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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ALVARO ARIZMENDI, Defendant and Appellant.	B276965 (Los Angeles County Super. Ct. No. BA432907)

APPEAL from a judgment of the Superior Court of Los Angeles County. James R. Dabney, Judge. Affirmed.

Richard D. Miggins, 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, Assistant Attorney General, Paul M. Roadarmel, Jr. and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellant of lewd act upon a child under 14 (Pen. Code, § 288, subd. (a)) as alleged in count 2 of the information. The jury was unable to reach a unanimous decision on the same charge in count 1. The trial court declared a mistrial on count 1 and ultimately dismissed the charge after sentencing on count 2. On count 2, the trial court denied probation and sentenced appellant to the low term of three years in the state prison.

Appellant's sole contention in this appeal is that the trial court committed prejudicial error when it admitted expert testimony about Child Sexual Abuse Accommodation Syndrome (CSAAS). Because we find that the trial court did not abuse its discretion in its decision to admit the testimony, or otherwise commit error when admitting the testimony, we affirm the judgment.

FACTUAL BACKGROUND

1. The Charged Offenses

The victim in both counts, T.A., is appellant's daughter. She was born in July 2001 and was 14 years old at the time of trial. K.A., a witness to some of the events testified to by T.A., is also appellant's daughter. K.A. was born in October 2007 and was eight years old at the time of trial. O.E., both girls' mother, was separated from appellant. Both shared custody of the children.

When T.A. was eight, she visited appellant at her half-brother's house in Boyle Heights. On one occasion there, T.A. was watching a movie with K.A., her half-brother, and her two half-sisters. As T.A. left watching the movie to get a glass of water, she passed by appellant, who was lying on the bed in his

room watching television. Appellant asked T.A. to lie down with him. T.A. initially refused, but eventually agreed and lay down next to appellant. Appellant told her to get on top of him.

When T.A. refused, appellant grabbed T.A.'s leg and pulled her on top of him, with her head against his chest. Appellant then held T.A. between her stomach and hips and began moving her up and down. While he did so, appellant's penis was against T.A.'s vagina. She knew what appellant was doing, and it made her feel uncomfortable. She told appellant she needed to get a glass of water. He told her "okay" and let her go.

T.A. returned to the room where her half-siblings and K.A. were watching the movie. She did not tell anyone what had happened because she was scared and did not think anyone would believe her. Later that evening, when her mother came by to drop off clothes, she cried and asked her mother to take her home, but she did not tell her mother what had happened. T.A. was scared that her mother would not believe her and that appellant would say that T.A. was lying.

T.A. continued to visit appellant over the next few years. In June 2013, when T.A. was 13, she and K.A. visited appellant in his one-bedroom apartment in Commerce. Appellant was cooking in the kitchen while T.A. and K.A. were in the bedroom on the bed watching a movie on appellant's phone. At some point, T.A. gave K.A. the phone and began watching television instead. Both girls were lying on their bellies. Appellant came into the room and flipped T.A. over onto her back. He got on top of her, belly to belly, then kissed her neck, cheeks, and face. T.A. felt uncomfortable and tried to get appellant off of her by pinching and biting him. Appellant responded by laughing and pinning her hands against the bed. T.A. asked K.A. for help, but

she did not respond. Appellant used his mouth to lift up T.A.'s shirt, and began sucking on her breast.

T.A. again asked K.A. for help. She also tried to punch and bite appellant to get him to stop. Finally, after T.A. pinched him again, appellant got up and returned to the kitchen. K.A. was still watching television on the phone.

T.A. texted O.E. and asked her to bring clothes. When O.E. arrived, T.A. cried and asked to go home but did not tell her mother what appellant had done. O.E. finally agreed to take both T.A. and K.A. home. On the ride home, T.A. told K.A. not to say anything to O.E. T.A. was afraid her mother would not believe either her or K.A. After the incident, T.A. continued to visit appellant at his apartment.

In November 2014, T.A. finally told her mother about what had happened in June. While at appellant's apartment, T.A. told Yesenia, appellant's girlfriend, that O.E. was showing more love to her boyfriend than to T.A. The next day, O.E. called T.A. at appellant's apartment, angry that T.A. had confided in Yesenia. O.E. came to the apartment to pick up T.A. and K.A. T.A. spoke to O.E. outside of the apartment. O.E. told T.A. she felt betrayed because T.A. spoke to Yesenia rather than her about their "problems." She told T.A. that T.A. could talk to her about anything. O.E. told T.A. that when young, she had a "hard life" and that an uncle had "abused" her.

