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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re S.M., a Person Coming Under the Juvenile Court Law. _____ THE PEOPLE, Plaintiff and Respondent, v. S.M. Defendant and Appellant.	B279804 (Los Angeles County Super. Ct. No. TJ22403)

APPEAL from an order of the Superior Court of Los Angeles County, Gibson W. Lee, Judge. (Retired judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Bruce G. Finebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and William N. Frank, Deputy Attorney General for Plaintiff and Respondent.

S.M. appeals from two sustained allegations that he committed a lewd act upon a child, his cousin (the child). S.M. contends that the juvenile court's findings were unsupported by substantial evidence. S.M. also challenges the child's trial testimony, arguing she was incompetent to testify and that the juvenile court erred in admitting her prior out-of-court statements. We affirm.

BACKGROUND

I. Prosecution Evidence

In 2015, S.M. was 16 years old. Erica M., S.M.'s cousin, had a daughter (the child) who was born in 2010. Erica M. and the child lived with Erica M.'s mother from October 2015 to December 2015. S.M. saw the child on three occasions during these months and had been alone with the child during this time.

The extended family had several events around Halloween, including trick or treating. The children wore their costumes on days other than just Halloween and the child wore a pink Sleeping Beauty dress. S.M. visited the

child's home on Halloween. When the child returned to her grandmother's home after trick or treating, she sat on the living room floor, took off her shoes, and used the remote control to turn on the television and watch cartoons. Other family members were also in the room at the time. The child's grandmother was in a different location within the home. After the other family members left the living room, S.M. came into the room from the kitchen. S.M. sat behind the child.[1] He then lifted the child's dress and touched her bare vagina with his hand.[2] S.M. made a circular up and down motion with his hand when he touched her vagina underneath her clothes. This was the first time S.M. had touched her vagina, which the child called her "coo coo." After S.M. finished touching her, the child got up and walked away. The child went to the kitchen, then her grandmother's room, and eventually to the bathroom.

Between Thanksgiving 2015 and Christmas 2015, S.M. and the child were again in her grandmother's living room together.[3] They were also together in the grandmother's bedroom at some point. On at least two occasions, S.M. touched the child's crotch area under her clothes. On one of

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[1] The child also said that they were seated on a bed at the time.

[2] The child also told a detective that she and S.M. were in her grandmother's room, rather than the living room, when this happened.

[3] The child told a detective that this was in the last two weeks of December 2015.

these occasions, S.M. lifted up the child's blouse, unbuttoned her slacks, and stuck his hand underneath her underwear. He made a circular up-and-down motion with his hand when he touched her "private." S.M. inserted his fingers into the child's vagina twice. S.M. also exposed his erect penis to the child at this time. He placed her hands around his penis and made her rub it back and forth.

The day after Christmas 2015, the child's mother was talking to her about hygiene. This included how to clean up her vaginal area after going to the bathroom and how to apply medicated ointment to her vaginal area if a rash developed. At this point, the child, who was visibly uncomfortable and nervous, whispered to her mother that she had something to tell her. Pointing to her vagina, the child said S.M. had touched her there and that this act had taken place around Halloween.

Over the next two days, the child's parents took her to their doctor and then to the police station and reported the sexual abuse to Los Angeles County Sheriff's Deputy Thomas Banuelos. When a detective later asked S.M. whether he had inappropriately touched the child, he apologized and began to cry.

II. Defense Evidence

A. *S.M.'s Testimony*

S.M. testified in his own behalf. He identified the child as his "little" cousin. S.M. claimed he did not go to their grandmother's home "at all" during September, October, and November 2015 and had no contact with the child during

that time. S.M. denied he had been alone with the child in their grandmother's living room in October 2015. He also denied being in their grandmother's bedroom with the child.

S.M. said he never went to any Halloween event at their grandmother's home. He did go to her house on Christmas Eve 2015 but neither Erica M. nor the child were there. S.M. stayed there overnight and went home the next morning to open presents. He said the child was not at their grandmother's home when he left in the morning. S.M. said he returned to their grandmother's home later that Christmas morning with his father. The child arrived at noon. S.M. said he held the child's hand, while she rode his hoverboard outside. Other than that, S.M. said he spent the day with his cousins, James M. and Nicholas,[4] in the their room. S.M. said he apologized to a detective because he felt bad for the child. He believed something had happened to her in 2013, but not in 2015.

