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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. RALPH ACERO, Defendant and Appellant.	B249581 (Los Angeles County Super. Ct. No. KA095162)

APPEAL from a judgment of the Superior Court of Los Angeles County. Christian R. Gullon, Judge. Reversed.

William P. Daley for the Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

The People charged Ralph Acero with rape and forcible oral copulation of his 19-year-old stepdaughter. The first trial resulted in a hung jury. In the second trial the jury convicted Acero of both counts and the court sentenced him to 14 years in prison.

A combination of evidentiary errors requires us to reverse the convictions.

FACTS AND PROCEEDINGS BELOW

A. Testimony of the Complainant, R. Doe

The complainant, identified in court as R. Doe,[1] lived with defendant Acero (her stepfather), her mother and an extended family of half-siblings, grandparents, an aunt and two cousins. R. and her half-sister Crystal shared a bedroom. Each girl had her own bed.

On a night in July 2011, R. went to bed at approximately 11:00 p.m. Crystal was already in her bed asleep. The light in the bedroom was off and the door was closed. At approximately 4:00 a.m. R. awoke when she felt Acero lying on top of her. She told him to get off but he just said "be quiet." She tried to push him off but he was too heavy.[2] Acero pulled off R.'s pajama bottoms and panties and licked her vagina. Holding her arms against her sides, Acero slid his body up R.'s and inserted his penis into her vagina. Acero thrust his penis in and out of R.'s vagina for what seemed to her "forever." He only stopped when his mother walked into the room and turned on the light. After his mother left the room, Acero got up and put on his pants. He told R. that what just happened "wasn't your fault" and that he would take the blame for it.

The next day, as R.'s mother Lorena was driving R. home from school, R. told her mother that she did not want to go home and that they needed to talk. R. then told Lorena that Acero had raped her. Lorena wanted R. to go home and confront Acero but R. did not want to go home, so she jumped out of the car at a traffic light and ran.

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[1] The complainant is referred to as R. throughout the trial and by the parties on appeal. We will do the same.

[2] At the time of the alleged rape R. was approximately 4 feet 11 inches tall and weighed about 95 pounds. Acero was about a foot taller and weighed approximately 225 pounds.

After running from the car, R. called her friend Juan Chavez who took her to a yogurt shop. R. told Chavez: "[M]y stepdad had raped me." Chavez told R. that she should immediately report the rape to the police but R. did not want to do that because she felt her mother did not believe her and because she thought "[s]ocial services were going to come and go to the house [and] put my siblings through everything."

After Lorena located R. at the yogurt shop she drove R. to her grandmother's home where she remained.

Approximately a week after the alleged rape R., who was a member of the Police Explorers troop in Irwindale, told two Irwindale police officers, Daniel Camerano, the leader of R.'s troop, and Ray Gonzalez, Camerano's superior that Acero had raped her.

Because the alleged rape did not occur in Irwindale's jurisdiction, the officers referred the matter to the Los Angeles County Sheriff's Department which took over the case. Deputy Robin Amador was the lead investigator. After interviewing R., Crystal, R.'s mother, grandmother and other witnesses, Deputy Amador arrested Acero.

In addition to R.'s testimony about the rape and oral copulation described above, she testified that Acero had molested her on two other occasions.

The first abuse occurred when R. was 13 years old, when she and Acero where at home alone. The rest of the family was at a concert. Acero awoke R., took her into his bed, and on the pretense that he was giving her something to make her feel better, gave her something intoxicating to drink. He then fondled her vagina and her breasts—first above her clothing then below. R. tried to push his hands away but couldn't. She awoke in daylight in her own bed.

Acero molested R. a second time when she had just turned 18. Her mother, Crystal, Acero and she were in a motel room following a Raiders football game and Acero gave her some cheap wine to drink. Later she drove to a store with him and threw up during the trip. On the way back to the motel Acero pulled into a parking lot where he pulled down her top and touched her breasts with his hands and mouth. R. testified that

she didn't remember if Acero touched her vagina but when she awoke the next morning she found that her panties were on inside out and bloody.

B. Other Evidence At Trial

Officers Camerano and Gonzalez testified that R. confided in them at a meeting of the Explorer troop that Acero had raped her and that was why she moved out of her parents' home.

R.'s half-sister, Crystal, testified that before the alleged rape, R. told her that "dad and I are having sex." Crystal disputed R.'s testimony about the incident after the Raiders game. She testified that the motel room was "pretty small" and she did not see R. drinking any alcohol there. She also testified that when R. and Acero returned from the store she did not see or smell any vomit on R. nor did she smell any in the family van on the drive back to Southern California.

