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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. OSMAN GOMEZ, Defendant and Appellant.	B250844 (Los Angeles County Super. Ct. No. BA398720)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gail Feuer, Judge. Affirmed as modified.

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

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and William H. Shin, Deputy Attorneys General for Plaintiff and Respondent.

Appellant Osman Gomez was convicted, following a jury trial, of four counts of lewd acts upon a child in violation of Penal Code section 288, subdivision (a).[1] The jury found true the allegations that appellant committed the offense against multiple victims within the meaning of section 667.61, subdivisions (b) and (e). The trial court sentenced appellant to a total of 45 years to life in state prison.

Appellant appeals from the judgment of conviction, contending that the trial court violated his constitutional right to be present at all critical stages of the proceeding by ordering that read back of testimony take place without appellant or his attorney, abused its discretion in excluding a victim's testimony about appellant's statements during a "ruse" telephone call, and gave the jury legally incorrect instructions on the "fresh complaint" doctrine. Appellant also contends that he is entitled to 40 days of presentence conduct credit. We agree that appellant is entitled to the presentence conduct credits. We affirm the judgment of conviction in all other respects.

Facts

1. D.R. (counts 1 – 3)

Appellant began molesting his daughter D.R. when she was five or six years old. At the time, D.R. lived with appellant, her mother Iris and a younger brother in a one-bedroom apartment in Los Angeles.

The first time appellant molested D.R., he took her into the bedroom and put his penis inside her vagina. He also licked her vagina. In another incident, D.R. was in the bathroom with appellant when he touched her vagina with his hands and tried to kiss her.

Sometime after these incidents, D.R.'s mother was bathing D.R. and noticed that her vagina was red. She took D.R. to the doctor's office and was told it was a rash. D.R. recalled that following the incidents, it was painful to urinate and she was diagnosed with a urinary tract infection.

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

D.R.'s mother left appellant, moving out of appellant's apartment with her children on November 29, 2000. The molestation stopped.

In 2008, D.R. told her boyfriend, Oscar Lopez, that her father had raped her when she was a little girl. D.R. was upset and cried.

Also in 2008, D.R. told her friend Jesse Valencia during a telephone conversation that her father had abused and raped her. There was cracking and discomfort in D.R.'s voice.

Eventually, D.R. told her school therapist about the molestation. The therapist filed a report with the police. When D.R. got home from school, she told her mother about the molestation.

2. K.A. (count 4)

At some point soon after D.R.'s mother left appellant, appellant began dating B.R., who also had a five to six-year-old daughter, K.A. Appellant moved in with the family around 2002. When K.A. was six, she moved to Bakersfield with her mother, two brothers, a sister and appellant.

In Bakersfield, on one occasion, appellant told K.A. to get on a bed and lie next to him. She did, and he rubbed her vagina over her pants.[2]

When K.A. was seven years old, the family moved back to Los Angeles. One day soon after the move, K.A.'s mother B.R. walked into her room and saw K.A. lying down next to appellant on the bed. K.A. looked surprised. After appellant left for work, B.R. asked K.A. if anything had happened. K.A. told B.R. that appellant was touching her. B.R. drove to appellant's work and confronted him. He denied touching K.A. At the time, B.R. believed appellant. This act was charged in count 4 of the information, and the jury found appellant guilty as charged.

K.A. testified that when she was eight years old, appellant came into the bathroom, pulled her out of the shower, touched her vagina and tried to put his penis in

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[2] In this case, appellant was charged only with acts of molestation occurring in Los Angeles County, and so was not charged with this act.

her vagina, but stopped when K.A. said it hurt. This act was charged in count 5 of the information. The jury found appellant not guilty of the charge.

K.A. also testified that when she was about nine years old, appellant rubbed her vagina underneath her pants about 10 times. She further testified that when she was about nine to 10 years old, appellant tried to put his penis in her vagina two or three times, but never succeeded. When K.A. was 11 years old, appellant rubbed her vagina three to four times per week. These acts were all charged together in count 6 of the complaint as continuous sexual abuse of a minor. The jury found appellant not guilty of the charge.

K.A. told her sister about the molestations, and also told D.R., whom she had known through appellant since she was eight. K.A. asked her sister not to tell their mother, and waited until appellant moved out of the house before telling her mother about the molestation of K.A.