B. *Testimony From Other Family Members*

The child's grandmother testified that she babysat the child during October 2015. While S.M. would typically be at her home for holidays like Thanksgiving, she could not recall whether he was there around Halloween 2015. However, S.M. was at her home for Christmas 2015 and played with the child "a lot" that day.

S.M.'s cousin, James M. testified that S.M. was "possibly" at their grandmother's home sometime in October

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[4] The record does not indicate Nicholas's last name.

2015. Although James M. went trick or treating that Halloween with family members, including the child, he did not remember if S.M. was there. While the child slept overnight at their grandmother's home on Christmas Eve 2015, S.M. was not at the house on Christmas Eve. S.M. was at the house on Christmas day, however, as was the child. James did not see S.M. interact with the child that day. Other than that, S.M. was not at their grandmother's house in December 2015.

S.M.'s father took his family, including S.M., to a Halloween night event which lasted several hours. He took S.M. home after that. While the family usually went to Las Vegas for Thanksgiving, S.M.'s father did not remember if S.M. went there in 2015 and said he did not spend Thanksgiving 2015 with S.M. S.M.'s father went to S.M.'s grandmother's home for Christmas 2015 and took S.M. with him.[5] S.M. sat on a couch in the living room, next to other children. Although S.M.'s father left the home after a couple of hours, S.M. remained here S.M.'s father did not see the child before he left.

C. *Expert Witness Testimony*

Dr. Bradley McAuliff, a psychology professor, testified as an expert witness for the defense. Before testifying, Dr. McAuliff reviewed the police reports, a 2013 report of abuse of the child and a 2015 report of abuse. He also

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[5] S.M.'s father also testified that S.M. spent Christmas Eve night at his grandmother's home.

watched the child, Erica M. and Deputy Banuelos's previous testimony.

Dr. McAuliff has testified many times regarding forensic interviewing of children, including the issue of suggestibility. According to Dr. McAuliff, suggestibility looks at the accuracy of a witness and factors that influence a witness's accuracy. These factors include a witness's age, cognitive processes, social pressures (including conformity and "demand characteristic"—making a witness report something that did not happen or was not completely true), interviewer authority, and the effects of direct or repeated questions. Open-ended questions can help minimize the influence of direct questions and the interviewer. Using ground rules during interviews such as an " 'I don't know instruction' " and " 'I don't understand instruction' " can also help minimize an interviewer's influence. The "ignorant interviewer instruction," i.e., "I don't know the answers to my questions," can also minimize an interviewer's authority. Using these protocols can increase the accuracy of a child's answers.

According to Dr. McAuliff, many of the factors that can affect a child's accuracy during an interview were present in this case. By virtue of her age alone, the child fell into the class of witnesses who tend to be "most suggestible" by information contained in direct questions. Another contributing factor was the repeated questioning of the child by Erica M., her grandmother, and the police.

Dr. McAuliff opined that the questioning sequence in this case—Erica M. repeated the allegations to a police officer in front of the child and the officer then began to question the child in front of the mother—may have led the child to "parrot back exactly" what Erica M. had said, instead of her own independent recollection. Dr. McAuliff further opined that a detective's use of an anatomical diagram at the beginning an interview with the child could have led to a false report, as could Erica M.'s promise that the child would get a toy if she answered all the questions at the adjudication hearing.

Dr. McAuliff stated that Erica M.'s initial set of direct questions about specific touches may have contained false information and could have influenced the child's answers. He also opined that a prior report made by the child's father after finding a rash in her vaginal area could have been a false allegation, indicating that this type of suggestibility had occurred before with the child. However, Dr. McAuliff also noted that the child's testimony—requiring leading questions and prompting—was typical for a child her age when talking about sexual abuse. Dr. McAuliff also said that while he had been retained to discuss the literature on suggestibility, he had not specifically opined as to whether the child was suggestible or not.

