmine was 16 years old, she was hospitalized for an attempted suicide. At the hospital, Jazmine disclosed to a nurse that Salazar had sexually abused her when she was younger. Jazmine was not aware that the nurse was a mandated reporter at the time she disclosed the abuse, but learned later that day that the nurse reported the abuse to the authorities.

About a month later, Johana, who is Jazmine's cousin, asked her why she attempted suicide. Jazmine vaguely stated that something had happened to her, and Johana asked if Salazar had touched her. Jazmine responded yes, but did not provide details.

Around this time, Jazmine's boyfriend, Daniel Corona, began living with Jazmine and her parents, and Jazmine became pregnant. Jazmine was 16 years old and Corona was 18 years old. At some point, Jazmine's parents and Corona had an argument, and Jazmine called the police when the argument began to escalate. The police arrested Corona for having a sexual relationship with a minor and fighting with Jazmine's father. The police also found drug paraphernalia in Jazmine's room.

The next day, Jazmine received calls and text messages from Corona's father, demanding that Jazmine's parents pay Corona's bail. Jazmine went to school that day, but decided to leave with Corona's father to bail him out of jail. Jazmine sent a text message to her mother stating that Salazar had picked her up from school. Jazmine sent the text message as an excuse to leave school with Corona's father, because nothing had happened to Salazar after she previously disclosed his abuse, and because she wanted to sidetrack everyone from what she was doing. Jazmine left school with Corona's father and met Corona's mother and aunt to get a bail bond loan. Corona's mother and aunt bailed Corona out of jail.

When Jazmine returned home, the police were waiting for her. She initially told the police Salazar had kidnapped her, but she soon recanted.

The next day, Jazmine attempted to commit suicide by lighting herself on fire. Jazmine's plan was to start a fire in the hallway that would spread to her bedroom. Although she successfully started the fire, it did not spread as intended. After hearing her mother in the hallway, Jazmine left her room and helped her mother extinguish the fire. Jazmine then called 911 and told the operator she did not know how the fire started. The police threatened to charge Jazmine with arson, after which she stated she started the fire in an attempt to commit suicide.

Johana testified that Salazar, who was her uncle-by-marriage, first sexually abused her when she was nine years old and at Salazar's house to visit with Giselle. After telling Giselle to go outside, Salazar took Johana into a bedroom, locked the door, and placed her on the bed. He proceeded to pull down her pants and underwear, and insert his penis into her vagina.

Johana told Giselle what Salazar did, but Giselle did not believe her.

About a year later, when Johana was 10 years old, she was visiting Giselle at Salazar's house when he again took her into the bedroom, pulled down her pants and underwear, and inserted his penis into her vagina.

On another occasion when Johana was 10 years old, she was at Salazar's house for a slumber party with Giselle. Johana reluctantly went with Salazar to the store to buy batteries. On the drive back, Salazar pulled his car to the side of the road and began rubbing Johana's thigh, getting close to her vagina. Salazar stopped when he received a phone call from Johana's mother.

Sometime around February 2015, when Johana was in eighth grade, she told a friend about the sexual abuse. The friend convinced Johana to tell her mother, which Johana did about a week later. Johana's mother then reported the abuse to the police.

After meeting with the police, Johana told Jazmine that Salazar raped her. Jazmine also disclosed that Salazar had raped her, but did not provide details.

Michelle Gomez, who is a detective with the Los Angeles Police Department, testified that she was assigned in February 2015 to investigate a complaint that Salazar sexually assaulted Johana. In April 2015, Detective Gomez interviewed Johana and learned that Jazmine might also be a victim. Detective Gomez then obtained a report filed with the Fontana police department, which was generated after Jazmine's August 2014 disclosure to the nurse. The report indicated the Fontana police had interviewed Jazmine's mother, but had taken no further steps in

the investigation. Detective Gomez proceeded to interview Jazmine and took over her case from the Fontana police department.

Salazar's daughter, Jennifer, testified that she went to speak with her father after learning Johana had accused him of rape. Salazar conveyed to her that he had inappropriately touched Johana, but did not rape her. Salazar also expressed being "ashamed," but Jennifer interpreted this to be related to him being a poor father, and not related to the rape accusation.

Salazar's other daughter, Giselle, testified that Jazmine lies about important things, is a dishonest person, and has asked Giselle to lie for her on multiple occasions. Sometime between 2007 and 2009, Jazmine told Giselle that Salazar had touched her. Johana was also present, and later told Giselle that Jazmine was lying. Giselle believed Jazmine was influencing Johana when she reported the abuse.

