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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.

JORGE ALBERTO SANDOVAL,

Defendant and Appellant.

B271087

(Los Angeles County
Super. Ct. No. VA137672)

APPEAL from a judgment of the Superior Court of Los Angeles County. John A. Torribio, Judge. Affirmed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

Jorge Sandoval was convicted of multiple acts of child sexual abuse. He appeals, arguing the trial court prejudicially erred in excluding certain evidence, “coaching the prosecutor” during Sandoval’s cross-examination, and allowing a witness to be impeached with a misdemeanor conviction. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 22, 2015, an information charged Sandoval with committing a forcible lewd act upon a child (Pen. Code, § 288, subd. (b)(1)),¹ two counts of committing lewd acts upon a child (§ 288, subd. (a)), sexual penetration with a foreign object (§ 289, subd. (a)(1)), and aggravated sexual assault of a child (§ 289, subd. (a)). The information further alleged as to counts 1, 4 and 5 that Sandoval committed the offenses through the use of force, violence, or fear of immediate unlawful bodily injury. (§ 1203.066, subd. (a)(1).) Sandoval pled not guilty.

The alleged victim, J., testified at trial. She was 11 years old on September 8, 2008 when she attended a party with Sandoval, her uncle. At one point during the evening, Sandoval was sitting on the couch with a blanket. He told J. to sit next to him and she complied. He then put the blanket over J. and himself, and touched her breasts and buttocks. The incident lasted until another relative walked into the room.

When J. was 13 years old, she moved in temporarily with Sandoval, his wife Magda, and Magda’s daughters. One night, Sandoval gave J. several shots of tequila and then told her to lay down with him in the living room. She complied and he then put his hands in her pants. He rubbed and penetrated her vagina

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

with his fingers. She froze. He told her to put her hand in his pants. When she did not do so, he grabbed her arm and put it in his pants. He tried to make her rub his penis. She tried to push his hands away multiple times but he “came back stronger.” Sandoval stopped when someone else walked into the room.

Sandoval’s now ex-wife, Magda, also testified. She had noticed unusual behavior between J. and Sandoval on several occasions when J. was living with them. He would hold J. “tight against his body,” and, on one occasion, “his body [was] pushed up against her rear.” She felt the contact was “too close for a girl that was already fully developed.” She told Sandoval she did not think it was appropriate for him to be touching J. in that manner. He became angry and accused her of “making too much out of it.”

Magda’s daughter, A., testified that Sandoval had inappropriately touched her when she was twelve years old. She had woken up feeling ill and went into the room Magda shared with Sandoval. Magda did not wake up but Sandoval said A. could lie next to him. She did so and was starting to fall asleep when Sandoval reached under her shirt and squeezed her breast. Magda woke up and Sandoval quickly removed his hand from underneath A.’s shirt. A. went into the kitchen and Sandoval followed her. He asked if she was OK. She told him to leave her alone and not to touch her again, and then went to bed.

A. told her sister Am. about the incident, and Am. said that Sandoval had done the “same thing” to her. A. also told J. about the incident, and J. said Sandoval had also inappropriately touched her as well.

Am. testified that when she was eleven or twelve years old, Sandoval suggested she lie next to him on the couch. She did and

he then placed his hand under her shirt and touched her breast. She felt uncomfortable and went back to her bedroom.

The parties stipulated that on October 9, 2012, Sandoval pled no contest to committing a lewd act upon a child (§ 288, subd. (a)) and the victim was A.

Sandoval testified and denied molesting J. He denied ever singling her out for “special physical contact,” denied ever being on the couch with her, and denied putting his hand under her clothing. One of Sandoval’s ex-wives and five of his relatives testified that J. had a reputation for being untruthful.

A jury found Sandoval guilty as charged and found the special allegation true. He was sentenced to a total term of 33 years to life. He timely appealed.

DISCUSSION

1. Exclusion of Impeachment Evidence

Sandoval first contends the trial court erred in sustaining prosecution objections to evidence of J.’s “propensity to lie” and “her character as a troubled and trouble-making child.” He describes approximately a dozen rulings the trial court made excluding evidence regarding (1) J.’s consumption of alcohol and drugs, (2) Magda’s disciplinary issues with J., (3) J.’s mental health, and (4) specific acts of misconduct relevant to J.’s reputation in the community. Sandoval then generally contends that the exclusion of all of this evidence as a whole violated a variety of constitutional rights including his right to a fair trial, to confront witnesses, to effective counsel, and to present a defense, as well as to due process.