III. Procedural History

Pursuant to Welfare and Institutions Code section 602, the Los Angeles County District Attorney's Office filed a petition alleging that S.M. committed lewd acts upon a child

(Pen. Code, § 288, subd. (a); counts 1 & 2).[6] S.M. denied the allegations. The juvenile court sustained the petition, and found each allegation to be true. The court further found that the crimes were felonies. The court declared S.M. a ward of court and placed him on home probation on various terms and conditions, including sex offender counseling. S.M. filed a timely notice of appeal.

DISCUSSION

I. Sufficiency of the Evidence Claim

S.M. was charged with committing two lewd acts involving the child—the first occurring between October 1, 2015, and November 30, 2015, with the second occurring between December 1, 2015, and December 30, 2015. According to S.M., however, the evidence failed to establish he was ever alone with the child during these particular time periods or that he had the opportunity to commit the alleged acts. We disagree.

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[6] Under Welfare and Institutions Code section 602, any person who is under 18 years of age when he or she violates any law of this state or of the United States is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court. Pursuant to Penal Code section 288, subdivision (a), any person who willfully and lewdly commits any lewd or lascivious act upon or with the body of a child under 14, "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

A. *Standard of Review*

The standard of review is well settled when determining whether sufficient evidence supported a jury's verdict. "On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Snow* (2003) 30 Cal.4th 43, 66 (*Snow*).)

" ' "[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." ' " (*Snow*, *supra*, 30 Cal.4th at p. 66.) " 'The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the [finder of fact] to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the [finder of fact], not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt." ' " (*Ibid*.)

On appeal, we must accept logical inferences that the finder of fact might have drawn from the circumstantial evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) "Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial

evidence to support the verdict of the [finder of fact]." (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

B. *Merits*

In *People v. Jones* (1990) 51 Cal.3d 294 (*Jones*), the California Supreme Court held that in order to substantiate charges of abuse under section 288, the victim need merely "describe the kind of act or acts committed with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy)"; "describe the number of acts committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping')"; and "describe the general time period in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period." (*Id.* at p. 316, italics omitted.) While additional details "may assist in assessing the credibility or substantiality of the victim's testimony, they are not essential to sustain a conviction." (*Ibid.*) Thus, nonspecific or "generic" testimony, where the victim fails to specify precise date, time, place or circumstance, may be sufficiently substantial to sustain a conviction. (*Id.* at pp. 314–316.)

In short, *Jones*, *supra*, 51 Cal.3d 294 held that as long as the victim specifies the type of conduct involved, its frequency, and that the conduct occurred during the

limitation period, nothing more is required to establish the substantiality of the victim's testimony. Here, the child described the type of proscribed conduct involved as well as the number of acts and the general time period in which the acts took place. S.M. acknowledges that the particular details surrounding a child molestation charge are not elements of the offense and are unnecessary to sustain a conviction.[7] However, S.M. argues, no more than two instances were alleged in this case. Therefore, a higher degree of specificity as to the dates of the alleged acts was required here.

Under this proffered theory, generic testimony is legally insufficient to support a conviction for a discrete act under section 288, subdivision (a). As noted by the Attorney General, S.M. asks us to fashion a new rule and hold that the principle set out in *Jones*, *supra*, 51 Cal.3d 294 should apply with less force when a child molester does not engage in a continuing course of conduct or multiple discrete acts of sexual abuse over "prolonged" period. S.M. cites no authority for this theory. Nor does *Jones* draw any such

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[7] Indeed, "[t]he law is clear that, when it is charged that an offense was committed 'on or about' a named date, the exact date need not be proved unless the time 'is a material ingredient in the offense' (Pen. Code, § 955), and the evidence is not insufficient merely because it shows that the offense was committed on another date." (*People v. Starkey* (1965) 234 Cal.App.2d 822, 827.) Time was not a "material ingredient" in the offenses charged here.

distinction. Indeed, Division Four of our court rejected a similar argument. (See *People v. Matute* (2002) 103 Cal.App.4th 1437, 1444–1445 [rejecting suggestion that generic testimony is acceptable only when defendant is charged under "course of conduct" statute].)

