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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. STEVEN PAUL MOORE, Defendant and Appellant.	B237493 (Los Angeles County Super. Ct. No. KA090816)

APPEAL from a judgment of the Superior Court of Los Angeles County. Steven D. Blades, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Jonathan M. Krauss, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Steven Paul Moore appeals from his conviction of multiple sex crimes committed over a three-year period against his twin stepdaughters.[1] He contends on appeal that his state and federal rights to a fair trial were violated by the exclusion of what defendant maintains is circumstantial evidence that the victims' mother fabricated the charges and coached the complaining witnesses. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Trial

Viewed in accordance with the usual rules of appeal (*People v. Zamudio* (2008) 43 Cal.4th 327, 357-358), the evidence established that twin sisters S.M.1 and S.M.2 were born in September 1998. Their mother, Sh. M., met defendant in August 2005 when the girls were 7 years old. In November 2006, Sh. and defendant married, and the family moved into an apartment. Both girls testified that, soon after, defendant engaged in lewd conduct with the girls on a number of occasions, including repeatedly forcing them to masturbate him. These acts continued until about June 1, 2010. The sexual assaults occurred when defendant was at home alone with the girls while Sh. was at work or school and defendant's younger son was at sports practice or in his room. The girls were afraid of defendant, who threatened to hurt their mother and "butcher" their pets if they told anyone what he was making them do. The girls finally disclosed the abuse to Sh. on June 1, 2010, after Sh. told them that she was leaving defendant.

Sh. immediately reported defendant to the police. While at the police station that day, Sh. called defendant from her cell phone. Unbeknownst to defendant, the call was

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[1] Defendant was charged by information with two counts of forcible lewd act upon a child occurring between September 2 and December 31, 2007 (Pen. Code, § 288, subd. (b)(1)); two counts of continuous sexual abuse occurring between January 1 and December 31, 2008 (§ 288.5, subd. (a)); and four counts of lewd and lascivious act upon a child under the age of 14 years occurring between January 1 and December 31, 2009 (§ 288, subd. (a)). A jury convicted defendant of all charges. Following denial of his motion for new trial, defendant was sentenced to a total of 60 years to life in prison. He timely appealed.

recorded by a detective. The recording was played for the jury. Initially, defendant denied the girls' accusations. But when Sh. urged defendant to tell her the truth, he said he woke up one day to discover the girls "playing" with him. Defendant explained, "I was basically asleep on the bed, and they were playing with me, and (cough), I fuckin just woke up to, to that in a climax and I didn't know what to do." Sh. pressed for more details and defendant elaborated, "They touched me a couple times, yes, and I told them that they couldn't do it! Remember that day [unreadable] swear to God they would come into the room when I would be taking a shower, just to watch me! And that's a fact." Defendant said the girls had "been wanting to take a shower with their dad for a long time, because all of their friends do it." He claimed the girls were "the ones who'd come on to me into the room and that was it, and I told them time and time again not to come into the room. Just like that day you caught [S.M.2] in the room, that was the same fuckin thing!" In the following colloquy, defendant gave additional details of his conduct:

> "[DEFENDANT]: The only thing that's ever happened was them touching me. [¶] SH.: And you had them jerk you off! How could you do that? [¶] [DEFENDANT]: They . . . I didn't know what to do! They wanted to! [¶] SH.: They wanted to, and you just let them. [¶] [DEFENDANT]: I did not have them do anything. [¶] SH.: You just let them. [¶] [DEFENDANT]: They wanted to, I didn't know what to do. They said that . . . you would believe them over me, and that's exactly what they said. And I was scared, yes. I didn't know what to do. [¶] SH.: So they would, they manipulated you to jerk you off, to touch your penis . . . [¶] [DEFENDANT]: Yes, that that's all that happened! [¶] SH.: . . . and then, and then what, use it as blackmail over your head? [¶] [DEFENDANT]: No, I don't know! I was always scared! I was always scared about it. [¶] SH.: You need help, . . . You know what, seriously, you need help. [¶] [DEFENDANT]: I know I do. [¶] . . . [¶] [DEFENDANT]: You're right, I . . . know it you're right, I do need help.