3. Defense

Appellant testified on his own behalf at trial. He denied molesting D.R. or K.A., or touching them sexually. He said that one day after he moved in with B.R. and her family, K.A. came into his bedroom and began touching his leg, which was under a blanket. B.R. walked into the room while K.A. was lying next to appellant. B.R. later called appellant at work and accused him of molesting K.A. The three met in person to discuss the matter, and K.A. admitted that appellant had not touched her.

Discussion

1. Read back of testimony

Due to space and time restraints, the trial court decided to have the requested read back of K.A.'s testimony held in the jury room. The court believed that it would be inappropriate for appellant or his counsel to be in the jury room, and so excluded them from the read back, over appellant's objections. Appellant contends the exclusion

violated his constitutional right to be present with counsel at all critical stages of the proceedings. We do not agree.

a. Trial court's ruling

The trial court proposed that the read back would take place in the jury room because the courtroom was in use on other matters. The court stated that appellant and his counsel could not be present at such a read back. Appellant's counsel objected and stated that in another felony trial, the court reporter had made facial expressions during the read back suggesting that some parts of the testimony were more believable than others. Counsel also stated that in a different read back situation, the reporter had omitted a portion of the testimony. The court replied that it had "never found a situation where the reporter made faces." The court added that "it would be fair to assume that . . . the reporter[] would be reading back what she was told to read back." The court also stated, "I would instruct the reporter not to make any faces. I do not expect this reporter to make any faces. Certainly she was quite stoic faced during the entire trial. I don't expect when she would be in the jury room it would be any different. And I have never seen that happen with our court reporter. And I would instruct her to read it exactly as it has been shown to defense counsel and the People." The court then cited two cases in support of its decision: *People v. McCoy* (2005) 133 Cal.App.4th 974 (*McCoy*) and *People v. Horton* (1995) 11 Cal.4th 1068, 1120 (*Horton*).

The next day, the court ruled: "Given how long the jury has been waiting . . . [w]e are going to do readback in the jury room. I've looked at the *McCoy* case, I've shepardized it. It's still good law." Before read back began, the court instructed the jury: "It is very important during the readback you cannot ask questions. You cannot talk about the case–okay–because you have a reporter there, so you cannot talk about the case. You cannot ask her questions. [¶] If there's a portion of testimony she does not read that you would like . . . when she's done, she's going to come back into the courtroom and you can send another note to the court."

b. Constitutional right to be present

Appellant contends that the trial court's ruling excluding him and his counsel violated appellant's constitutional right to be present at all critical stages of his trial.

Under federal constitutional law, a defendant has the right to the presence of counsel "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." (*Mempa v. Rhay* (1967) 389 U.S. 128, 134.) A defendant also has the right "to be present at all critical stages of the trial where his absence might frustrate the fairness of the proceedings" (*Faretta v. California* (1975) 422 U.S. 806, 819, fn. 15) and to be personally present "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745.)

The California Constitution "grants to the accused the rights 'to have the assistance of counsel' and 'to be personally present with counsel' and requires that those rights 'shall be construed by the courts of this state in a manner consistent with the Constitution of the United States' (Cal. Const., art. I, §§ 15, 24)." (*McCoy, supra,* 133 Cal.App.4th at p. 981.) Consistent with the above-cited federal law on personal presence, California courts have held that "a 'defendant is *not* entitled to be personally present during proceedings which bear no reasonable, substantial relation to his or her opportunity to defend the charges against him, and the burden is on defendant to demonstrate that his absence prejudiced his case or denied him a fair and impartial trial.' [Citations.]" (*Horton, supra,* 11 Cal.4th at pp. 1120-1121 [italics added].)

The California Supreme Court has held that "[t]he reading back of testimony ordinarily is not an event that bears a substantial relation to the defendant's opportunity to defend [citations]." (*Horton, supra,* 11 Cal.4th at p. 1121.) The United States Supreme Court has never held that a read back of testimony is a critical stage of trial. (*McCoy, supra,* 133 Cal.App.4th at p. 982 [citing *LaCrosse v. Kernan* (9th Cir. 2001) 244 F.3d 702, 707-708].)