Samantha Martinez, Acero's goddaughter, also disputed R.'s description of the Raiders game incident. Martinez and her family were staying in the motel room next to R. and her family. She testified that she saw R. and Acero when they returned from the store. R. was driving the van and did not appear to be drunk or sick.

Lorena, R.'s mother, testified that while driving R. home from school, R. told her that Acero had raped her the previous evening. She responded, "'Okay then. We're going to go to the station, and you're going to report this." Lorena drove toward the Irwindale police station. At a red light R. jumped out of the car and ran. Lorena found R. later in the afternoon at a yogurt shop and drove her to a relative's home where R. wanted to stay.

As to the alleged molestation after the Raiders game, Lorena testified that she was in the motel room with Acero and R. She did not see R. drink any liquor, she did not observe R. acting intoxicated or sick, and she did not see or smell vomit on R.'s clothes or in the van. Finally, Lorena testified that Acero was not home alone with R. the night the family attended the concert. He was not at home at all that night.

Henrietta Sanchez, R.'s aunt (Lorena's sister) testified that on one occasion when she was about to visit Acero's mother she peeked into a bedroom window and saw R., holding an open towel, straddling Acero as he lay on the bed. She was naked below the waist. Sanchez left without entering the house.

C. Pretrial Hearing On R.'s Sexual Activity

In a pretrial hearing under Evidence Code section 782[3], Acero sought to introduce evidence that before the alleged rape R. was having consensual sex with Acero and a cadet in her Explorer troop and that after the alleged rape R. lied to the police and her doctor when she denied having previously engaged in sexual activity. He also asked leave to offer evidence that prior to the alleged rape R.'s aunt witnessed R. straddling Acero wearing nothing but a towel, and on another occasion, she witnessed R. rubbing her crotch against Acero's knee.

The court allowed evidence of the towel incident and R.'s consensual sex with Acero.

D. Acero's Conviction

A jury convicted Acero of one count of rape and one count of forcible oral copulation.

E. Post-conviction *Brady* and *Pitchess* Motions

Acero's counsel moved for a new trial citing numerous evidentiary errors. While that motion was pending, counsel told the court that she had learned that at the time of his testimony, Officer Camerano was suspended from the Irwindale Police Department based on charges of sexual conduct with some of the Explorer scouts in his troop possibly including R. Counsel also learned that the prosecutor knew about this suspension during the trial but did not inform her. Counsel moved under *Brady* and *Pitchess*[4] for production of identifying information of all complainants and witnesses interviewed in connection

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[3] All statutory references are to the Evidence Code unless otherwise stated.

[4] *Brady v. Maryland* (1963) 373 U.S. 83; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

with the sex abuse charges against Camerano. The trial court denied that motion and the motion for new trial.

DISCUSSION

I. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE THAT R. LIED TO THE POLICE WHEN SHE TOLD THEM THAT PRIOR TO THE RAPE SHE WAS A VIRGIN.

Section 782 sets out the procedure for determining the admissibility of "evidence of sexual conduct of the complaining witness . . . to attack the credibility of the complaining witness." (§ 782, subd. (a).) First, the defendant must file a written motion and an offer of proof detailing the relevancy of the evidence. (§ 782, subd. (a)(1), (2).) If the court finds the offer sufficient, it then orders a hearing out of the presence of the jury to allow questioning of the complaining witness regarding the offer of proof. (§ 782, subd. (a)(3).) If the court finds the evidence relevant on the issue of credibility under section 780, and not inadmissible under section 352, the court may make an order stating what evidence may be introduced by the defendant and the nature of the questions permitted.

Admissibility of evidence under section 782 is within the discretion of the court. It is the appellant's burden to show the evidentiary ruling was unreasonable. (*People v. Mestas* (2013) 217 Cal.App.4th 1509, 1514.)

Here, the court ruled under section 782 that Acero could introduce evidence that R. had previously engaged in consensual sexual activity with him but could not introduce evidence that R. had lied to the officers that, prior to the alleged rape, she was a virgin and that she lied to Officer Gonzalez when she denied dating or having sexual relations with a cadet in her troop. (The court excluded as irrelevant R.'s statement to her doctor the day after the alleged rape that she was not sexually active.)

We acknowledge that in cases involving rape and other sex offenses section 1103, subdivision (c)(1) provides that "opinion evidence, reputation evidence, and *evidence of specific instances of the complaining witness'[s] sexual conduct* . . . is not admissible by the defendant in order to prove consent by the complaining witness." (Italics added.)