You're totally right. You're a hundred percent right. I let them touch me and I definitely shouldn't have. [¶] SH.: How can you do that . . . ? [¶] [DEFENDANT]: I don't know, I was scared! [¶] SH.: (crying) [¶] [DEFENDANT]: I'm telling you the truth, I was scared and I let them because they come in and they want to. And that's fact. [¶] SH.: And you let them. [¶] [DEFENDANT]: I didn't know what else to do. [¶] SH.: They were nine, ten, eleven years old, you didn't know what to do?! What kind of father does that . . . . How many times . . .? How many times do you think it happened? [¶] [DEFENDANT]: I don't know. [¶] SH.: Guestimate. Two, three, five, ten? [¶] [DEFENDANT]: Ohhh, oh maybe five or six times. Maybe five or six times. [¶] SH.: Five or six times. [¶] [DEFENDANT]: Yes. I didn't know what to do. [¶] SH.: So you let it happen over and over again. [¶] [DEFENDANT]: They would hide under the bed! [¶] . . . [¶] . . . [¶] . . . [¶] [DEFENDANT]: They would come in, and hide in the bathroom. When I opened the door, there they were, I swear to God. They will tell you the truth. [¶] . . . [¶] [DEFENDANT]: . . . I didn't know what to do, you're right. I failed. I honestly need help, I didn't know what to do. I was scared, they wanted to do it. I didn't know what to do. It had already gone too far, but swear to God on everything, I did not ever touch them one time. Never once. [¶] SH.: You didn't touch them, but you had them touch you . . . [¶] [DEFENDANT]: I didn't have them! Trust me, I did not have them, they DID. They did. I didn't have them do anything."

Testifying at trial, defendant denied ever sexually abusing the girls. He explained that some time before they accused him, the girls told defendant they had been molested by the son of the woman who ran the daycare they attended when they lived in Bakersfield; defendant thought their current accusations were based on what had been done to them by this other person. Defendant described the girls as precocious and

suggested that they had become "sexualized" by what had happened to them in daycare. Defendant recounted an incident in 2009, when he woke up to find the girls had jumped on him and S.M.2 had her hand up his shorts, but he slapped it away. When defendant said he was going to tell Sh. about the incident, S.M.2 said she would say it was defendant's fault. So defendant did not tell Sh.

Defendant also recounted times when the girls would sneak into the bathroom to watch defendant showering, or hide under the bed to watch him dressing.

Regarding the recorded admissions defendant made in the phone call, he explained that at the time of the call he and Sh. had been arguing for two days and he had not slept in 38 hours. That morning, Sh. sent him about 30 texts and then in a brief call prior to the recorded call, she told defendant that the girls had accused him of "messing around" with them. Sh. had accused defendant of "serious" things in the past, but never of child abuse. Defendant "was really reluctant to have this conversation on the phone. I was stressed out, I was tired of arguing with my wife at this point, and I wanted to get to the bottom of this, and I had some previous information that the girls had told me that I needed to get home and discuss with my wife in regards to a parallel argument according to these allegations." Defendant was just trying to calm down Sh. so that he could come home and talk to her: "[G]enerally when we argue in any type of an argument, if I tell her what she wants to hear, calm her down, she'll let me come home. And I figured with the information we had we could go over it and it would blow over as usual."