Salazar denied Johana's and Jazmine's accusations that he sexually abused them. After he learned he was accused of sexual misconduct, he told his daughter, Jennifer, that he had not been a good father or husband, and had done terrible things that he was ashamed of and regretted. Salazar told Jennifer he may have touched Johana inappropriately, but never sexually. He clarified that he would hug Johana, but did not know if that was considered inappropriate.

The jury convicted Salazar of one count of continual sexual abuse (count 1; Pen. Code, § 288.5, subd. (a)),¹ six counts of lewd acts upon a child (counts 2–6, 9; § 288, subd. (a)), two counts of oral copulation or sexual penetration with a child 10 years old or

¹ All further section references are to the Penal Code unless otherwise specified.

younger (counts 7–8; § 288.7, subd. (b)), and one count of aggravated sexual assault of a child (count 10; § 269, subd. (a)(1)), as alleged in the second amended information. It also found true as to counts 1–5 and 7–10, that Salazar committed an offense specified in section 667.61, subdivision (c), against more than one victim.

The trial court sentenced Salazar to an aggregate term of 150 years to life, consisting of 15 years to life for count one, plus a consecutive 15 years to life for each remaining count.

Salazar timely appealed.

DISCUSSION

I. The Court Did Not Abuse its Discretion in Excluding Evidence of Jazmine’s Alleged Theft

Salazar contends the trial court erred in excluding, pursuant to Evidence Code section 352, evidence that Jazmine stole \$5,000 from her mother. He also contends the exclusion of such evidence violated his right under the confrontation clause of the United States Constitution to effectively cross-examine Jazmine. We disagree.

A. Standard of Review

Evidence Code section 352 vests in the trial court broad discretion to exclude relevant evidence when “its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) “This discretion allows the trial court broad power to control the presentation of proposed impeachment evidence ‘ “to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral

credibility issues.’ [Citation.]” ’ ” (*People v. Mills* (2010) 48 Cal.4th 158, 195.)

We review a trial court’s exclusion of evidence under Evidence Code section 352 for abuse of discretion. (See *People v. Brown* (2003) 31 Cal.4th 518, 534.) “Where . . . a discretionary power is statutorily vested in the trial court, its exercise of that discretion ‘must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]’ ” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125.)

B. Motion to Exclude Evidence and Pretrial Hearing

Prior to trial, the People filed a motion, pursuant to Evidence Code section 402,² seeking to prevent Salazar from eliciting testimony that Jazmine stole \$5,000 from her mother to use as bail for Jazmine’s boyfriend, Daniel Corona. The People anticipated Salazar would point to a statement in a police report indicating Jazmine’s mother believed Jazmine took \$5,000 from her closet. However, in a subsequent police report, Jazmine’s mother stated the money had been stolen before Jazmine would have used it for bail, and the mother did not know if Jazmine was ever aware of the money. The People also anticipated Salazar would rely on a statement by Jazmine’s classmate in one of the police reports indicating Jazmine stated she had \$5,000 in a savings account to use for Corona’s bail. The People argued that such evidence should be excluded pursuant to Evidence Code

² Evidence Code section 402 provides that the “court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury.” (Evid. Code, § 402, subd. (b).)

section 352 because it was “clearly more prejudicial than probative.”

In his opposition brief, Salazar cited numerous cases holding that evidence of a witness’s prior acts involving moral turpitude have a logical bearing upon the witness’s veracity. He asserted Jazmine’s credibility was “crucial,” and the outcome of the case would likely depend on the jury’s credibility determinations. According to Salazar, Jazmine was “calculated, determined, controlling, and scheming”

At the hearing, the court noted that the alleged theft did not seem “terribly relevant.” The court also expressed concern that, given the conflicting evidence, to prove Jazmine stole the money would require a mini-trial.

In response, Salazar addressed the evidentiary support for the theft, stating, “family members have said to family members, primarily on Mr. Salazar’s side, that they suspected that Jazmine stole \$5,000 from the mom.” He further noted that, according to a police report, Jazmine’s classmate stated Jazmine told Corona’s father to bail him out of jail. Counsel also noted that a police report indicated Jazmine’s mother stated \$5,000 was missing from her closet, but she was not sure if Jazmine took it and Jazmine had denied doing so.

After hearing argument from counsel, the court granted the People’s motion to exclude evidence of the theft, noting that it was “too speculative and not important.”

C. Discussion

The trial court’s statements at the hearing indicate it excluded evidence of Jazmine’s alleged theft because it concluded the potential for undue consumption of time substantially

outweighed the probative value of such evidence.³ This was not an abuse of discretion.

Salazar's purported evidentiary basis for the theft consisted of speculation among his relatives contradictory hearsay statements contained in police reports. To prove the allegations, Salazar likely would have had to call several additional witnesses, including Jazmine's mother, the unidentified classmate, and Salazar's relatives. Even then, the only witnesses with direct knowledge, Jazmine and her mother, denied Jazmine stole the money. As a result, Salazar was likely to have had difficulty proving the allegations, and to do so would have required significant time.