Appellant urges us to rule where the U.S. Supreme Court has been silent and find that a defendant in a criminal trial has the federal constitutional right to be present at the read back of testimony. We decline this suggestion.

Appellant points out that the Ninth Circuit Court of Appeals has found a right to be present at read back. (*Fisher v. Roe* (9th Cir. 2001) 263 F.3d 906, 917, overruled on other grounds by *Payton v. Woodford* (9th Cir. 2003) 346 F.3d 1204.) He urges us to follow the Ninth Circuit's decision. The decisions of the Ninth Circuit are not binding on California courts. (See, e.g., *People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn 3.) In this case, they are not persuasive.

Over the last 25 years, the California Supreme Court has repeatedly held that a defendant has no right be present at the read back of testimony because it "is not an event that bears a substantial relation to the defendant's opportunity to defend." (*People v. Horton, supra*, 11 Cal.4th at p. 1121; *People v. Medina* (1990) 51 Cal.3d 870, 903; *People v. Garrison* (1989) 47 Cal.3d 746, 782; *People v. Hovey* (1988) 44 Cal.3d 543, 585.) The California Supreme Court has recently reaffirmed this holding. (*People v. Lucas* (2014) 60 Cal.4th 153, 299-300.) As mandated by the California Constitution, the court's analysis of personal presence at read back is consistent with general United States Supreme Court decisions on a defendant's right to personal presence.

c. Statutory right to be present

Appellant also contends section 1138 and also sections 1043 and 977, subdivision (b)(1), provide the right for a defendant or his lawyer to be present at all read backs of testimony. Appellant makes this contention primarily to support his argument that read back is a critical stage of the proceedings under federal constitutional law. As we have explained, we are bound by the California Supreme Court's holding that "the rereading of testimony is not considered a critical stage of trial in which the defendant has a constitutional right to personal presence." (*People v. Lucas, supra*, 60 Cal.4th at p. 299.)

To the extent that appellant is claiming a violation of his statutory rights, we agree in part. There was no violation of section 1138, which is written in the disjunctive[3] and does not provide a defendant with the right to be present. "[T]he primary goal served by section 1138 is to provide the jury with the evidence it needs for its deliberations. [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1017.) Section 977, subdivision (b)(1), does provides for a defendant to be present at read back. (*People v. Avila* (2006) 38 Cal.4th 491, 597.) Section 1043, subdivision (a), provides that a defendant "shall be personally present at the trial." However, a violation of section 977 (or § 1043) is a statutory error only. (*Ibid*.) As we discuss below, the exclusion was not prejudicial even under the more demanding federal standard.

d. Harmless error

Even assuming that appellant had a right to be present at read back to defend himself, any error in excluding him would be harmless beyond a reasonable doubt.

Here, the parties agreed on the portions of K.A.'s testimony to be read to the jury. The trial court admonished the jury not to ask any questions or discuss the case during read back, and also told jurors that if they wanted to hear any additional testimony, they must make a separate request to the court. We cannot presume that any error or misconduct occurred. (*People v. Pride* (1992) 3 Cal.4th 195, 251 [where reporter was instructed not to comment or answer questions during read back "we will not presume that testimony was misread or that misconduct occurred"]; *McCoy, supra*, 133 Cal.App.4th at p. 983 [where the judge has carefully admonished the jury before read back and where the defendant cannot show that his presence or his counsel's presence

[3] "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, *or* after notice to, the prosecuting attorney, and the defendant or his counsel, *or* after they have been called." (§ 1138 [italics added].)

could have assisted the defense in any way, court committed no error in allowing the read back over defense objection].)

Further, the testimony read back itself involved events which began when K.A. was nine and which were charged in count 6 of the complaint. The jury acquitted appellant of count 6 and also count 5, which alleged a separate act of molestation when K.A. was younger. The jury convicted appellant of only one count involving K.A., count 4. K.A.'s account of this act was at least partially corroborated by B.R.'s testimony. Clearly, even if there were irregularities during the read back, it did not result in any prejudice to appellant.

2. Hearsay

Appellant contends the trial court abused its discretion in excluding testimony by D.R. about appellant's statements during a "ruse" telephone call without holding a hearing pursuant to Evidence Code section 402. He contends in the alternative that his counsel was ineffective in failing to request such a hearing.

a. Trial court's ruling

Appellant's trial counsel asked D.R., "So when you called [appellant], did you bring up the subject of him abusing you?" D.R. replied, "Of course." Counsel asked, "At any time did [appellant] admit to abusing you?" The prosecutor objected on hearsay grounds.