Applying the well settled standard of review, it is clear that sufficient evidence supported the charged offenses. With respect to the first offense, alleged to have occurred between October 1, 2015, and November 30, 2015, the child's testimony provided the details necessary to show the type of conduct involved, its frequency, and that the conduct occurred during the limitation period. According to the child, when she returned home after trick or treating, she sat on the living room floor to watch cartoons. The child's younger cousin and his mother were also in the living room at the time. After they left the living room, S.M. came into the room from the kitchen. S.M. sat behind the child. He then lifted the child's dress and touched her bare vagina with his hand. S.M. made a circular up and down motion with his hand when he touched her vagina underneath her clothes. This was the first time S.M. had touched her vagina.

In deciding the sufficiency of the evidence, a reviewing court resolves "neither credibility issues nor evidentiary conflicts." (*People v. Maury*, *supra*, 30 Cal.4th at p. 403.) Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. (*Ibid.*) Moreover, unless the testimony is physically impossible or inherently

improbable, "testimony of a single eye witness is sufficient to support a criminal conviction." (*People v. Allen* (1985) 165 Cal.App.3d 616, 623.) Thus, by citing evidence contradicting the child's testimony—such as his father's testimony that he and S.M. were at a pumpkin patch on Halloween—and pointing to inconsistencies within the child's testimony, S.M. has asked us to do precisely what we cannot. (See *People v. Misa* (2006) 140 Cal.App.4th 837, 842 (*Misa*) [appellate court cannot reweigh evidence when considering sufficiency of evidence].) Indeed, rather than reweigh the evidence or revisit credibility issues on appeal, we presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Pham* (2009) 180 Cal.App.4th 919, 924–925.) Following these guidelines compels our holding that sufficient evidence supports S.M.'s conviction as to the first offense.

With respect to the second offense, alleged to have occurred between December 1, 2015, and December 30, 2015, the child said that on at least two occasions, S.M. touched her underneath her clothes.[8] On one of these occasions, S.M. lifted up her blouse, unbuttoned her slacks, and stuck his hand beneath her underwear. He made a circular up-and-down motion with his hand when he touched her "private."

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[8] At trial, the child said she did not remember the second offense alleged to have occurred in December 2015. The juvenile court then admitted the child's prior statements to law enforcement under Evidence Code sections 1235 and 1360.

He also inserted his fingers into the child's vagina and exposed his erect penis to the child. He placed her hands around his penis and made her rub her back and forth. Rather than present an alibi defense, this time S.M. admitted he was with the child on Christmas day but denied committing the alleged acts.

On appeal, S.M. again points to inconsistencies within the child's testimony as to when the acts took place as well as testimony from other relatives supporting his claim that the two had only limited contact on Christmas day. Once again, however, we cannot reweigh the evidence or revisit credibility issues. Instead, we presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. These well established rules compel the conclusion that sufficient evidence supports S.M.'s conviction as to the second offense.

II. Witness Competency Claim

After the child testified at trial, S.M. moved to strike her testimony based on her alleged lack of knowledge as well as her personal competence. The juvenile court denied the motion. On appeal, S.M. contends this was an abuse of discretion. We disagree.

A. *Proceedings Below*

Before the child began describing the alleged offenses, she testified that she knew the difference between the truth and a lie. For example, she testified that if someone said her name and it actual was her name that would be "a truth," and if someone said her green toy was "pink," that would be

"a lie." The child said that it would be "bad" to tell a lie because she would "get in trouble." As an example, she said that if she lied to her teacher, she might "lose [her] recess." the child promised to only tell the truth while testifying and not guess when answering a question. Thus, before her testimony began, the juvenile court determined that the child could distinguish between truth and falsity and that she understood she had to tell the truth.

The child then began testifying. On occasion, her answers became more detailed on cross-examination, such as when she described the lewd acts that occurred around Halloween. Sometimes she did not remember a particular detail, however, explaining it was "a long time ago." The child also lapsed into answering, "I don't remember," when asked several pointed questions about how S.M. touched her vagina and what she told a detective about S.M. touching her. Although the child testified on direct examination that she did not remember the December 2015 acts, she did remember telling the prosecutor about S.M. touching her. The child also testified that what she told the detective was the truth.