Even if Salazar could establish that Jazmine stole the money, such evidence was not particularly probative. Although the theft may have indicated a general willingness to lie, it did not directly relate to the sexual misconduct allegations. In contrast, evidence that Jazmine falsely accused Salazar of kidnapping, and was accused by Johana of making false sexual abuse allegations, was far more damaging to Jazmine's credibility as it specifically related to her accusations against Salazar.

³ We disagree with the People's assertion that the trial court excluded the evidence because it was not relevant. The court noted the evidence was not "terribly relevant" and "not important." These statements suggest the court found the evidence had some relevance, but lacked sufficient probative value. Indeed, if Jazmine stole \$5,000, it might suggest a willingness to lie, which was relevant to her credibility and Salazar's defense that she falsely accused him of sexual misconduct. (See *People v. Wheeler* (1992) 4 Cal.4th 284, 295–296 [misconduct involving moral turpitude, including grand theft, may suggest a willingness to lie].)

We also reject Salazar's contention—which he makes for the first time on appeal—that the evidence was relevant because it provided a motive for Jazmine to falsely accuse him of sexual misconduct. According to Salazar, Jazmine accused him of sexual abuse, and persuaded Johana to do the same, in order to distract from her own misconduct, which included, among other things, stealing \$5,000.

Initially, Salazar forfeited this argument by failing to assert it below. With limited exceptions not applicable here, a claim that evidence was wrongly excluded cannot be raised on appeal absent an offer of proof in the trial court. (See *People v. Hill* (1992) 3 Cal.4th 959, 989, disapproved on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) In his opposition papers and at the hearing, Salazar failed to argue that evidence of the theft was relevant to show a motive for Jazmine to make false accusations. Instead, he generally and vaguely argued the evidence was relevant to Jazmine's credibility. As such, Salazar failed to provide an offer of proof sufficient to preserve his argument on appeal.

Even if Salazar had not forfeited this argument, we would not find an abuse of discretion given the minimal probative value of the evidence to show Jazmine's motive. Salazar's theory that Jazmine accused him of sexual misconduct to distract from her own misconduct was not consistent with other evidence presented at trial. For example, it was undisputed that Jazmine first disclosed the sexual misconduct in August 2014, which was months before she allegedly stole the money. It was also undisputed that Jazmine did not affirmatively report the abuse to any authorities subsequent to the alleged theft. Rather, she was contacted by Detective Gomez several months after the

alleged theft, in the course of the detective's investigation of Johana's allegations.

In any event, any possible error in excluding the evidence was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Welch* (1999) 20 Cal.4th 701, 749–750; *People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

Evidence of Salazar's guilt was strong. Both Johana and Jazmine testified at length and in detail about numerous instances in which Salazar sexually abused them. Further, Salazar admitted to "inappropriately touching" Johana, and expressed shame upon being confronted with some of the accusations.

Moreover, the jury convicted Salazar despite the introduction of significant evidence from which it could have questioned Jazmine's credibility. This included evidence that Jazmine falsely accused Salazar of kidnapping, asked Giselle to lie for her on multiple occasions, and had previously been accused by Johana of falsely accusing Salazar of sexual abuse. Such evidence was significantly more probative of Jazmine's credibility with respect to the specific allegations of sexual abuse than evidence that she stole \$5,000. Given the jury was not persuaded by this evidence, we have no doubt the jury would have convicted Salazar even if it heard evidence of the alleged theft.

Further, there was significant other evidence from which Salazar could argue motive. For example, around the same time period as the alleged theft, Jazmine admitted to starting a fire in her house while her mother was inside, leaving school with Corona's father, falsely accusing Salazar of kidnapping, having drug paraphernalia in her room, and becoming pregnant. Salazar was free to argue that Jazmine falsely accused him of

sexual abuse in order to distract from any of these acts, and he fails to adequately explain how evidence of an additional act of misconduct would have meaningfully bolstered his defense.⁴

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

FLIER, J.

⁴ Because we find no error under Evidence Code section 352, we also reject Salazar’s constitutional claim. As explained by our Supreme Court, “[t]he routine and proper application of state evidentiary law does not impinge on a defendant’s due process rights. [Citation.] Additionally, ‘reliance on Evidence Code section 352 to exclude evidence of marginal impeachment value . . . generally does not contravene a defendant’s constitutional rights to confrontation and cross-examination.’ [Citation.] ‘Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’ [Citation.]” (*People v. Riccardi* (2012) 54 Cal.4th 758, 809–810, abrogated on another ground by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; see *Mills, supra*, 48 Cal.4th at p. 196.)