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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHEAL DAVID DIAZ,

Defendant and Appellant.

2d Crim. No. B293673
(Super. Ct. No. BA457019)
(Los Angeles County)

Micheal David Diaz appeals from the judgment entered after a jury found him guilty of five counts of lewd act upon a child under the age of 14 years. (Pen. Code, § 288, subd. (a).) Z.D. was the victim in four counts (counts 1-4). A.D. was the victim in one count (count 6). The jury found true an allegation that appellant had committed a lewd act against more than one victim. (Pen. Code, § 667.61, subds. (b), (c)(8), (e)(4).) He was sentenced to prison for 30 years to life.

Appellant contends: (1) the trial court erroneously failed to disqualify A.D. as a witness because of her inability to perceive and recollect, (2) defense counsel was ineffective because he failed

to object to evidence of an uncharged sexual offense, and (3) the evidence is insufficient to support his convictions on counts 1-4 as to Z.D. We affirm.

Facts

L.D. has three daughters - Z.D., A.D., and Ali.D. Z.D. and A.D. are twins who were born in 2007. Ali.D. was born in 2010. Appellant is L.D.'s "cousin by marriage." L.D. has known him all of her life. Appellant is A.D.'s godfather.

The four counts involving Z.D. allege that the offenses occurred between March 2, 2011, and December 30, 2016. The underlying facts are as follows: Count 1 - when Z.D. was about five years old, she rubbed appellant's penis for about five minutes. Count 2 - while Z.D. was rubbing appellant's penis, appellant told her to kiss him and "move his tongue around in his mouth." Z.D. stuck her tongue inside appellant's mouth. Count 3 - In a family bathroom at Disneyland in Orange County, Z.D. rubbed appellant's penis with toilet paper while he was sitting on the toilet. Z.D. thought she was "like four" years old. Count 4 - while Z.D. was lying on appellant's bed, appellant "grabbed" her "butt" with his hand. It felt "uncomfortable." Z.D. "was too scared" to say anything to appellant.

The one count (count 6) involving A.D. is based on an incident at Disneyland. Appellant "kissed" A.D. on her lips with his tongue.

Count 6: Claim that A.D. Should Have Been Disqualified as a Witness Because of Her Inability to Perceive and Recollect

Appellant "agrees [A.D.] probably knew right from wrong and truth from a lie." But he argues: "[H]er inability to perceive and recollect what happened when she was four or five years old

should have disqualified her." "[I]n order to be qualified, a child must . . . be able to perceive and accurately recollect facts."

Appellant's argument lacks merit. An inability to perceive and recollect is not a ground for disqualifying a witness. "As a general rule, 'every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter.' (Evid. Code, § 700; see Pen. Code, § 1321.) A person may be disqualified as a witness for one of two reasons: (1) the witness is incapable of expressing himself or herself so as to be understood, or (2) the witness is incapable of understanding the duty to tell the truth. (Evid. Code, § 701, subd. (a).)" (*People v. Mincey* (1992) 2 Cal.4th 408, 444.) "Inconsistencies in testimony and a failure to remember aspects of the subject of the testimony . . . do not disqualify a witness. . . . They present questions of credibility for resolution by the trier of fact. [Citations.]" (*Id*. at pp. 444-445; see also *People v. Anderson* (2001) 25 Cal.4th 543, 573 ["Under the Evidence Code, the capacity to perceive and recollect particular events is subsumed within the issue of personal knowledge, and is thus determined 'in a different manner' from the capacity to communicate or to understand the duty of truth"]; *People v. Lewis* (2001) 26 Cal.4th 334, 356 (*Lewis*) ["In order to have personal knowledge, a witness must have the capacity to perceive and recollect. [Citation.] The capacity to perceive and recollect is a condition for the admissibility of a witness's testimony on a certain matter, rather than a prerequisite for the witness's competency"].)

Appellant's argument not only lacks merit; it is forfeited because he failed to raise it in the trial court. Appellant's counsel objected on the ground that A.D. was not "meaningfully qualified as a witness." After the objection, the prosecutor examined A.D.

about her ability to distinguish between telling the truth and lying. Both the prosecutor and trial court asked her about the consequences of lying. They did not inquire about A.D.'s ability to perceive and recollect.