On cross-examination, the child testified that, during breaks in the proceedings, her mother helped remind her what to remember. "When somebody makes me feel better and I get happy," she explained, "I start to answer the questions and think really hard." The child also testified that if she answered the questions at the adjudication hearing, she would get a toy and get to go to the park.

Immediately after the child testified, defense counsel argued she was not a competent witness. The juvenile court invited written briefing on the matter. At the subsequent hearing on the motion, defense counsel contended that the child's testimony was difficult to understand, that it took a long time to elicit her answers, and that she had answered, "I don't remember" a number of times when testifying. According to defense counsel, this demonstrated the child was either incapable of expressing herself or did not understand her duty to tell the truth. The juvenile court rejected both contentions and denied the motion.

B. *Merits*

As a general rule, "every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter." (Evid. Code, § 700; see Pen. Code, § 1321.) A person may be disqualified as a witness for one of two reasons: (1) the witness is incapable of expressing himself or herself so as to be understood, or (2) the witness is incapable of understanding the duty to tell the truth. (Evid. Code, § 701, subd. (a).) "Inconsistencies in testimony and a failure to remember aspects of the subject of the testimony, however, do not disqualify a witness. [Citation.] They present questions of credibility for resolution by the trier of fact." (*People v. Mincey* (1992) 2 Cal.4th 408, 444.) The party challenging the witness bears the burden of proving disqualification, and a trial court's determination will be upheld in the absence of a clear abuse of discretion.

(*Adamson v. Department of Social Services* (1988) 207 Cal.App.3d 14, 20.)

On appeal, S.M. contends the child was incompetent to testify because she was nonresponsive and noncommunicative during her testimony and lacked sufficient personal knowledge as demonstrated by her inconsistent testimony as well as the rewards she was promised for her testimony.[9] "[A] witness must be allowed to testify unless he or she (1) cannot communicate intelligibly, (2) cannot understand the duty of truthful testimony, or (3) lacks personal knowledge of the events to be recounted." (*People v. Anderson* (2001) 25 Cal.4th 543, 574 (*Anderson*).)

Here, the juvenile court determined that the child was capable of expressing herself and understood her duty to testify truthfully. "But while the first two questions are determined entirely by the court, its role with respect to the issue of personal knowledge is more limited. A witness challenged for lack of personal knowledge must nonetheless be allowed to testify if there is evidence from which a rational trier of fact could find that the witness accurately perceived and recollected the testimonial events. Once that threshold is passed, it is for the jury to decide whether the witness's perceptions and recollections are credible." (*Anderson*, *supra*, 25 Cal.4th at p. 574, italics omitted.) Therefore, it was for the juvenile court to decide whether or

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[9] On appeal, S.M. does not re-raise his challenge to the child's competency on the grounds she did not understand her duty to testify truthfully.

not the child's perceptions and recollections were credible. S.M.'s personal knowledge claim is simply an impermissible invitation to reweigh the evidence. (See *Misa*, *supra*, 140 Cal.App.4th at p. 842.)

Furthermore, S.M.'s reliance on *People v. Delaney* (1921) 52 Cal.App. 765 (*Delaney*) is misplaced. In *Delaney*, the child victim initially testified at the preliminary hearing that the defendant had not abused him. At trial, the child testified that the defendant had in fact abused him. But on cross-examination, the child revealed that his mother had told him to so testify. (*Id.* at pp. 774–775.) S.M. points to the promise of a toy by the child's mother to draw parallels with *Delaney*. However, unlike *Delaney*, there is no evidence that the child's mother told her to say something that did not take place, rehearsed her testimony, or sought to influence her testimony in any other way.

III. Hearsay Claim

Lastly, S.M. claims that the juvenile court erred by admitting the child's out-of-court statements to law enforcement. Specifically, he contends that the statements were improperly admitted as prior inconsistent statements under Evidence Code section 1235 or as a statement describing an act of child abuse under Evidence Code section 1360.[10] S.M. also claims that the statements' admission

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[10] Evidence Code section 1235 allows for the admission of a witness's prior inconsistent statements if "offered in compliance with Evidence Code section 770," which requires that (1) the witness was examined while testifying to give

violated his right to confrontation and due process. We disagree. The juvenile court properly admitted the statements. Thus, their admission did not violate S.M.'s constitutional rights.