B. The Excluded Evidence

At a pretrial Evidence Code section 402 hearing, the prosecutor sought to exclude evidence that Sh. worked as an exotic dancer. Defendant objected, arguing: "That's the whole case, Your Honor, right there. Of course they want that out." Defendant maintained the challenged evidence was relevant, explaining that defendant gave Sh. permission to work as an exotic dancer, but when he discovered that she was also selling sexual favors and perhaps having an affair, they argued; the next morning, Sh. sent defendant sexually explicit photographs attached to emails, including one photograph of

Sh. masturbating a man; later that same day, the girls told Sh. that defendant had forced them to masturbate him. Defendant argued that, from the circumstantial evidence of the similarity of the alleged abuse to the act depicted in the photograph and the timing of the girls' accusation, a trier of fact could reasonably infer that Sh. manufactured the accusations and coached the girls about what to say.[2]

The trial court noted the absence of any motive Sh. would have to fabricate the charges since it would not give her any advantage in the divorce proceedings. (Defendant was not the girls' father so he would not have to pay child support and Sh. earned more than defendant so he would not have to pay alimony.) The trial court observed, "[T]here's a difference between circumstantial evidence and innuendo, and I'm having a difficult time trying to see the circumstantial evidence here." The trial court expressly weighed the relevance of the evidence against its prejudice, and excluded the evidence under Evidence Code section 352.

The admissibility of the emails was revisited during trial when defendant wanted to use them to impeach Sh.'s testimony that she and defendant were no longer arguing the morning she picked up the girls at school. Defendant also argued the emails were admissible to disprove the implication that Sh. was disgusted by defendant's conduct. In a second Evidence Code section 402 hearing, Sh. testified that at the time she wrote the emails, Sh. was unaware that defendant had sexually abused her daughters, and the sexual desires she referred to in her email were the desires defendant articulated in a letter he wrote to Sh. about a year before the girls made their accusations; in that letter, defendant said he wanted to watch and videotape Sh. having sex with other men and women. The trial court excluded the emails from evidence, but allowed defendant to show them to Sh.

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[2] Defendant argued that the challenged evidence was also relevant to explain why there were so many sex toys in the house and to counter the inference that it was because of defendant. This issue was resolved by the prosecutor's representation that Sh. would testify the toys belonged to her and defendant. Sh. eventually testified that the adult toys and pornography she turned over to the police belonged to both her and defendant and that defendant watched the pornography in her presence. S.M.1 also testified that some of the sex toys belonged to Sh.

to refresh her memory that her argument with defendant was ongoing that morning when she picked up the girls at school.

DISCUSSION

Defendant's single contention on appeal is that the exclusion of evidence "about the contentious and suggestive environment in which [the] allegations of abuse were made: an environment in which [defendant's] minor accusers were subject to a barrage of sexual imagery and innuendo, and his wife wanted him out of the picture," denied him a fair trial under federal and state law. He argues that, if the excluded evidence had been admitted, he could have shown that Sh. "had a motive to not just divorce [defendant] but to eliminate him – regardless of whether that motive was financial, emotional or a combination therof – and by virtue of this motive, a motive to coach the girls into making a very public announcement of abuse, the acts of which followed, in significant detail, acts that Sh. performed in her quasi-professional occupation as exotic dancer, only then would [defendant] have been able to adequately defend against the allegations against him." Although defendant titles his argument as based on the Sixth Amendment to the United States Constitution, interspersed in that argument are references to state law. Accordingly, we address both. We find no error under either federal or state law.

A. State Law

1. Standard of Review

We begin with the standard of review. A trial court's rulings on the admissibility of evidence, including under Evidence Code section 352, are reviewed for abuse of discretion. (*People v. Scott* (2011) 52 Cal.4th 452, 491 (*Scott*).) We will not set aside a judgment by reason of the erroneous exclusion of evidence unless the error resulted in a miscarriage of justice. (Evid. Code, § 354.) An error has resulted in a miscarriage of justice and warrants reversal "if in the absence of the error, the appealing party would have probably obtained a more favorable result. (See Cal. Const., art. VI, § 13; Code

Civ. Proc., § 475; Evid. Code, § 354; [citations].)" (*Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 526-527.)

" 'As a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." [Citations.]' [Citation.]" (*People v. McNeal* (2009) 46 Cal.4th 1183, 1203.) Where the trial court does not preclude the defendant from presenting a defense but rejects some evidence concerning that defense, the error is reversible only if it has resulted in a miscarriage of justice. (*Ibid*.)