Since appellant did not object on the ground that A.D. was unable to perceive and recollect what had occurred at the time of the commission of the charged offense, he has not preserved this issue for appellate review. (See Evid. Code, § 353, subd. (a); *People v. Bolden* (2002) 29 Cal.4th 515, 546-547 ["Because defendant did not object on those grounds in the trial court, they are not preserved for appellate review"]; *People v. Partida* (2005) 37 Cal.4th 428, 435 ["What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling"]; *Lewis*, *supra*, 26 Cal.4th at p. 357 ["Defendant did not timely object to Pridgon's incapacity to perceive and recollect to limit the admissibility of Pridgon's testimony before he testified. Thus, without an objection, the trial court was not required to determine whether Pridgon had personal knowledge before he testified"].)

Moreover, appellant failed to obtain a ruling on his objection that A.D. had not "been meaningfully qualified as a witness." After the prosecutor and the court had finished questioning A.D. about whether she understood her duty to tell the truth, appellant's counsel should have sought a ruling on his objection that she was not qualified. Instead, counsel did not bring the matter up again. For this reason alone, the claim is forfeited. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1249

["Defendant forfeited these claims by failing to obtain a ruling on his objection"]; *People v. Valdez* (2012) 55 Cal.4th 82, 143 [defendant's "'[f]ailure to press for a ruling on a motion to exclude evidence forfeits appellate review of the claim because such failure deprives the trial court of the opportunity to correct potential error in the first instance'"].)

Accordingly, we reject appellant's claim that "[r]eversal is the appropriate remedy because the court's qualification of a child who could not independently and accurately recollect past events deprived appellant of his [Sixth Amendment] right to adequate and meaningful cross-examination." We also reject appellant's claim that "the error in qualifying an incompetent witness" violated his right to due process under the Fourteenth Amendment.

Claim that Counsel Was Ineffective for Failing to Object to Evidence of an Uncharged Sexual Offense

Count 7 of the information charged appellant with the misdemeanor offense of annoying or molesting Ali.D., Z.D. and A.D.'s sister, in violation of Penal Code section 647.6, subdivision (a)(1). The trial court granted the prosecutor's pretrial motion to dismiss count 7 because the misdemeanor offense had been committed in Orange County instead of Los Angeles County, where the information was filed and the case was tried. The prosecutor requested that, pursuant to Evidence Code section 1108, the facts underlying dismissed count 7 be admitted to show appellant's propensity to commit the charged sexual offenses. (All further statutory references are to the Evidence Code.) The court asked defense counsel if he objected. Counsel responded, "I would just submit to the court on that. I don't have any

argument I can provide on that topic." The trial court granted the prosecutor's request.

Appellant acknowledges that, by not objecting to the admission of the propensity evidence, he "appear[s]" to have waived his right to complain that the trial court erroneously admitted the evidence. Appellant "asks this Court to review his claim of error in admitting evidence of an uncharged offense under the rubric of ineffective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 690.)" Appellant argues, "It seems unassailable that any reasonably competent attorney would object to the admission of other crimes evidence on the basis that it would be more prejudicial than probative."

Ali.D. testified as follows: At the time of the trial in July 2018, she was 11 years old. When she was eight or nine years old, appellant drove her to Disneyland. After appellant had parked his car, he went into the back seat, removed his clothes, and made Ali.D. watch him masturbate. Appellant did not touch Ali.D. or make her touch his body.

Section 1108, subdivision (a) provides that evidence of the defendant's commission of an uncharged sexual offense is admissible "if the evidence is not inadmissible pursuant to [s]ection 352." Section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . ." "By reason of section 1108, trial courts may no longer deem 'propensity' evidence unduly prejudicial per se, but must engage in a careful weighing process under section 352." (*People v. Falsetta* (1999) 21 Cal.4th 903, 916-917.)

The standard for evaluating a claim of ineffective counsel is as follows: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 687.) To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." (*Id.* at p. 688.) To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.)

"[T]he [defendant] 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." (*People v. Williams* (1988) 44 Cal.3d 883, 937; see also *Harrington v. Richter* (2011) 562 U.S. 86, 112 ["The likelihood of a different result must be substantial, not just conceivable"].) "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.)