T.A. then told O.E. about the incident that occurred the prior June. O.E. started crying and got angry. She put T.A. in the car with K.A. and their uncle. O.E. went back into the apartment, got all of the girls' belongings, and returned to the car. The uncle drove them away from the apartment. During the drive, O.E. called appellant on her phone and began yelling at

him; telling him he was stupid and asking how he could have done this to T.A.

They drove to the East Los Angeles Sheriff's Station to report what had happened. T.A. did not want to go and initially refused to get out of the car because she was afraid appellant would go to jail for what he had done. Eventually, she got out of the car and talked to the deputies. She told the deputies about the incident that had happened in Commerce, but initially did not tell them about what had occurred years earlier in Boyle Heights. Later, after the deputies spoke to O.E., she told them about the Boyle Heights incident.

Deputy Joe Carbajal is a deputy sheriff assigned to the East Los Angeles Station. On November 26, 2014, he and his partner were called in from the field to take a crime report at the station. They returned to the station and contacted O.E., who was there with her daughters T.A. and K.A. Carbajal first spoke with O.E. for 10 or 15 minutes. Then he spoke to T.A. T.A. told him about an incident that occurred the day after a family party. The party occurred on July 19, 2014. T.A. told Carbajal that on that day, her father had pinned her hands against the bed and began kissing her cheeks and neck. He then lowered her shirt and began sucking on her right nipple. T.A. also told Carbajal about another incident where her father grabbed her, placed her on top of him, and began grinding up and down against her. Carbajal attempted to determine the date of this incident, but T.A. was unable to provide him with any relevant information.

Carbajal also spoke with K.A. K.A. denied that appellant had ever done anything inappropriate with her, and also denied that she had witnessed him do anything inappropriate with T.A.

Sheriff's Detective Tifani Stonich conducted follow-up interviews of T.A. on multiple dates: at O.E.'s home on November 30, 2014, at the district attorney's office on December 19, 2014, and a pre-trial interview the week prior to trial. During the November interview, T.A. told Stonich about the incident in Boyle Heights. She told Stonich she was eight when it happened. T.A. told Stonich she was watching television with her cousins when she left to get something from her bedroom. When she entered her bedroom, her father was lying on the bed and he asked her to lie down with him. Initially she said no, but eventually relented, lied down next to him, and put her head on his shoulder.

T.A. also described the Commerce incident. She told Stonich she was wearing a tank top when it occurred. T.A. also said she was insecure and felt unloved because of O.E.'s relationship with her ex-boyfriend, Eduardo. She said that after O.E. told her she would have to go live with appellant, she told O.E. about what appellant had done.

Stonich also interviewed K.A. on November 30. K..A. told Stonich she knew Stonich was there to ask about what her dad had done to T.A. When Stonich asked what had happened, T.A. said her father carried T.A. onto the bed, placed her on her back, got on top of her, and then started kissing T.A. on the neck and chest.

During the interview at the district attorney's office, T.A. told Stonich that when the Boyle Heights incident occurred, she was watching television with her step-siblings. She also told Stonich that she told her mother about it right after it happened. Her mother responded by saying she would talk to appellant

about it. She also talked about the Commerce incident, again stating that she was wearing a tank top when it occurred.

Stonich also interviewed O.E. the week prior to trial. O.E. dated the Commerce incident as having occurred on July 20, 2014, since when T.A. disclosed to her the incident, she said it happened the same day as "Danny's party," which occurred on July 20, 2014.

2. Expert Testimony Regarding CSAAS

Jayme Jones is a clinical psychologist, who counsels both victims of child sexual abuse and their families. CSAAS "is a model developed to help explain the behavior of children after they have been sexually abused. It is not a diagnostic tool that can be used to determine whether a child has been abused, but rather is used to explain some common misconceptions associated with child sexual abuse. Jones did not review any reports or transcripts about T.A.'s case. She testified only as to the general concepts of CSAAS and how it can explain behavior often associated with children who have been sexually abused.

The model has five components, not all of which are always present. The five components are (1) secrecy, since sexual abuse ordinarily occurs where there are no witnesses, (2) helplessness, since children are both physically and socially weaker than adults and cannot take themselves out of a bad situation, (3) accommodation, since children typically try to accommodate or find ways of making the abuse tolerable rather than actively disclose it to someone else, (4) delayed disclosure, since children many times will not disclose the incidents for years, and (5) recantation, since children will often recant the disclosure when it creates negative consequences for themselves or their family.

It is not unusual for child victims not to fight back or resist: because an adult is larger than the child, the child's reaction often is to freeze, rather than resist or fight. Also, the first reaction of a child is not to fight back or resist an adult who is someone the child knows and loves. Child victims often continue to feel affection for and love an abusive family member since, in addition to the abuse, the family member often also does nice things for the child. Children tend to focus on the good, rather than the bad.