A. *Proceedings Below*

The child testified that she first talked to her mother, grandmother and aunt before she went to the police station the next week. The child said that at the police station, a man (Deputy Banuelos) gave her a coloring book and crayons and that her family spoke to the deputy while she colored. The child testified that she spoke to Detective Vital at a later time. During her testimony, the child sometimes denied

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him or her an opportunity to explain or deny the statement; or (2) the witness was not excused from further testimony. Evidence Code section 1360 creates a limited exception to the hearsay rule in criminal prosecutions for a child's statements describing acts of abuse, including sexual abuse. (*People v. Brodit* (1998) 61 Cal.App.4th 1312, 1327 (*Brodit*).) Section 1360 safeguards the reliability of the hearsay statements by requiring that: (1) the court find, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances surrounding the statement(s) provide sufficient indicia of reliability; (2) the child either testifies at the proceedings, or, if the child is unavailable to testify, other evidence corroborates the out-of-court statements; and (3) the proponent of the statement gives notice to the adverse party sufficiently in advance of the proceeding to provide him or her with a fair opportunity to defend against the statement. (*People v. Eccleston* (2001) 89 Cal.App.4th 436, 444–445 (*Eccleston*).)

telling Detective Vital about S.M. touching her or said she did not remember doing so. Other times, however, the child admitted she told Detective Vital that S.M. had touched her.

Based on the child's statements, the prosecutor made an offer of proof that Deputy Banuelos would address the child's prior inconsistent statements. Defense counsel objected because the child had not testified she had interacted with Deputy Banuelos. "I'm not sure what statements [the child] made that were inconsistent," defense counsel noted. "Well, they obviously have to be made," the court answered. "And they obviously have to be inconsistent." The juvenile court overruled the objection, noting that the court could always strike the testimony.

At a subsequent hearing on the issue, the prosecutor argued that Deputy Banuelos and Detective Vital could testify as to the child's prior statements pursuant to Evidence Code sections 1235 and 1360.[11] The prosecutor also argued that the child did not need to deny each and every statement she previously made to Deputy Banuelos or Detective Vital in order for the statements to be deemed admissible. Any confrontation clause claim was precluded

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[11] The prosecutor argued that in a case involving a child witness, when there is a lack of memory, several express denials, and refusal to answer questions, those combined circumstances satisfied Evidence Code section 1235. In the alternative, the statements were reliable and, therefore, admissible under Evidence Code section 1360.

by defense counsel's ability to cross-examine the child, who was subject to recall for further testimony.

With respect to Evidence Code section 1235, defense counsel argued that if the child had been *deliberately* evasive, then her statements to Deputy Banuelos and Detective Vital would be admissible. Defense counsel further argued that the child didn't expressly deny speaking to Deputy Banuelos and instead gave a nonresponsive answer. Defense counsel also claimed the prosecutor had to ask the child about each and every statement that the child had made to Deputy Banuelos before introducing the statements at trial. With respect to Evidence Code section 1360, defense counsel argued that this particular evidence code section did not apply to Penal Code section 288, subdivision (a), violations.[12] The court overruled defense counsel's objections. After Deputy Banuelos testified, defense counsel again objected to the admission of the child's prior statements because the child had not denied making some of the statements, instead responding, " 'I don't remember.' " Defense counsel also renewed his request that the court expressly find the child lied when she said that she did not remember. The court overruled the objections.

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[12] Defense counsel later argued that the child's statements to Deputy Banuelos were not admissible under Evidence Code section 1360 because they lacked sufficient indicia of reliability.

B. *Merits*

We apply " 'the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question,' " such as the admission of prior inconsistent statements under Evidence Code section 1235. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007–1008.) We also review a trial court's admission of evidence under section 1360 for abuse of discretion. (*Brodit*, *supra*, 61 Cal.App.4th at pp. 1329–1330.)