Section 782, subdivision (a) on the other hand specifically states that under certain conditions the defendant may offer "evidence of sexual conduct of the complaining witness . . . *to attack the credibility* of the complaining witness under Section 780[.]" (Italics added.)

Evidence that R. lied to the police when she said that prior to the alleged rape she was a virgin was not offered as "evidence of sexual conduct of the complaining witness," although it would reveal her prior sexual conduct. Rather, it was offered "to attack the credibility of the complaining witness." (§ 782, subd. (a).) Acero's theory was that R. was not raped but had engaged in consensual sex. Her lying about her virginity supports that theory. A logical inference is that she lied about the loss of her virginity because she was ashamed. And if she lied about the loss of her virginity to hide that shame, she was also lying about the rape to hide her shame of having consensual sex with her stepfather. Therefore, the lie was relevant, and admissible unless excludable under section 352.

There was no reasonable basis for excluding the "virginity lie" under section 352. Questions about R.'s statements to the officers would consume very little time.
With regard to prejudice, the possibility that the jury would consider the evidence for propensity to engage in sexual intercourse, an evil sought to be avoided by section 1103, subdivision (c)(1), is a danger, but that danger is substantially outweighed by its probative value. In any case, an appropriate instruction would direct the jury to consider the evidence only for its relevance to credibility.

Similarly, evidence that R. lied when she denied having a sexual relationship with another cadet was not being offered to show that R. was promiscuous but to further attack her credibility. And for the same reasons that section 352 did not bar evidence of the lies to the officers, it did not bar evidence of her lying about her relationship with her fellow cadet.

II. THE COURT ERRED IN NOT ALLOWING R.'S DOCTOR TO TESTIFY ABOUT HER EXAMINATION OF R. THE DAY AFTER THE ALLEGED RAPE.

Acero sought to present the testimony of R.'s personal physician, Dr. Laxmi Suthar. At a section 402 hearing, Suthar testified that she saw R. on the day after the alleged rape. It was a routine visit to adjust R.'s medication for nocturnal seizures. Suthar performed a routine physical examination related to the seizure medication, which encompassed a check of her heart, lungs and legs[5] and a discussion of any concerns R. might have. She told Suthar that she was not "sexually active" and asked about birth control pills but did not tell the doctor that she had been raped the previous night. Suthar did not prescribe birth control pills at that appointment.

The court ruled that Suthar could not testify because she had "nothing [relevant] to present." The court did rule, however, that if R. testified that she did tell Suthar about being raped, then Acero could call Suthar to rebut that testimony.

We disagree with the court's assessment of the relevance of the doctor's testimony. A juror could reasonably find it suspicious for a woman to fail to tell her physician that she was just raped a few hours earlier while at the same time asking the doctor for contraceptives. R. was not so shy about sex to prevent her from admitting that she contemplated having consensual sex in the future. A reasonable juror could infer that because R. didn't mention the rape to Suthar— something that a patient would be expected to tell her doctor—that she wasn't raped.[6]

III. THE COURT ERRED IN LIMITING THE CROSS-EXAMINATION OF THE PROSECUTION'S EXPERT.

The People offered the testimony of Dr. Charles Grob, a psychiatrist who studies the common behaviors of persons who have suffered sexual abuse. Grob testified that it

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[5] Suthar testified that she did not see any bruises on Ruby's legs. It is unclear, however, from the doctor's testimony and her examination notes whether she examined Ruby's legs beyond looking for swelling of her ankles. Therefore, we do not decide whether the court erred in excluding evidence that Suthar saw no bruises on Ruby's legs when she examined them.

[6] Because we reverse for the above error and other errors we discuss in this opinion, we need not decide whether the court erred in prohibiting the testimony of Ruby's doctor that R. denied she was "sexually active."

was consistent with common behavior that R. did not report the earlier molestations until just before this second trial.

On cross-examination, defense counsel asked Grob: "People make false allegations regarding rape based on feelings of shame; isn't that correct?" The court sustained an objection to this question on the ground it assumed a fact not in evidence—that R. felt shame about something. That ruling was erroneous. Acero's entire theory of the case was that R. was ashamed of engaging in voluntary sex and therefore lied about her virginity and for the same reason lied about sex with Acero being unconsented. Had the court admitted, as it should have, the evidence about R. lying about her virginity, there would have been evidence to support the relevance of the question.[7]

IV. THE COURT ERRED IN ADMITTING DEPUTY ADMADOR'S TESTIMONY THAT SHE FOUND R. "CREDIBLE."

On direct examination by the prosecutor the lead investigator, Deputy Amador, testified that when she initially interviewed Lorena about R.'s rape allegation Lorena was "very uncooperative." The prosecutor then asked Amador whether Lorena's attitude changed at any time. Amador answered: "After I told her her daughter was credible, she broke down crying." Acero objected to this answer on the ground that testimony vouching for R.'s credibility was unduly prejudicial and should have been excluded under section 352. The court disagreed. It reasoned that the "[s]tatement is being offered not for the truth of the matter, but rather the effect on the listener, which I think is a very obvious exception to the hearsay rule, and the effect on the listener is very relevant based on all of the information that's come into this trial."

