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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RAFAEL MARTINEZ, Defendant and Appellant.	B284509 (Los Angeles County Super. Ct. No. TA141099)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allen J. Webster, Jr., Judge. Affirmed.

Robert H. Derham, 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, Shawn McGahey Webb and Heather B. Arambarri, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Rafael Martinez appeals his jury conviction on five counts of lewd acts upon a child under the age of 14 years (Pen. Code, § 288, subd. (a))[1] and one count of oral copulation or sexual penetration upon a child under the age of 10 years (§ 288.7, subd. (b)). The jury also found that he had committed lewd acts upon multiple victims, a special circumstance under the One Strike Law. (§ 667.61, subd. (e)(4).) Appellant contends that he suffered prejudicial error when the trial court admitted the testimony of a sheriff's deputy regarding "grooming" practices of child molesters, which he alleges was improper expert testimony and inadmissible profile evidence.

We conclude that although the trial court erred by allowing expert testimony regarding "grooming" as lay opinion testimony, the error was harmless. Accordingly, we affirm appellant's conviction and sentence.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged in six counts with committing the following acts against minors C.P., Y.R.1 and Y.R.2:

- Counts 1 and 2 (C.P.): lewd acts upon a child, on or between July 1, 2011 and May 1, 2013;
- Count 3 (C.P.): lewd act upon a child, on or about May 10, 2013;
- Count 4 (Y.R.2): lewd act upon a child, on or about June 16, 2016;
- Count 5 (Y.R.1): lewd act upon a child, on or between May 1, 2015 and June 16, 2016;

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[1] All further statutory citations are to the California Penal Code, unless otherwise stated.

- Count 11 (Y.R.1): oral copulation or sexual penetration with a child 10 years old or younger, on or about May 27 2016.[2]

We summarize the allegations and proceedings below.

A. *Y.R.2 and Y.R.1*

In 2016, eight-year old Y.R.2 and her six-year old sister Y.R.1 lived in a house in Compton with their parents and brother. Appellant sold and installed residential water filtration systems in the neighborhood, and would often rest at the house and play games with the girls.

At trial, Y.R.1 testified that appellant touched her one time while they were seated outside on a sofa playing Candyland. Appellant had asked Y.R.2 to get him some water and, when she left, he touched Y.R.1 in her vaginal area with his hand. Y.R.1 could not remember whether appellant touched her inside or outside her "middle part," but at the preliminary hearing, she had testified that appellant had placed his hand inside her "middle part" and moved it around.[3] Appellant told Y.R.1 not to tell anyone about the touching.

Y.R.2 testified that on June 17, 2016, she was playing hide and seek with appellant outside her house. While she was hiding under sofa cushions, with appellant hiding next to her, he touched her vaginal area outside her clothes and rubbed her

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[2] At the preliminary hearing, counts 6-10 involving Y.R.1 were dismissed due to insufficient evidence. Y.R.1 testified that appellant had touched her one time on one day.

[3] This incident formed the basis of both counts 5 and 11. The deputy sheriff who interviewed Y.R.1 also testified that she told him "she could feel [appellant's] finger go inside."

breasts with his hand.[4] Y.R.2 told her mother about the touching the same day it occurred, in the presence of Y.R.1, who then told her mother that appellant had also touched her. The next day, Y.R.2's mother filed a police report, and the girls were interviewed in person by sheriff's deputies. The girls identified appellant in a photographic six-pack as the person who touched them. Appellant was arrested in August 2016.

B. *C.P.*

C.P. was 13 years old at the time of trial. She testified that the "plumber" who was installing alkaline water in the sink touched her three different times, twice when she lived on New England Street and once when she lived on Green Avenue. C.P. lived with her parents and brothers, and she saw the man periodically between 2011 and 2013. The first time he touched her was in July 2011, when he was installing the water system in the New England Street house. As C.P. observed him at work in the kitchen sink, with no one else present, he touched her buttocks with his hand. He returned sometime later to service the filter and collect his payment. C.P.'s mother gave her money to pay him. As C.P. stood outside at the gate to pay him, he touched her breasts. The third incident was in May 2013, when the man reinstalled the filtration system from the New England Street house to the Green Avenue house. C.P. was briefly alone in the house during the move, and the man went near or into her bedroom and touched her buttocks with his hand. C.P.'s father

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[4] At the preliminary hearing, Y.R.2 testified that appellant touched her "middle parts," but circled her buttocks in a diagram. At trial, Y.R.2's mother testified that Y.R.2 said appellant had touched her vaginal area under her clothing and told her not to tell anyone.

testified that he observed C.P. that day acting unusual, hiding in her bedroom closet and nearly crying when her parents left because she did not want to be alone. C.P. did not immediately tell anyone about these three incidents.