2. It Was Not an Abuse of Discretion to Exclude the Evidence

With certain statutory exceptions, all relevant evidence is admissible. (Evid. Code, § 351.) " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness . . . , having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The test is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts. (*People v. Fields* (2009) 175 Cal.App.4th 1001, 1016.) Circumstantial evidence is evidence from which a fact may be inferred. (*People v. Nealy* (1991) 228 Cal.App.3d 447, 451.) "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (Evid. Code, § 600, subd. (b).) The trial court has broad discretion to determine whether evidence, including circumstantial evidence, is relevant. (*Scott, supra,* 52 Cal.4th at p. 490; *People v. Harris* (2005) 37 Cal.4th 310, 337-338.)

However, even relevant evidence may be excluded if its probative value is substantially outweighed by concerns of undue prejudice. (Evid. Code, § 352.) " ' "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 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against [a party] as an individual and which has very little effect on the

issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' " [Citation.]' [Citation.] [¶] The prejudice that section 352 ' "is designed to avoid is not the prejudice or damage to [a theory of prosecution or defense] that naturally flows from relevant, highly probative evidence." [Citations.] "Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors. [Citation.]" [Citation.]' [Citation.] In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." [Citation.]' [Citation.]" (*Scott, supra,* 52 Cal.4th at pp. 490-491.)

Here, we find no abuse of discretion in the trial court's finding that the excluded evidence was of doubtful relevance to any material issue in the case, including the credibility of the complaining witnesses, and in any event was outweighed by undue prejudice. Contrary to defendant's argument, it does not follow that because Sh. worked as an exotic dancer, took money for performing sexual acts and wanted to end her relationship with defendant, she would have a motive to fabricate the abuse allegations or coach the girls about what to say.[3]

Even assuming that the excluded evidence was somehow relevant, the trial court did not abuse its discretion in excluding it as more prejudicial than probative under Evidence Code section 352. Any tendency of the evidence to show that Sh. had a motive to fabricate the charges was slight in comparison to the substantial likelihood that the jury may have misused the information to punish Sh., and by extension her daughters, for Sh.'s unrelated sexual activities.

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[3] On appeal, defendant argues the emails, were admissible to "debunk Sh.'s 'disgust' over the details of the alleged abuse." Sh.'s feelings about the abuse were irrelevant to whether or not it occurred.

3. Any Error Was Harmless

We also conclude that any error was harmless as defendant has failed to show the requisite miscarriage of justice warranting reversal. Defendant was not precluded from presenting as a defense that Sh. was hostile to defendant and for that reason coached the girls into making false accusations against him. In fact, he testified that he and Sh. argued regularly, including yelling, shouting and banging things. On one occasion, Sh. hit defendant in the face with a lighter, cutting him, and then followed him into another room and beat him with her fists. The girls could hear them arguing all the time. Defendant and Sh. had been having a serious argument for the two days prior to the day the girls made their accusations. Defendant hypothesized that the reason the girls made the accusations when they did was because "they weren't seeing any results. [Sh.] threatened to leave so many times and we fought so many times, and every time we fought evidently she was asking them if something had ever happened between me and the girls, and then the girls said they only asked – Mom only asked us three times. They said that on the stand. Now all of a sudden they're accusing me of this, and, you know, here I am stuck in the middle thinking, who is accusing me, my wife or the girls?" In light of defendant's own admissions during the recorded conversation with Sh., it is not reasonably probable that he would have obtained a more favorable result if had he had been allowed to introduce evidence tending to show the reasons for the hostility.

Defendant's reliance on *People v. Haxby* (1962) 204 Cal.App.2d 791 (*Haxby*), for a contrary result is misplaced. In that case, the defendant's conviction for committing lewd acts upon a neighborhood child was reversed based on a finding that the trial court had erroneously excluded evidence that the complaining witness's father and the defendant had a hostile relationship. (*Id*. at p. 796.) *Haxby* is inapposite because, here, defendant was allowed to introduce evidence that he and Sh. had a hostile relationship at the time the girls made their accusations.

