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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. NELSON OLIVERIO CABRERA, Defendant and Appellant.	2d Crim. No. B242572 (Super. Ct. No. 1397530) (Santa Barbara County)

Nelson Oliverio Cabrera appeals his conviction by jury of continuous sexual abuse of a child under the age of 14 years. (Pen. Code, § 288.5, subd. (a).)[1] The trial court denied probation and sentenced appellant to 12 years state prison. Appellant claims that the trial court erred in admitting expert testimony on Child Sexual Abuse Accommodation Syndrome and not granting probation. We affirm.

Facts and Procedural History

In 2011, 12 year old Jane Doe reported that her father, appellant, touched her breasts two years earlier. Jane kept it a secret until her mother divorced appellant, made custody arrangements, and told Jane it was important that she spend time with appellant. Jane said: "You don't know what happened." She broke down crying, and told her mother about the sexual abuse.

[1] All statutory references are to the Penal Code unless otherwise stated.

The matter was reported to Santa Barbara County Child Welfare Services (CWS). On March 18, 2011, CWS Social Worker Puvanaspri Singh interviewed Jane at school. Jane said that appellant "accidentally" touched her breast in the fifth grade. After the interview, Jane told her mother that she was not truthful and did not want to get appellant in trouble.

Singh interviewed Jane a second time on March 22, 2011. Jane stated that appellant had moved back into the house and had a big fight with her mother. Jane did not feel safe and told Singh that appellant had molested her on prior occasions dating back to the third grade. When Jane was 10 years old, she awoke to find appellant in bed with her. Appellant had removed her training bra and was massaging her breasts and nipples. Jane asked what he was doing. Appellant told her that this is what dads do with their daughters.

Jane told Singh about another molestation in appellant's RV before church. Appellant positioned Jane on his lap and put his tongue in her mouth.

Cecilia Rodriguez conducted a SART forensic interview on March 29, 2011 that was recorded on DVD and played to the jury. Jane described a series of molestations in which appellant touched and kissed her breasts, kissed her mouth, and rubbed his penis over her clothing. Jane said that she would nap after school and appellant would lay down next to her and touch her. On one occasion, Jane woke up and asked why her shirt was off. Appellant said "I'm giving you a massage" and asked Jane to take a shower with him.

Jane said that appellant would touch her on "my chest" and "boobs," and put his tongue in her mouth. On one occasion, appellant laid next to Jane, unzipped his pants, exposed his penis, and started touching it. Jane recalled six incidents of sexual contact that took place in the fourth through sixth grades.

On March 30, 2011, Jane made a pretext call that was recorded. Jane told appellant she was uncomfortable visiting him because he had touched her "boobs and stuff." Appellant said that it "never happened" and complained that people would think "I was abusing you. . . ." Jane persisted and appellant promised not to touch or massage her again.

Jane testified that appellant started touching her when she was in the third grade. Appellant touched her over a span of "some years" and at least two of the incidents

were more than three months apart. On one occasion, appellant removed her training bra, fondled her breasts and nipples with both hands, and said "I'm just giving you a massage. When Jane's grandmother opened the bedroom door, appellant quickly pushed Jane away.

On other occasions, appellant French kissed Jane in his RV. Appellant would lay down and "pick me up, like when somebody picks a baby up, and just put me on top." Appellant kissed Jane, fondled her breasts, and pressed his penis against her bottom.

Jane learned that appellant's conduct was wrong and rejected appellant's sexual advances in the sixth or seventh grade. On one occasion, when friends were visiting, appellant gave Jane flowers and tried to hug her. Jane pushed him away and told appellant to leave her alone.

Appellant testified that it "never happened." Appellant said that he massaged Jane and her brothers when they were younger but there was no sexual abuse.

Appellant's brother, Emilio Flores, testified that appellant lived with him for 10 or 15 years before appellant married. Appellant was "very affectionate" with Flores' daughters. When the daughters were 10 or 12 years old, Flores warned appellant that there were laws about touching children and that people "can take it the wrong way."

Doctor Anthony Urquiza, a clinical psychologist at U.C. Davis Medical Center, testified about Child Sexual Abuse Accommodation Syndrome (CSAAS) which describes patterns of behavior experienced by children who have been sexually abused. Doctor Urquiza explained that CSAAS is not a diagnosis or syndrome but is used to educate jurors about common child sexual abuse myths and misconceptions. The doctor described five CSAAC characteristic behaviors: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, conflicted, and unconvincing disclosure, and (5) retraction.

Doctor Urquiza also described common misconceptions associated with each CSAAS behavior.