Based upon studies, approximately 15 to 20 percent of child sexual abuse victims disclose within the first year, and another 20 to 25 percent disclose within five years. Approximately 50 percent of child sexual abuse victims never disclose. The longer the child waits to disclose, the more difficult the disclosure becomes since the child begins to feel like an accomplice in, rather than a victim of, the abusive behavior.

DISCUSSION

Appellant's sole contention on appeal is that the admission of expert testimony on CSAAS rendered defendant's trial unfair. His argument is in four parts. First, he contends that the trial court abused its discretion in admitting the evidence since it was not relevant to any fact disputed in the trial. Second, he contends, based largely on anecdotal evidence and authority from non-California jurisdictions, that the factual basis for allowing CSAAS evidence no longer exists and it should be rejected in its entirety as "junk science." Third, he contends that admission of CSAAS evidence violates due process since it describes behavior that is present whether or not the alleged victim is being truthful about the abuse itself, and thus inevitably is likely to be misused by the jury to corroborate the victim's allegations claiming abuse

occurred. Finally, appellant argues that CSAAS evidence should not be admitted because it violates the standard set forth in the *Kelly/Frye* line of cases.

None of appellant's arguments have merit.

1. The Trial Court Did Not Abuse its Discretion

Expert testimony about CSAAS may not be used to establish that, in fact, a complaining witness has been sexually abused. It is, however, admissible to explain the witness's behavior -- such as delayed reporting of the alleged incident -- when such behavior has been used to attack her credibility. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300; see also *People v. Humphrey* (1996) 13 Cal.4th 1073, 1096; *People v. Mateo* (2016) 243 Cal.App.4th 1063, 1069; *People v. Sandoval* (2008) 164 Cal.App.4th 994, 1001-1002; *People v. Wells* (2004) 118 Cal.App.4th 179, 188; *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745; *People v. Housley* (1992) 6 Cal.App.4th 947, 955-957; *People v. Stark* (1989) 213 Cal.App.3d 107, 116; *People v. Bowker* (1988) 203 Cal.App.3d 385, 390-394; *People v. Gray* (1986) 187 Cal.App.3d 213, 217-220; *People v. Roscoe* (1985) 168 Cal.App.3d 1093, 1097-1100.) Although CSAAS evidence is relevant to rehabilitate the complaining witness's credibility, it may be admitted during the prosecution's case in chief so long as an issue has been raised about the complaining witness's credibility. (*Patino,* at p. 1745; *People v. Bergschneider* (1989) 211 Cal.App.3d 144, 159-160; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 735-736.) The trial court's decision to admit CSAAS testimony, like opinion testimony by qualified experts generally, will be reversed on appeal only upon a showing of a manifest abuse of discretion. (*McAlpin,* at p. 1299.)

The trial court in the immediate case did not abuse its discretion. First, the issue of delayed disclosure, one of the components of CSAAS, was clearly present in this case. T.A. waited five years to disclose the Boyle Heights incident, and over four months to disclose the Commerce incident. K.A., who was physically present during the Commerce incident, initially claimed it did not happen when interviewed by Deputy Carbajal at the East Los Angeles Sheriff's Station, and only admitted that it did four days later when interviewed at home by Detective Stonich. Based upon the nature of this case, as well as the appellant's opening statement and closing argument, the credibility of both girls, or lack thereof, was the focal point of the defense. Under such circumstances, the allowance of CSAAS testimony by the trial court to explain delayed disclosure was not an abuse of discretion.

More importantly, the trial court was extremely cautious in terms of discussing with the jury how this evidence could be used. The court instructed the jury not once, but twice, on the limited use of this evidence. Part way through Dr. Jones's cross-examination, during an exchange between her and defense counsel about what CSAAS does and does not establish, the trial court addressed the jury:

"You can't tell whether it occurred or not based on the fact of this model. This is only here to -- this is for you guys [the jury] -- this is very limited evidence. It's there only to basically discuss things that do – that have occurred, that can occur in the context of child abuse and to disabuse common misconceptions about how people may react to that abuse. That's it. You can't tell from this model or this testimony what happened or use it to determine whether or not it happened."

Later, during the main jury instructions prior to closing argument, the trial court instructed the jury with CALCRIM No. 1193:

"You have heard testimony from Jones regarding child sexual abuse accommodation syndrome. Jones's [sic] testimony about child abuse sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him.

"You may consider this evidence only in deciding whether or not [T.A.'s] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony."

Thus, the trial court instructed the jury not once, but twice, on the limited use to which it could put the CSAAS testimony. The evidence was relevant to issues the jury needed to decide, and there was no likelihood the jury would use it in an impermissible manner. (See *People v. Adcox* (1988) 47 Cal.3d 207, 253 [jurors are presumed to follow the instructions given them].) The trial court did not abuse its discretion.