Sandoval has not met his burden on appeal of affirmatively establishing error. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 846, fn. 9 [a point asserted on appeal without authority or

adequate development of argument will not be considered].) He cites multiple rulings by the trial court excluding a variety of evidence and then generally argues the “evidence at issue here was clearly relevant for reasons stated by defense counsel,” and “[g]iven that said testimony struck at the heart of the case, which was J.’s credibility, it should have been admitted.” These arguments are entirely conclusory. Sandoval does not identify the specific ground of each objection, and offers no specific analysis as to why the rulings were erroneous.

Even if Sandoval had properly developed his arguments, we would find the trial court did not err. With respect to whether J. had consumed alcohol or illegal drugs when she was 13 years old, the court ruled that this evidence was irrelevant. Defense counsel was not focusing on whether J.’s perception was impaired when she was molested. Rather, counsel apparently only sought to introduce evidence that J. generally had experience consuming these substances prior to the molestation and during the time she lived with Sandoval. The trial court properly excluded this evidence under Evidence Code section 352. As the trial court correctly put it, “unless you have somebody coming in and testifying that she . . . was drunk every day and hallucinating, I think it’s highly prejudicial and it really has very slight probative value.”

With respect to Magda’s disciplinary issues with J., the court sustained the prosecution’s relevance objection to a question as to whether Magda’s daughter A. had “observe[d]” J. and Magda getting into arguments. Magda was later asked on the stand as to whether she had had “disciplinary issues” with J., and Magda confirmed that she had. The daughter’s opinion on

this issue had little probative value and was properly excluded under Evidence Code section 352.

Thirdly, after J. testified that she had used antidepressants when she was 13 years old, the court sustained the prosecution's relevance objection as to whether she had a "mental condition." This evidence was highly prejudicial, and had little probative value absent any indication such a mental condition interfered with J.'s ability to recall events. The evidence was properly excluded under Evidence Code section 352.

Lastly, Sandoval cites to a portion of the record where defense counsel asked Sandoval's sister about J.'s reputation for honesty. Counsel also sought to ask the sister about a particular incident when J. allegedly bought "drugs" and then denied having done so. However, the court stated that "generally" specific acts of misconduct are not admissible to show a witness's reputation for truthfulness. Defense counsel responded to the court, "Right," and, therefore, forfeited any objection. (*People v. Partida* (2005) 37 Cal.4th 428, 435.)

Although Sandoval is correct that the court's statement about specific acts of misconduct was erroneous, he has not shown prejudice.² (See *People v. Harris* (1989) 47 Cal.3d 1047,

² Sandoval argues the error was of constitutional dimension. Although "completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.] . . . If the trial court misstepped, '[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.' [Citation.] Accordingly, the proper standard of review is that announced in *People v. Watson* (1956) 46 Cal.2d 818, 836,

1081, disapproved on another ground in *People v. Wheeler* (1992) 4 Cal.4th 284, 299, fn. 10 [section 28(d) to the California Constitution “effected a pro tanto repeal” of Evidence Code section 787].) Sandoval argues only that his sister’s opinion “had little weight” without testimony about the specific instance when J. was untruthful. However, the sister’s testimony was cumulative to testimony of Sandoval’s other relatives. Although Sandoval argues that his other relatives *also* could have testified to specific instances when J. was untruthful had the court not generally barred such evidence, he does not identify what that proposed testimony would have been. Accordingly, he has not shown a reasonable probability of a more favorable result had this evidence been admitted. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

2. *Alleged Judicial Misconduct*

During Sandoval’s cross-examination by the prosecutor, the prosecutor asked him if he had spoken with Detective Michael Allen previously. Sandoval replied in the affirmative. The prosecutor then inquired, “Did you ever tell Detective Allen that [J.]—” At that point, the court interrupted the examination and called for a sidebar. The court informed the prosecutor at sidebar, “This could be an instance where you’re opening the door. That’s your decision as a trial lawyer. . . . I just want you to know when you start going into conversations with law enforcement that you can’t just cherry-pick what you want out of it.” The prosecutor responded that she wanted to ask Sandoval whether he “told Detective Allen that he believed [J.] to be a liar.”

and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension [citation].” (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103.)

Defense counsel did not raise any objection but stated, “I don’t think he had the opportunity,” apparently referring to Sandoval’s interrogation by the police. The prosecutor withdrew his question.