CSAAS Evidence

Before trial, appellant moved to exclude Dr. Uriqaza's testimony on the ground that CSAAS evidence should only be admitted to rebut defense attacks on the credibility of the complaining witness. Appellant argued that CSAAS is not relevant unless

the prosecution identifies a cognizable myth concerning child sexual abuse on which the jury should be educated. The trial court ruled that the prosecution could not use CSAAS testimony to show that a specific person was a victim of child abuse, that CSAAS testimony was admissible to show that a victim's behavior was not inconsistent with being a victim of abuse, that the prosecution could introduce CSAAS testimony in its case-in-chief to rehabilitate a child abuse victim witness, and the prosecution did not have to identify specific credibility issues with a witness's testimony before introducing CSAAS testimony.

Appellant argues that the trial court abused its discretion in admitting Dr. Uriqaza's expert testimony. It is settled that CSAAS testimony may be admitted for the limited purpose of disabusing a jury of misconceptions it might have about how a child reacts to a molestation. (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744.) CSAAS evidence is relevant where the victim's credibility is placed in issue "due to the paradoxical behavior, including a delay in reporting a molestation. [Citations.]" (*Id.*, at pp. 1744-1745.) It is admissible to disabuse jurors of specific myths or misconceptions suggested by the sexual abuse evidence and to show that victims of child sexual abuse, as a group, often delay reporting abuse and recant or minimize prior reports of abuse. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 394.)

Appellant asserts that California should follow the lead of Pennsylvania, Kentucky, and Tennessee published cases which hold that CSAAS evidence is inadmissible. (See e.g., *Com. v. Dunkle* (1992) 529 Pa. 168 [602 A.2d 830]; *Newkirk v. Com.* (Ky. 1996) 937 S.W.2d 690; *State v. Bolin* (Tenn. 1996) 922 S.W.2d 870.) We decline appellant's invitation to rule that CSAAS evidence is inadmissible in every child sexual abuse case. Our state Supreme Court has recognized that CSAAS evidence may be relevant, useful, and admissible in child sexual assault cases. (*People v. Brown* (2004) 33 Cal.4th 892, 905-906; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301.) As an intermediate appellate court, we are bound by its reasoning. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see e.g., *People v. Perez* (2010) 182 Cal.App.4th 231, 245.)

Dr. Urquiza's CSAAS testimony was relevant and properly admitted to explain the different stages of reaction that child sexual abuse victims experience. It helped

the jury evaluate why Jane delayed reporting, why she tried to keep the molestation a secret and protect appellant, and why she reported the sexual abuse in a piecemeal fashion and made inconsistent statements. The trial court did not err in admitting the CSAAS testimony to explain Jane's contradictory statements and to explain why she acted as she did. (*People v. Patino, supra,* 26 Cal.App.4th at p. 1746.)

Appellant asserts that the CSAAS testimony was highly prejudicial but forfeited the issue by not objecting on that ground. (See e.g., *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1014-1015.) Appellant brought an in limine motion to exclude the CSAAS testimony on relevancy grounds but did not argue that the evidence was unduly prejudicial. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1130 [objection on relevancy grounds does not preserve challenge under Evid. Code, § 352].) Appellant never asked the trial court to weigh the probative value and prejudicial effect of the CSAAS evidence before or during the trial. (See *People v. Champion* (1995) 9 Cal.4th 879, 913.) When Doctor Urquiza testified, appellant did not object on Evidence Code section 352 grounds, forfeiting the issue. (Evid. Code, § 353, subd. (a); *People v. Kipp* (2001) 26 Cal.4th 1100, 1124.)

On the merits, the CSAAS evidence was highly probative and helped explain Jane's reaction to the alleged sexual abuse. (Evid. Code, § 801, subd. (a).) Doctor Urquiza provided a general explanation of how children who are sexually abused sometimes act.[2] Doctor Urquiza did not vouch for Jane's statements or opine that Jane manifested certain characteristics generally exhibited by sexually abused children.

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[2] Relying on *People v. Bledsoe* (1984) 36 Cal.3d 236 [rape trauma syndrome], appellant argues that Doctor Urquiza's testimony exceeded the permissible scope of expert testimony. "Fundamentally, *Bledsoe* must be read to reject the use of CSAAS evidence as a *predictor* of child abuse." (*People v. Bowker, supra,* 203 Cal.App.3d at p. 393.) CSAAS testimony may, however, be used to disabuse jurors of common misconceptions concerning children who have been subjected to sexual abuse. (*Id.*, at pp. 393-394; see Couzens & Bigelow Sex Crimes (The Rutter Group 2013) Cal. Law & Procedure, §12.8, p. 12-32.) Doctor Urquiza emphasized that CSAAS should not be used to diagnose child sexual abuse and that he had no opinion on whether or not Jane was sexually abused. Appellant complains that Doctor Urquiza's expert testimony was "so broad as to be useless." The jury was instructed that it may disregard expert witness testimony that was unbelievable, unreasonable, or unsupported by the evidence. (CALCRIM 332.)