At sidebar, the court asked appellant's counsel, "[C]an you tell me generally what did the father say on the phone? What is your understanding as to what the defendant said?" Counsel replied, "Oh, I don't know the specificity. I just know that there was a ruse where they tried to call him. And it's my understanding that he didn't—he's never confessed to anything. But in terms of what he said, I don't know."

The court ruled that if appellant "admitted, it would be a statement against interest. I'm going to sustain the objection because it is–I understand I'm sustaining the objection because [it is] the equivalent of asking did he deny doing it, and that would be hearsay."

b. Admissibility

Appellant contends the trial court abused its discretion in ruling D.R.'s testimony was inadmissible without holding a hearing to determine what her testimony would be, and further erred in failing to consider applicable exceptions to the hearsay rule. We do not agree.

Appellant's counsel did not request an Evidence Code section 402 hearing to determine what D.R.'s specific testimony would be. To the extent appellant contends the trial court had a sua sponte duty to hold a section 402 hearing to make this determination, appellant is mistaken. Even assuming the trial court has a sua sponte duty under section 402 to hold a hearing to determine preliminary facts, that duty would involve deciding "disputed" facts. Nothing in this case indicated any dispute about D.R.'s testimony. There was general agreement that D.R. accused appellant of abusing her, and that appellant either denied it or was silent.

Appellant has not cited, and we are not aware of, any cases requiring a trial court to hold a hearing to look for additional facts which would support admission of evidence on a different basis than the one advanced by the proponent of the evidence. Further, there is nothing in the record to suggest that such a hearing would have uncovered other bases for admission of the statements.

Appellant argues that a hearing might have shown that he said things during the telephone conversation that "fell short of a confession" but were otherwise admissible as party admissions. He also argues that his silence was "arguably" admissible as an adoptive admission. Appellant has misunderstood the legal meaning of an admission and the purpose of Evidence Code section 1220.

An admission is "an acknowledgment of some fact or circumstance which in itself is insufficient to authorize a conviction and which only tends toward the ultimate proof of guilt." (*People v. Wheelwright* (1968) 262 Cal.App.2d 63, 69.) An admission by a declarant is admissible "*when offered against* the declarant in an action to which he is a party." (Evid. Code, § 1220 [italics added].) This means that the statement is being

offered to show the declarant's guilt. Appellant sought to use any statements he made to D.R. to show that he was not guilty.[4] This does not satisfy the requirements of Evidence Code section 1220. Similarly, an adoptive admission occurs when a party knows the content of a statement and has "manifested . . . his belief in [the statement's] truth." (Evid. Code, § 1221.) Appellant clearly did not agree with D.R.'s accusatory statements. Thus, he did not adopt her statements.[5]

Appellant also suggests that a hearing might have shown that when D.R. asked her accusatory questions, he "could" have responded, "What are you talking about?" He argues that this would have gone to his state of mind, and so been an exception to the hearsay rule. There are no facts in the record to support such an argument. Appellant was later asked by his counsel, "So what did you respond when she started accusing you of all these allegations?" Appellant stated, "My answer was always no." Further, there is also no apparent relevance to appellant's state of mind during the telephone conversation.

c. Ineffective assistance of counsel

Appellant contends that if the trial court did not have a sua sponte duty to hold an Evidence Code section 402 hearing, his counsel was ineffective in failing to request such a hearing.

Appellant has the burden of proving ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) In order to establish such a claim, appellant must show that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable.

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[4] An admission may contain facts in mitigation as well as facts showing guilt, but appellant has not suggested that he offered any mitigating facts during the telephone conversation.

[5] We agree with appellant that, in some circumstances, an admission can be adopted by silence. However, silence in response to an accusation is generally treated "as an accused's acquiescence in the truth of the statement or as indicative of a consciousness of guilt and upon the theory that the natural reaction of an innocent man to an untrue accusation is to deny it promptly." (See *People v. Bracamonte* (1961) 197 Cal.App.2d 385, 388.) Appellant clearly did not want the court to treat his silence as agreement.