Sandoval argues the court improperly “advocate[d] on behalf of the prosecutor, cautioning the prosecutor prospectively that h[er] inquiry was opening the door to the defense to adduce evidence that would be favorable to the defense”³ We conclude that, although there might be other interpretations, defendant has misconstrued the import of the conversation which seems to us born out of the trial court’s intent to ensure the case would be tried efficiently.

The “ ‘trial court has both the duty and the discretion to control the conduct of the trial’ [citation] ‘the Due Process Clause clearly requires a “fair trial in a fair tribunal,” [citation], before a judge with no actual bias against the defendant or interest in the outcome of his particular case. [Citations.]’ [Citation.] The role of a reviewing court ‘is not to determine whether the trial judge’s conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge’s behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial. [Citation.]’ [Citation.] In deciding whether a trial court has manifested bias in the presentation of evidence, we have said that such a violation occurs only where the judge ‘ “officially and unnecessarily usurp[ed] the duties of the prosecutor . . . and in so doing create[d] the impression that he [was] allying himself with

³ In light of our discussion in the text, we find no need to consider the Attorney General’s argument that defendant forfeited his point by not objecting at trial.

the prosecution.” ’ [Citation.]” (*People v. Harris* (2005) 37 Cal.4th 310, 346–347 (*Harris*).)

We conclude the trial court broached the subject of the potential effect of the cross-examination as part of its “duty and [] discretion to control the conduct of the trial.” (*Harris, supra*, 37 Cal.4th at p. 346.) Concomitantly, we find that any benefit the prosecution may have received from having time to reflect on the nature of his cross-examination was incidental and fell far short of the trial court “allying himself with the prosecution.” (*Id.* at p. 347.) In any event, the alleged error was harmless.

Here, Sandoval does not identify what evidence “favorable to the defense” would have become admissible had the prosecutor continued with his line of questioning. Sandoval’s argument thus becomes speculative at best and does not demonstrate that the court allied itself with the prosecution or that Sandoval was prejudiced by the sidebar discussion. The court’s comments were not “so prejudicial” that Sandoval was denied a fair trial. (*Harris, supra*, 37 Cal.4th at p. 347.) And it does not appear the comments prejudiced Sandoval at all for another reason. Defense counsel himself encouraged the prosecution not to continue on her line of questioning by pointing out that Sandoval had not had the opportunity to address J.’s credibility during his interview with the police. We also observed that the court’s comments were made during a sidebar and, therefore, could not have prejudiced the defense in the eyes of the jury. This falls far short of showing a bias against the defense.

3. *Impeachment With Prior Misdemeanor Conviction*

Before defense witness Osvaldo Sandoval took the stand, defense counsel informed the court the witness had been convicted of misdemeanor spousal battery and inquired, “Is the

fact of the conviction admissible or the conduct admissible?” The court responded, “If Osvaldo takes the stand, [the prosecution] will be allowed to ask him if he has been convicted of domestic battery” Defense counsel said, “we’re not going to dispute that . . . So if she’s allowed to ask him about the misdemeanor conviction, that’s fine.” Osvaldo Sandoval then took the stand and *defense counsel* asked him on direct examination if he was on probation for a misdemeanor. Osvaldo replied that he was on probation for domestic violence. The prosecution did not ask Osvaldo about the conviction on cross-examination.

Sandoval argues correctly that the trial court erred in ruling that the prosecution could ask Osvaldo about his misdemeanor conviction but not the underlying conduct. (See *People v. Chatman* (2006) 38 Cal.4th 344, 373 [“Misdemeanor convictions themselves are not admissible for impeachment, although evidence of the underlying *conduct* may be admissible subject to the court’s exercise of discretion. [Citation.]”].) However, Sandoval forfeited this claim by not raising an objection in the trial court. (*People v. Partida, supra*, 37 Cal.4th at p. 435.)

Furthermore, Sandoval has not shown he was prejudiced by the error, which was not of constitutional dimensions. (See *People v. Collins* (1986) 42 Cal.3d 378, 392 [erroneous admission of prior felony conviction subject to harmless error analysis].) Osvaldo testified that he was related to Sandoval, and he believed J. to be untruthful. Four other relatives of Sandoval also testified that they thought J. was untruthful. Accordingly, Osvaldo’s testimony was cumulative. In addition, defense counsel has not explained what the underlying misdemeanor conduct was, therefore, we cannot determine whether the fact of the conviction was more prejudicial to Osvaldo than the

underlying domestic violence. On these grounds, Sandoval has not shown it is reasonably probable the court's ruling affected the verdict.

DISPOSITION

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

GRIMES, J.

SORTINO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.