B. Federal Law

Defendant contends his Sixth Amendment right to confront Sh., S.M.1 and S.M.2 was violated by the exclusion of the challenged evidence. We disagree.

1. Federal Evidentiary Overview and Standard of Review

Rule 403 of the Federal Rules of Evidence is the federal equivalent to Evidence Code section 352. (*People v. Falsetta* (1999) 21 Cal.4th 903, 921; *People v. Holford* (2012) 203 Cal.App.4th 155, 176, fn. 10.) Like Evidence Code section 352, Rule 403 gives trial courts discretion to "exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Like the courts of this state, the federal courts of appeals accord trial courts' evidentiary rulings wide discretion. (*Sprint/United Management Co. v. Mendelsohn* (2008) 552 U.S. 379, 384.) "Under this deferential standard, courts of appeals uphold Rule 403 rulings unless the district court has abused its discretion. [Citation.]" (*Ibid*.) Generally, restriction of cross-examination will not be found an abuse of discretion "as long as the jury receives sufficient information to appraise the biases and motivations of the witness." (*United States v. Bonanno* (9th Cir. 1988) 852 F.2d 434, 439; see also *United States v. Feldman* (9th Cir. 1986) 788 F.2d 544, 554 [same].)

2. The Confrontation Clause

Cases construing the Sixth Amendment's Confrontation Clause generally fall into two categories: (1) cases involving out-of-court statements and (2) cases involving restrictions on the scope of cross-examination. (*Delaware v. Fensterer* (1985) 474 U.S. 15, 18 (per curiam) (*Delaware*).) The second category, in which this case fits, includes situations in which the trial court allows cross-examination of a witness, but does not permit defense counsel to expose facts from which the jury could draw negative

inferences about the witness's credibility. (*Id*. at p. 18.) A defendant's constitutional guaranties prohibit the trial court from arbitrarily excluding relevant portions of a witness's testimony. (*Rock v. Arkansas* (1987) 483 U.S. 44, 52-55.)

Nevertheless, the Confrontation Clause does not proscribe all limits on cross-examination. (*Holley v. Yarborough* (2009) 568 F.3d 1091, 1098 (*Holley*); *Feldman, supra*, 788 F.2d at p. 554.) Our Supreme Court has observed that restrictions on the right to present defense evidence are permissible under the Confrontation Clause "if they ' "accommodate other legitimate interests in the criminal trial process" ' and are not 'arbitrary or disproportionate to the purposes they are designed to serve.' [Citations.]" (*People v. Cudjo* (1993) 6 Cal.4th 585, 639, citing *Rock, supra*, 483 U.S. at pp. 55–56, *Chambers v. Mississippi* (1973) 410 U.S. 284, 295, and *Michigan v. Lucas* (1991) 500 U.S. 145, 148-149 (*Lucas*).) Thus, for example, a criminal defendant does not have a constitutional right to introduce evidence that is "incompetent, privileged, or otherwise inadmissible under standard rules of evidence." (*Taylor v. Illinois* (1988) 484 U.S. 400, 410.) As to Rule 403, exclusion of evidence under that rule does not violate the Confrontation Clause if the probative value of the excluded evidence "is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." (*Holmes v. South Carolina* (2006) 547 U.S. 319, 326.) Specifically, the Confrontation Clause does not prevent "a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, '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.' (*Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).)" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.)