(*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

"When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for the counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation." (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

Appellant suggests that if his counsel had requested an Evidence Code section 402 hearing, that hearing might have shown other ways that his statements could have been admitted. As we discuss above, there is nothing in the record to suggest that a section 402 hearing would have uncovered any information favorable to appellant. His own description of his responses to the accusations was that he said no. Thus, appellant's counsel may have chosen not to request a section 402 hearing because counsel knew that appellant's replies were simple denials which were not admissible.

Since there is a satisfactory explanation for trial counsel's behavior, appellant's claim of ineffective assistance fails. Generally, claims of ineffective assistance of counsel are more appropriately raised in a petition for writ of habeas corpus, particularly if the claim requires consideration of matters outside the trial record.

3. Fresh complaint doctrine

The victims in this case told others about appellant's acts of molestation, and evidence of these disclosures were admitted pursuant to the fresh complaint doctrine. The trial court instructed the jury on the limited permissible use of the disclosures under the fresh complaint doctrine. Appellant contends the trial court erred in also instructing the jury with CALCRIM No. 318, which he argues permitted the jury to use the victim's disclosures for any purpose.

Using CALCRIM No. 303 as a starting point,[6] the trial court instructed the jury that the victims' disclosures were "admissible for the limited purpose of . . . determining whether the alleged molestation did or did not occur. You may consider that evidence only for that purpose and for no other. [¶] The details of what was disclosed cannot be considered for the truth of what was disclosed."

The trial court also instructed the jury with CALCRIM No. 318 which stated: "You have heard evidence of statements that witnesses made before the trial. If you decide that the witness made those statements, you may use those statements in two ways: 1. To evaluate whether the witness's testimony in court is believable; AND 2. As evidence that the information in those earlier statements is true." The Bench Notes for CALCRIM No. 318 state that it should be used when a testifying witness has been confronted with a prior inconsistent statement.

Appellant contends that the jury might have understood CALCRIM No. 318 as applying to D.R.'s and K.A.'s complaints and ignored the limiting language of the disclosure instruction. Respondent contends appellant has forfeited this claim by failing to object in the trial court.

Assuming the claim was not forfeited, and the instruction was understood by the jury to permit full use of D.R.'s and K.A.'s complaints, the error would be harmless. The complaint testimony was merely cumulative. (See *People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1526 [erroneous admission of fresh complaint evidence without restriction was harmless when victim testified about the rape at trial and jury had the opportunity to hear directly from victim and to judge her credibility]; see also *People v. Manning* (2008) 165 Cal.App.4th 870, 880-881 [any error in failing to give limiting instruction on fresh complaint doctrine would be harmless where victim testifies at trial].)

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[6] Appellant refers to the court's instruction as CALCRIM No. 303. However, CALCRIM No. 303 is a short, general purpose instruction which tells the jury: "During the trial, certain evidence was admitted for a limited purpose. . . . You may consider that evidence only for that purpose and for no other." It bears little relation to the detailed instruction given by the court in this case.

4. Presentence custody credit

The trial court awarded appellant 269 days of actual custody credit, but believed that the nature of appellant's offenses barred any conduct credit. Appellant contends that he is entitled to 40 days of presentence conduct credit. Respondent agrees. We agree as well.

Appellant was entitled to conduct credit up to 15 percent of the actual period of confinement. (§ 2933.1, subd. (a); see also § 667.5, subd. (c)(6).) Fifteen percent of 269 is 40. We order the abstract of judgment corrected to reflect these additional days. (See *People v. Taylor* (2004) 119 Cal.App.4th 628, 647 [court's failure to award correct amount of presentence custody credit is jurisdictional defect that renders sentence unauthorized]; *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6. [unauthorized sentence may be corrected whenever it comes to the attention of the reviewing court].)

Disposition

Appellant is awarded 40 days of conduct credit. The abstract of judgment is ordered corrected to show 269 days of actual custody credit plus 40 days of conduct credit for a total of 309 days of presentence custody credit. The clerk of the superior court is instructed to prepare an amended abstract of judgment reflecting this correction and to deliver a copy to the Department of Corrections and Rehabilitation. The judgment of conviction is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GOODMAN, J.*

We concur:

MOSK, Acting P.J. KRIEGLER, J.

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