The court erred in overruling Acero's objection. We agree that evidence of Amador's statement, if admitted to show Lorena's state of mind, would not be hearsay. (*Holland v. Union Pacific Railroad Co.* (2007) 154 Cal.App.4th 940, 947.) Nonetheless, all evidence must be relevant and Lorena's crying was not relevant to any issue in the

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[7] Aceero also alleges that the court erred when it allowed Dr. Grob to testify that he got "a sense of truthfulness" from speaking with Ruby. Because Acero did not object to this testimony he has forfeited the claim on appeal.

case. Nor was Amador's opinion of R.'s credibility admissible. (*People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 82.)

V. THE COURT CORRECTLY REJECTED ACERO'S POST-TRIAL *BRADY* MOTION BUT ERRED IN DENYING THE *PITCHESS* MOTION.

After Acero was convicted, his counsel learned what the prosecutor had known before the trial started: At the time of trial, Officer Camerano was on administrative leave based on a "sexual allegation" against him and that there was "talk around the [s]tation that . . . Irwindale Police Officer Daniel Camerano and R. . . . were also involved in a sexual relationship." Officer Gonzalez told Acero's investigator "that he informed the Assistant District Attorney prosecuting the case prior to testifying that he had heard talk around the station that Officer Camerano and R. were involved in a sexual relationship." Gonzalez also informed the prosecutor before he testified that Camerano was on administrative leave.

Upon receiving this information, Acero amended his pending new trial motion to allege *Brady* error and made a *Pitchess* motion requesting: "All complaints and statements from any and all sources relating to acts of sexual misconduct between R. Doe and Officer Daniel Camerano and . . . production of the names, addresses, dates of birth, and telephone numbers of all persons who filed complaints, who may be witnesses, and/or who were interviewed by the employing agency or their agents, the dates and locations of the incidents complained of, as well as the date of the filing of such complaints." The court denied a new trial based on *Brady* error and declined to inspect Camerano's records under *Pitchess* as codified in sections 1043 and 1045.

A. The Court Correctly Denied The *Brady* Motion.

Acero contends that the prosecution's failure to turn over its information about Camerano's suspension from duty based on complaints of sexual misconduct and R.'s possible involvement in that investigation as a complaining witness requires reversal of his convictions under *Brady*. We disagree.

The *Brady* decision, *supra*, 373 U.S. at p. 87, requires the prosecutor to disclose to the defense all material exculpatory evidence. This includes impeachment evidence pertaining to prosecution witnesses. (*People v. Jordan* (2003) 108 Cal.App.4th 349, 359.) The prosecution's failure to disclose material exculpatory evidence is ground for reversal. (*In re Brown* (1998) 17 Cal.4th 873, 891.)

Evidence is "material" for *Brady* purposes only if there is a reasonable probability that its disclosure would have changed the result. (*In re Sassounian* (1995) 9 Cal.4th 535, 544.) Thus, Acero had the burden of showing that the undisclosed "'favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" (*In re Brown*, *supra*, 17 Cal.4th at p. 887.) Acero could not make that showing because evidence Camerano was suspected of improper sexual conduct with his troopers was not material and exculpatory of Acero. It had little bearing on the credibility of Camerano's trial testimony. (If Camerano and R. had a relationship it might show that Camerano was biased in her favor but his testimony was duplicative of other testimony). Nor did it bear on R.'s credibility because Acero could only speculate that R. may have made an accusation of sexual misconduct against Camerano and, if she did, whether that accusation was true or false. *Brady* "'does not require the disclosure of information that is of mere speculative value.'" (*People v. Williams* (2013) 58 Cal.4th 197, 259.)

B. The Court Erred In Denying The *Pitchess* Motion For Disclosure Of The Materials Relating To The Investigation Of Officer Camerano Without Examining The Relevant Records.