We reject the argument that the trial court abused its discretion by not excluding the CSAAS evidence or that Doctor Uquiza's testimony was more prejudicial than probative. (Evid. Code, § 352.) The prejudicial impact, in any, was minimized by a CALCRIM 1193 instruction stating that "Doctor Anthony Urquiza's testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not [Jane's] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony." It is presumed that the jury understood and followed the instructions.[3] (*Weeks v. Angelone* (2000) 528 U.S. 225, 234 [145 L.Ed.2d 727, 738]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 83.) There is no merit to the argument that the CSAAS evidence rendered the trial fundamentally unfair or denied appellant due process. (See e.g., *People v. Patino, supra,* 26 Cal.App.4th at p. 1747.)

Sentencing

Appellant claims that the trial court erred in not granting probation or sentencing appellant to the low term of six years state prison. The trial court imposed a 12 year midterm sentence because "the aggravating and mitigating factors are substantially in balance." Although Jane was particularly vulnerable and appellant took advantage of a position of trust or confidence (aggravating factors), appellant had no prior criminal record (a mitigating factor).

Appellant complains that the trial court did not consider other mitigating factors or appellant's statutory eligibility for probation (§ 1203.066) but waived the error by not objecting. (*People v. Scott* (1994) 9 Cal.4th 332, 356.) The failure to raise specific mitigating factors at time of sentencing bars appellant from asserting on appeal that the trial

[3] Appellant's trial attorney referred the jury to CALCRIM 1193 and argued that Doctor Urquiza "can't tell whether there's been sexual abuse or not. And when I asked him on cross-examination, he said it's better termed a pattern and not a syndrome. [¶] . . . It's not based on any scientific facts or controlled studies. It's a tool to help clinical people with symptoms of alleged child abuse. But its not used as a way to diagnose."

court erred its discretion in not considering those factors. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 582.)

Appellant also claims that the trial court abused its discretion in not granting probation but probation is an act of clemency, not a right. (*People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822, 831; *People v. Johnson* (1993) 20 Cal.App.4th 106, 109.) Because a trial court possesses broad discretion to grant or deny probation, its decision will not be set aside unless it was arbitrary, capricious, or unreasonable. (*People v. Warner* (1978) 20 Cal.3d 678, 683.) The trial court denied probation after "very carefully balanc[ing] both the favorable and unfavorable factors" and after "consider[ing] the nature, seriousness, and circumstances of the crime as compared to other instances of the same crime. . . ." If found that Jane was particularly vulnerable and that appellant took advantage of a position of trust.

Appellant argues that a court is prohibited from finding that a child victim is particularly vulnerable due to the victim's age because age is an element of the offense. (Cal. Rules of Court, rule 4.420(d); *People v. Garcia* (1985) 166 Cal.App.3d 1056, 1069.) The trial court, however, found that Jane was particularly vulnerable because appellant was her father, told her "this is what dads do," and molested her when she was alone and had no other adult to turn to for help. The probation report noted that appellant took advantage of a position of trust "in the worst possible way." Victim vulnerability based on a parent-child relationship or the defendant's supervision or control over the victim is a valid sentence consideration. (*Id.*, at p. 1070.)

Appellant complains that the trial court found that the duration and frequency of the molestations was an aggravating factor. Section 288.5, subdivision (b) required that the jury find that three acts of sexual abuse were committed over a period of at least three months (CALCRIM 1120), but appellant sexually abused Jane on six occasions over a two year period. Appellant showed no remorse and told Jane that it never happened and that she was crazy to talk about it. The probation report stated that the sexual abuse deeply impacted Jane and that she was trapped in a cycle of molestation. Jane broke down crying many

times during the trial, and "[d]espite being in counseling for over a year, . . . [was] very conflicted about what [appellant] has done to her . . . ."

The trial court reviewed the probation report recommending a 12-year sentence, appellant's sentencing memorandum, letters from Jane and other family members, victim impact statements from Jane, Jane's mother and grandmother, and the prosecution's request for a 16-year upper term sentence. The court denied probation on an assortment of grounds including "the vulnerability of the victim. The fact that [appellant] inflicted emotional injury . . . [and] took advantage of a position of trust. [Appellant] has failed to show remorse, and . . . there is a likelihood that if he is not imprisoned he will be a danger to others."

Appellant makes no showing that the trial court abused its discretion in denying probation or that the 12-year sentence was arbitrary or capricious. (*People v. Superior Court* (*Alvarez*) 1997 14 Cal.4th 968, 977-978; *People v. Superior Court* (*Du*), *supra,* 5 Cal.App.4th at p. 831.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Jean M. Dandona, Judge

Superior Court County of Santa Barbara

Sharon M. Jones, 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, Senior Assistant Attorney General, Marc A. Kohm, Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.