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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

HERBERT CONSTANTINE MORRISON,

Defendant and Appellant.

2d Crim. No. B229986  
(Super. Ct. No. 1348580)  
(Santa Barbara County)

Herbert Constantine Morrison was charged with three counts of forcible rape (Pen. Code, § 261, subd. (a)(2)), forcible oral copulation (§ 288a, subd. (c)(2)) and lewd act upon a child (§ 288, subd. (a)(1)).<sup>1</sup> He was also charged with possession of a firearm and ammunition by a felon (§§ 12021, subd. (a)(1); 12316, subd. (b)(1)). A jury found him guilty on all counts except lewd act upon a child. On that count, the jury found him guilty of the lesser included offense of assault.

On appeal, Morrison contends the trial court abused its discretion in finding a four-year-old child competent to testify. We affirm.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

## FACTS

Because Morrison does not challenge the sufficiency of the evidence, a brief summary of the facts is all that is necessary.

Morrison is Jane Doe 2's stepfather. Jane Doe 2 was 28 years old at the time of trial. She has known Morrison since she was four years old. Morrison married Jane Doe 2's mother in 1986. Morrison, Jane Doe 2, her daughter, Jane Doe 1, and her mother have lived in the same house ever since.

Jane Doe 2 testified that Morrison began molesting her when she was nine years old. He would touch her breasts, vagina and bottom. She never said anything because she was afraid for her life. Morrison had a pistol. When he got angry, he would show the pistol to Jane Doe 2 and her mother and tap it while making threatening noises.

When Jane Doe 2 was 11 years old, Morrison forced her to orally copulate him. At the same age, he began raping her. The rapes continued into her adulthood. Jane Doe 2 asked Morrison to stop many times. He promised he would, but he continued in spite of his promise.

When Jane Doe 1 was three years old, Morrison touched her crotch. Jane Doe 1 told her mother, Jane Doe 2. Jane Doe 2 contacted the police.

T. H. is Jane Doe 2's niece. When H. was eight years old, Morrison gave her a "wet kiss"; it did not feel grandfatherly. One day when H. was older she was in the bathroom at Jane Doe 2's house. Morrison did not know H. was there. H. heard Morrison say to Jane Doe 2, "You sittin' up on that pussy. You need to give me some." When H. asked Jane Doe 2 about the comment, she said that Morrison was just talking crazy.

B.P. had known Morrison for most of her life. When she was 16 or 17 years old, B.P. put his hand on the inner part of her thigh and started moving toward her crotch. She pushed his hand away. Later, Morrison asked her if he could perform oral sex on her. He offered her a car, but she refused.

## DISCUSSION

Morrison contends the trial court abused its discretion in determining that four-year-old Jane Doe 1 was competent to testify.

The trial court held a hearing outside the presence of the jury. It asked Jane Doe 1 some innocuous questions such as her age, whether she goes to school and who does her hair. She shrugged her shoulders in response to some of the questions, but answered most of them appropriately.

The court asked Jane Doe 1 whether she knew defense counsel. She replied in the affirmative, although she had never seen him before. The court asked Jane Doe 1 whether she knew Morrison. She replied in the negative, although she lived in the same house.

The court asked Jane Doe 1 if she knew what the truth was. She nodded that she did. The court asked if he called her "Susie," whether that would be the truth. She replied, "No. That would be a lie." The prosecutor said he was wearing a black tie. He asked Jane Doe 1 if that was the truth or a lie. She correctly responded that it was a lie.

The trial court found Jane Doe 1 competent to testify. Jane Doe 1 was called as a witness.

In the presence of the jury Jane Doe 1 refused to remove her hands from the front of her face, or look at anybody. She also would not let go of the witness support person. The court allowed Jane Doe 1 to take a break. Outside the presence of the jury the court told the parties that unless there was a dramatic change in Jane Doe 1's demeanor, he would not allow her to testify. The court said, "It's just a gut wrenching situation here . . . ."

When Jane Doe 1 returned to the witness stand she was able to testify. She testified on direct examination by the prosecutor:

"Q. Now, [Jane], did somebody touch you in a way that you didn't want to be touched?

"A. Yeah.

"Q. And where were you touched? Where did that person touch you?

"A. Right there. [¶] . . . [¶]

"Q. You can go ahead and sit back down. For the record, she indicated her crotch area. [¶] Now, do you know the person who touched you in that spot?

"A. Peter [Morrison].

"Q. And did you want him to touch you there?

"A. No."

On cross-examination Jane Doe 1 testified the touching occurred in the garage while she was dancing. At first, she said it happened three days ago, later she testified it happened four days ago. Then she said Morrison touched her twice. She said she did not know when the second incident occurred. She said it happened in the garage. She denied she told the police the touching occurred when she was in bed.

Evidence Code section 700 provides: "Except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter."

Evidence Code section 701, subdivision (a), provides: "A person is disqualified to be a witness if he or she is: . . . [i]ncapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or . . . [i]ncapable of understanding the duty of a witness to tell the truth."

The party objecting to a proffered witness has the burden of proving the witness is disqualified. (*People v. Anderson* (2001) 25 Cal.4th 543, 573.) The trial court's determination will be upheld absent a showing of a clear abuse of discretion. (*Ibid.*) Inconsistencies in testimony or the failure to remember aspects of the subject of the testimony do not disqualify a witness. (*People v. Mincey* (1992) 2 Cal.4th 408, 444.) Such matters are questions of credibility for the trier of fact. (*Ibid.*)

Here Jane Doe 1 demonstrated she was able to express herself in a manner capable of being understood. In fact, her testimony on direct examination left no doubt

about what she claims happened. That cross-examination revealed some inconsistencies, does not disqualify her as a witness. It merely goes to her credibility.

Jane Doe 1 also demonstrated she knows the difference between the truth and a lie. Morrison claims, however, that there is no evidence she understood the duty of a witness to tell the truth. But Jane Doe 1's responses to questions were those of a typical four-year-old child. A typical four-year-old child would know it is her duty to tell the truth when questioned by adults in authority. In any event, any deficiency in the evidence works against Morrison, who has the burden of proof.

The judgment is affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.\*

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\* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

James F. Iwasko, Judge

Superior Court County of Santa Barbara

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