In *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 14, our high court distinguished the standard for disclosure in *Pitchess* from the standard in *Brady*. "Our state statutory scheme allowing defense discovery of certain officer personnel records creates both a broader and lower threshold for disclosure than does the high court's decision in *Brady* . . . . Unlike *Brady*, California's *Pitchess* discovery scheme entitles a defendant to information that will 'facilitate the ascertainment of the facts' at trial [citation], that is, 'all information pertinent to the defense' [citation]."

A *Pitchess* motion under section 1043, subdivisions (b)(2) and (3) requires the defendant to file a written motion that includes "[a] description of the type of records or information sought," supported by "[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records." "A showing of good cause is measured by 'relatively relaxed standards' that serve to 'insure the production' for trial court review of 'all potentially relevant documents.' [Citation.]" (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016.) To establish good cause, the defendant must present a "plausible scenario of officer misconduct . . . that might or could have occurred." (*Id*. at p. 1026.) A plausible scenario presents "an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Ibid.*) If the trial court concludes the defendant has made a good cause showing for discovery, the custodian of records must bring to court all documents "'potentially relevant'" to the defendant's request. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226.)

Acero's *Pitchess* motion met the requirements of section 1043, subdivision (b). It identified the proceeding in which discovery was sought, identified the party seeking the disclosure, named the peace officer whose records were sought, the agency that had custody and control of the records and named the time and place where the motion would be heard. (§ 1043, subd. (b)(1).) It described the types of records sought. (§ 1043, subd. (b)(2).) Finally, it included affidavits showing good cause for the discovery and setting out the materiality of the discovery to the pending litigation. (§ 1043, subd. (b)(3).)

As to the latter requirement, Acero's counsel filed declarations stating that she had been informed and believed that R. "had a pending sexual allegation against Officer Camerano at the time she testified against my client" and that counsel was "never informed of R.'s allegations against Officer Camerano and did not know they existed

until after the verdict." In a supplemental declaration, counsel stated that Camerano's colleague, Officer Gonzalez, told her investigator that "prior to testifying that [Gonzalez] had heard talk around the station that Officer Camerano and R. were involved in a sexual relationship" and that he had passed this information to the prosecutor in Acero's case.

This information was material to Acero's pending motion for a new trial based on newly discovered evidence. (*People v. Nguyen* (2007) 151 Cal.App.4th 1473, [post-trial Pitchess motion is permitted if it goes to a pending motion for a new trial].) Even if potentially cumulative, if R. had sexual intercourse with Camerano prior to the alleged rape, her statement that she was a virgin at the time of the asserted rape was untrue and evidence of her lie would be relevant under section 782. On the other hand, if the investigation showed that R. falsely accused Camerano of sexual misconduct, evidence of that lie would be relevant under section 782. (*People v. Adams* (1988) 198 Cal.App.3d 10, 18 [reversible error to exclude evidence that complainant had falsely accused other men of raping her].)

Because there was reason to believe that the investigation into Camerano's sexual activities with members of his troop may have involved R. either as a victim or as someone making a false accusation against Camerano, the existence of the investigation was material and the court should have reviewed the relevant information.

Normally the remedy for a *Pitchess* error is to conditionally reverse the judgment and order the trial court to review the file to determine prejudice. (*People v. Gaines* (2009) 46 Cal.4th 172, 176.) Here we reverse the judgment for other reasons but we include this discussion for the court's guidance in any future proceeding.

VI. THE CUMULATIVE EVIDENTIARY ERRORS REQUIRE REVERSAL OF ACERO'S CONVICTIONS.

We need not discuss Acero's remaining claims of error because taken together the evidentiary errors described above require reversal of Acero's convictions.

The prosecution's case depended entirely on R.'s credibility. We acknowledge that the testimony of one witness, if believed, can be sufficient to support a verdict. Here, R.'s credibility was called into question by several witnesses. Her half-sister, Crystal,

testified that R. told her before the alleged rape that she was "having sex" with her stepfather. Crystal, Samantha Martinez and Lorena also contradicted portions of R.'s testimony about events following the Raiders game and Lorena denied that R. was home alone with Acero on the night she claimed he molested her on his bed. R.'s aunt Henrietta testified she saw R. naked below the waist straddling Acero on his bed.

The evidentiary errors we have identified hobbled the jury's ability to evaluate R.'s credibility by excluding evidence that she lied to the police about being a virgin at the time of the alleged rape and that she did not report the alleged rape at her meeting with her doctor the following day. Acero was further prejudiced by the court allowing Deputy Amador to testify that she found R. credible.

Were it not for this collection of errors it is reasonably probable that Acero would have obtained a more favorable result at trial. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.*

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