2. California Law Allows CSAAS Expert Testimony

Appellant contends that a number of other jurisdictions, specifically Kentucky, Tennessee, Pennsylvania, Iowa, and Florida, have determined that CSAAS is not admissible for any reason because of the likelihood of misuse by the jury. (See, e.g., *Newkirk v. Commonwealth* (Ky. 1996) 937 S.W.2d 690, 693; *State v. Bolin* (Tenn. 1996) 922 S.W.2d 870, 873; *Commonwealth v. Dunkle* (Pa. 1992) 602 A.2d 830, 837-838[1]; *State v. Stribley* (Iowa

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[1] In addition to not being dispositive of the current matter, this out-of-state case was abrogated by the enactment of 42 Pennsylvania Consolidated Statutes section 5920, which provides

App. 1995) 532 N.W.2d 170, 173-174; *Hadden v. State* (Fla. 1997) 690 So.2d 573, 577.) He also argues, anecdotally, that jurors have now been watching "Law and Order, Special Victims Unit" for 18 years and over 400 episodes, and thus are now fully aware of the issues surrounding how and when child victims report sexual abuse. Finally, he flatly contends that CSAAS is "junk science" that has been rejected by its creator, Dr. Summit, and the American Psychiatric Association's Diagnostic and Statistical Manual (DSM IV) as a diagnostic tool for determining whether or not sexual abuse has occurred. This last argument, obviously, is beside the point since in California in general, and in this case in particular, such evidence is and was admitted not for that purpose. Moreover, in this case the trial court was careful, on two separate occasions, to so instruct the jury.

Whatever the law of other jurisdictions, we are obliged to follow the law of California and, specifically, the holdings of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.) Our Supreme Court has held that CSAAS evidence, with the limitations imposed by the trial court in this case, is admissible. (See, e.g., *People v. Brown* (2004) 33 Cal.4th 892, 906; *McAlpin, supra,* 53 Cal.3d at pp. 1300-1301.) More recent Court of Appeal cases do not suggest a trend towards the exclusion suggested by appellant. (See, e.g., *People v. Mateo, supra,* 243 Cal.App.4th at p. 1069; *People v. Sandoval, supra,* 164 Cal.App.4th at pp. 1001-

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that, when certain sexual offenses are charged, a qualified expert "may testify to facts and opinions regarding specific types of victim responses and victim behaviors." (See *Commonwealth v. Olivo* (Pa. 2015) 127 A.3d 769, 771-781.)

1002.) We follow the law of California as it is, not as appellant would like it to be, and thus reject this contention.

3. There Is No Violation of Due Process

Next, appellant contends that CSAAS is so generic that it applies whether or not the child has actually been abused, and thus is likely to be misused by the jury to corroborate the fact of the crime rather than to understand some of the common misconceptions about how children react to molestation. This argument overlooks two important points. First, as mentioned above, California law, as interpreted by our Supreme Court, expressly permits CSAAS evidence so long as it is limited in the manner done by the trial court in the immediate case. Second, it overlooks the fact that jurors are presumed to follow instructions and, in this case, the court instructed the jury not once, but twice, on the permissible and impermissible uses of the CSAAS testimony.

The two cases cited by appellant in support of this argument, *People v. Patino, supra,* 26 Cal.App.4th at page 1744, and *People v. Housley, supra,* 6 Cal.App.4th at page 958, do not support his position. In both cases, the Court of Appeal distinguished between the permissible and impermissible uses of CSAAS testimony, and ultimately found that the trial court had properly admitted and limited the testimony. (*Patino,* at pp. 1745-1747; *Housley,* at pp. 954-956.) Both of these cases support, rather than undercut, what the trial court did in the immediate case. We find no error.

4. *Kelly/ Frye*

Finally, appellant contends that the trial court improperly admitted CSAAS evidence because it does not satisfy the

requirements of *People v. Kelly* (1976) 17 Cal.3d 24 and *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.

The *Kelly/Frye* line of cases condition the admissibility of evidence based on a new scientific method upon a showing that the method is generally accepted as reliable in the relevant scientific community. (*People v. Shirley* (1982) 31 Cal.3d 18, 34.) Evidence such as CSAAS is not based upon a new scientific method, but rather upon clinical experience with child abuse victims and the professional literature which evaluates the reactions of such victims. As such, it is not "scientific evidence" subject to the conditions of the *Kelly/Frye* line of cases. (*People v. Harlan* (1990) 222 Cal.App.3d 439, 448-450; *People v. Gray, supra,* 187 Cal.App.3d at pp. 218-220.) Thus, we find no error on this ground

DISPOSITION

The judgment below is affirmed.

SORTINO, J.*

WE CONCUR:

BIGELOW, P. J.

FLIER, 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.