Generally it is true that the testimony of a witness indicating that he or she does not remember an event is not inconsistent with a prior statement describing the event. (*People v. Sam* (1969) 71 Cal.2d 194, 208–210.) However, as the California Supreme Court has noted, justice is not promoted "by a ritualistic invocation of this rule of evidence." (*People v. Green* (1971) 3 Cal.3d 981, 988.) Therefore, "[i]nconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness's prior statement [citation], and the same principle governs the case of the forgetful (or as here, reluctant) witness." (*People v. Burciago* (1978) 81 Cal.App.3d 151, 165 (*Burciago*), quoting *Green*, at p. 988.) Testimony that is a "combination of statements of a lack of memory, together with several express denials, and many instances of refusal to answer a question" constitutes an implicit denial, allowing admission of the witness's prior statements under Evidence Code section 1235. (*Burciago*, at pp. 165–166.)

From our review of the child's testimony, it appears the child avoided the prosecutor's questions when she did not want to talk about the specifics of S.M.'s sexual abuse, especially when it concerned her genitalia. She repeatedly said, "I don't remember," when asked specific questions about how S.M. had touched her vagina and what she told a detective about S.M. touching her vagina. Given that the child had answered many other questions during her testimony, it is unlikely that her claim "I don't remember" was based only on an inability to recall the details of the offense. Indeed, the child denied making other statements to Detective Vital regarding the abuse. This combination of a lack of memory, several express denials and some refusals to answer, constituted an implicit denial warranting admission of the child's prior inconsistent statements. (See *Burciago*, *supra*, 81 Cal.App.3d at p. 165.) Thus, the juvenile court did not abuse it discretion in admitting the statements under Evidence Code section 1235.[13]

The child's statements were also admissible under Evidence Code section 1360.[14] At trial, defense counsel

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[13] Because the child testified at the trial and was subject to cross-examination, the admission of her prior inconsistent statements did not violate the confrontation clause. (See *California v. Green* (1970) 399 U.S. 149, 162; *People v. Zapien* (1993) 4 Cal.4th 929, 955.)

[14] The juvenile court held a hearing on the admissibility of the child's prior statements during the adjudication hearing rather than conducting a pretrial

argued that the child's statements were not sufficiently reliable because the child made the statements in her mother's presence and after the mother relayed to police what the child had already told her. On appeal, S.M. again contends the child's statements were not reliable. Indicators of reliability include: (1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) use of terminology unexpected from a child of that age; and (4) lack of a motive to fabricate. (*Idaho v. Wright* (1990) 497 U.S. 805, 821–822 (*Wright*).) However, "the factors bearing on a statement's reliability are not limited to those specifically enumerated in . . . *Idaho v. Wright*—any factor bearing on reliability may be considered." (*In re Lucero L.* (2000) 22 Cal.4th 1227, 1250.) Additional factors may include the competency of the victim-witness and whether he or she could differentiate between truth and falsehood. (*Eccleston*, *supra*, 89 Cal.App.4th at pp. 446–447.)

As previously noted, the juvenile court concluded that the child was a competent witness who could differentiate between truth and falsehood and did not abuse its discretion in so finding. Other factors demonstrating reliability were also satisfied. With respect to spontaneity, the child

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hearing. Given that this was a bench trial, this was an efficient use of all the resources involved. Thus, S.M.'s first argument—that the juvenile court should have held a pretrial hearing to determine whether the child's statements satisfied the reliability requirement of Evidence Code section 1360—is unavailing.

initiated the discussion with her mother regarding the abuse. When Deputy Banuelos asked the child if she knew why she was at the police station, she answered, "because her cousin touched her private." Although the details of what the child revealed during these conversations varied, the general outline of abuse—particularly S.M.'s attention to her "private parts"—remained constant. We deem this a finding satisfying the "consistent repetition" factor enumerated in *Wright*, *supra*, 497 U.S. 805. (See *Eccleston*, *supra*, 89 Cal.App.4th at p. 446.) Because there was sufficient indicia of reliability, the juvenile court did not abuse its discretion in admitting the statements under Evidence Code section 1360.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.