Applying the federal standards, the trial court did not err in excluding the challenged evidence because the jury received sufficient information to appraise the biases and motivations of witnesses Sh., S.M.1 and S.M.2. Any biases against defendant could be inferred from (1) S.M.2's and defendant's testimony that Sh. and defendant argued a lot; (2) Sh.'s testimony that she had already decided to end the marriage when she picked up the girls from school that day (i.e., before the girls disclosed the abuse); and (3) Sh.'s testimony (refreshed by looking at the excluded emails) that she and defendant were engaged in an extended argument the morning the girls revealed the abuse. Nor did exclusion of the challenged evidence allow the prosecution to falsely portray S.M.1 and S.M.2 as sexually inexperienced. First, the fact that Sh. was an exotic dancer, that she may have performed sexual favors for money and/or that she emailed sexually explicit photographs of herself to defendant, is not probative of S.M.1's and S.M.2's sexual experience. Second, defendant testified that the girls told him they had been abused in the past and that they sometimes hid under his bed to see him naked. This was consistent with S.M.1's testimony that she and S.M.2 sometimes saw defendant naked while they were hiding under his bed. The challenged evidence would have added little, if anything, to the jury's ability appraise the biases and motivations of witnesses Sh., S.M.1 and S.M.2, or their credibility generally.

Defendant's reliance on *Holley, supra,* 568 F.3d 1091 and *Barbe v. McBride* (4th Cir. 2008) 521 F.3d 443 (*Barbe*) for a contrary result is misplaced. In *Holley*, the defendant was convicted of multiple counts of lewd and lascivious conduct and molestation of his 11-years-old granddaughter, R.S. Over defense objection, the trial court excluded evidence that R.S. told two neighborhood children that she had done "weird stuff" in a closet with her boyfriend ("weird stuff" was also a term R.S. used to describe acts by the defendant); a neighborhood boy wanted to "hump her brains out"; and her brother, M.S., once tried to have sex with her. (*Holley* at pp. 1096-1097.) In original state court proceedings, the California Court of Appeal affirmed, finding evidence of R.S.'s statements was " 'of questionable, if any, relevance, had the potential for being unduly prejudicial, and was not sufficiently probative of any issue in the trial to

warrant the consumption of time.' " (*Id*. at p. 1099.) The Ninth Circuit disagreed. It found evidence that R.S. "made prior claims of her own sexual appeal was clearly relevant to impeach [R.S.], and thus allow the jury to evaluate the credibility of her allegations. [Citation.] Discrediting the accuracy and reliability of [R.S.'s] testimony could have shown a tendency to exaggerate or overstate, if not outright fabricate. [Citations.] . . . Evidence that [R.S.] had a highly active sexual imagination or that she had a familiarity with sexual activities was relevant to counter the prosecution's theory of the case, as emphasized during closing argument, that a little girl like [R.S.] would not fabricate things of a sexual nature." (*Id*. at p. 1099.) *Holley* is inapposite because here, the excluded evidence was not prior statements made by S.M.1 or S.M.2 which would reflect on whether they were likely to fabricate things of a sexual nature. Rather, the excluded evidence was their mother's conduct, which was not relevant to the girls' credibility.

Barbe in also inapposite. In *Barbe*, the defendant was convicted of sexually abusing his granddaughter, J.M., and another victim. A prosecution expert testified that over the course of multiple interviews J.M. related three incidents of sexual abuse by the defendant; the expert opined that J.M. had been sexually abused because she fit the criteria for post-traumatic stress disorder. The trial court found the West Virginia rape-shield law precluded the defendant from questioning the expert about whether J.M.'s psychological symptoms could be caused by the fact that she had been sexually abused by men other than the defendant. (*Id*. at p. 446-448.) The appellate court reversed, concluding that, under *Rock*, *supra*, 483 U.S. 44 and *Lucas*, *supra*, 500 U.S. 145, trial courts must determine on a case-by-case basis whether a state's rape-shield exclusionary rule was arbitrary or disproportionate to the legitimate interest intended to be promoted by the rule, rather than adopting a per se rule of exclusion. (*Id*. at p. 454.) Unlike in *Barbe*, the trial court in this case did not apply a per se rule of exclusion. On the contrary, it reasonably determined that the probative value of the challenged evidence was substantially outweighed by the probability of undue prejudice under Evidence Code section 352, California's counterpart to Rule 403.

We conclude that the trial court's evidentiary rulings satisfied both state evidentiary laws and federal constitutional requirements.

DISPOSITION

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.