We need not determine whether counsel was deficient in not objecting on section 352 grounds to the admission of Ali.D's testimony. Appellant has failed to carry his burden of proving prejudice. The trial court said, "I am going to allow the People to use it [the propensity evidence] pursuant to Evidence Code section 1108." The court ""is presumed to have known and applied the correct statutory and case law in the exercise of its

official duties."'" (*People v. Jacobo* (1991) 230 Cal.App.3d 1416, 1430.) We therefore presume that the trial court exercised its discretion under section 352 and determined that the probative value of the propensity evidence was not substantially outweighed by its prejudicial impact. The court was not required to "expressly weigh prejudice against probative value, or even expressly state it ha[d] done so." (*People v. Williams* (1997) 16 Cal.4th 153, 213.)

The court was well aware of the section 352 limitation on the admissibility of evidence of uncharged sexual offenses pursuant to section 1108. In an earlier pretrial proceeding, it had excluded evidence of an uncharged sexual offense allegedly committed by appellant in 2006. The court said, "I understand that on its face it's [the uncharged 2006 sexual offense is] absolutely admissible pursuant to Evidence Code section 1108." But the court expressed "concern[] under [section] 352 with respect to the time and also the age of the allegation." The court decided, "[U]nder [section] 352 I'm not going to allow it."

The court did not abuse its discretion in admitting evidence of the Ali.D. uncharged sexual offense. The evidence had significant probative value. "There was not a substantial danger of undue prejudice because the circumstances of the [Ali.D.] incident were no more inflammatory [actually less inflammatory because there was no touching] than the circumstances of the current incident[s] involving [Z.D. and A.D.]. [Citation.]" (*People v. Callahan* (1999) 74 Cal.App.4th 356, 371.) "'Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. . . . "'The

"prejudice" referred to in . . . section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging.'" [Citation.]" . . .' [Citation.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 438-439.)

Because the trial court acted within its section 352 discretion, it is not reasonably probable that the result would have been different had defense counsel objected on section 352 grounds.

Claim that Evidence is Insufficient to Support Convictions on Counts 1-4

Z.D. was the victim in counts 1-4. Appellant contends that the evidence is insufficient to support his convictions on these counts. "[W]e review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] . . . 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) "Because 'we review the entire record in the light most favorable to the judgment . . .' [citation], the effect is that on appeal 'a defendant challenging the sufficiency of the evidence to support [his] conviction "bears a heavy burden," [citation] . . .' [citation] of showing insufficiency of the evidence . . . ." (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1287.)

Appellant asserts that Z.D.'s testimony "lacks sufficient clarity to constitute substantial evidence." (Italics and bold omitted.) His total argument is contained in a single paragraph that states: "The prosecution evidence with respect to the charges involving [Z.D.] came via her trial testimony [o]n July 18[, 2018,] when she was 11 years old, and the DVD of her . . . interview in February 2017, when she was nine years old. [Record citation.] [Z.D.'s] responses to the interviewer's questions as to when the alleged offenses took place were ambiguous. It could have been when she was five years old or four or maybe seven. She could not even remember what grade she was in. [Record citation.] Then, at trial, [Z.D.] could not recall some of the things she told the interviewer in response to questions posed to her. [Record citation.]"

Appellant's perfunctory argument is inadequate to carry his heavy burden of showing insufficiency of the evidence. The argument is unsupported by meaningful legal and factual analysis with citation to authority. "'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]' [Citations.] This principle is especially true when an appellant makes a general assertion, unsupported by specific argument, regarding insufficiency of evidence. [Citation.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

It is of no legal consequence that Z.D. was unable to remember precisely when the offenses had occurred. In *People v. Moreno* (1989) 211 Cal.App.3d 776, 792, the court noted: "[T]he children were admittedly unable to specify the exact dates of the molestations. However, there is no requirement that the

particular date be provided so long as the evidence is otherwise sufficient to permit the jury to differentiate one act from another and assess and agree upon appellant's guilt with respect to each separate act charged." The California Supreme Court has recognized that greater clarity is not required: "Does the victim's failure to specify precise date, time, place or circumstance render generic testimony insufficient? Clearly not. As many of the cases make clear, the particular details surrounding a child molestation charge are not elements of the offense and are unnecessary to sustain a conviction. [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 315-316.)

Disposition

The judgment is affirmed.

NOT FOR PUBLICATION.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Lisa B. Lench, Judge

Superior Court County of Los Angeles

Charlotte E. Costan, under appointment by the Court of Appeal for Defendant and Appellant.

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