In September 2013, C.P. told her brother about the touching, and he encouraged her to tell their mother. The next day, C.P. told her mother, who immediately reported the touching to the police. C.P. was interviewed by police officers. She described the man who touched her as that "person that was installing the alkaline water system."[5]

C.P.'s father identified appellant as the man who had installed the water filtration system at the New England Street house and reinstalled it in the Green Avenue house. Police officer Peter Cabral also testified, based on the initial report he took from C.P. and her mother in October 2013. C.P. had reported the same three incidents to him, but had said the second incident happened in the kitchen, where appellant grabbed her buttocks and fondled her breasts. Officer Cabral also testified that the third incident occurred in C.P.'s bedroom, where C.P. had gone to avoid seeing the man once she recognized him from the previous two incidents. He said C.P. told him that the man

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[5] C.P. did not identify appellant in a photographic six-pack shown to her in April 2014, a year after the last incident. Nor did she identify him at the preliminary hearing in November 2016. During trial, C.P. described the man who touched her as "kind of old," probably in his "mid 30s," although he had more wrinkles and looked older than her 47-year old father. Ultimately, C.P. identified appellant during trial as the man who touched her, but acknowledged it was based on her recognition of him from the photographic six-pack she was shown during trial.

walked into her bedroom as she was lying in bed, fondled her breasts and buttocks, and told her not to tell anyone.[6]

C. *Grooming Testimony*

Detective Alfred Jaime of the Los Angeles County Sheriff's Department, the lead investigator in the charges involving Y.R.1 and Y.R.2, testified for the prosecution.[7] Detective Jaime had been a sworn peace officer for 29 years and had been working in the Special Victims Bureau (SVB) for five years. He had received training in sexual assault investigations from the sheriff's department and various coaching organizations, and had handled approximately 150 cases involving sexual offenses against children between 2013 and trial.

Defense counsel objected that Detective Jaime had not been designated as an expert, arguing that the discovery statute required the prosecution to provide notice of the anticipated testimony, the expert's qualifications, and any relevant reports. (§ 1054.1.) At sidebar, the prosecutor explained her intention to question Detective Jaime regarding the narrow topic of grooming. The trial court ruled that Detective Jaime could give opinion testimony as a lay witness, and cited Evidence Code 353 as the basis for allowing police officers to provide lay opinion testimony.[8]

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[6] Although it is unclear from the record to what extent C.P.'s case was investigated after her mother filed a police report in October 2013, no charges were filed until after Y.R.2 and Y.R.1's mother filed a police report in June 2016.

[7] The Los Angeles Police Department was assigned to investigate C.P.'s case.

[8] California Evidence Code section 353 addresses the erroneous admission of evidence. It states that a verdict or

The judge further narrowed the scope of the examination to "what [Detective Jaime] believes grooming is or what he thinks people do in terms of trying to basically gain someone's confidence," based on his experience and training. The prosecution submitted that "it is Detective Jaime's experience as a detective that separates him from the average person in terms of his familiarity with this pattern of behavior," and "that technically is an expert opinion." However, the court found the subject of grooming to be within the "common knowledge" of a police officer with similar training, and reiterated: "I'm allowing him basically to indicate what his job title was, [and] what he does; and he can give his opinion; and that's it." Detective Jaime could not discuss child psychology or answer any hypotheticals.

Detective Jaime explained "grooming" as follows:

> "Grooming is a term that involves where a subject will allow himself to, you know, become closer to a family or a certain individual, whether it be a child or an adult. They will figure out ways to infiltrate that family, develop a relationship, sort of test their boundaries to see what they can and can't get away with, develop, you know, some secrets. They will exchange some personal information with the adults. The will gain the trust of the child where they'll form a secret bond, like they won't tell secrets, or they will share secrets, they won't tell anybody what they do. That's what they do. It's a process where they're seeing how far they can get away with and what they can achieve."

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finding will not be set aside, nor a judgment or decision reversed, because of the erroneous admission of evidence, unless a proper objection or motion to strike was timely made, and the admitted evidence is found to have resulted in a miscarriage of justice.

He further opined regarding the purpose of grooming: "The behavior itself is predatory in nature in that they are looking for . . . a family or a child that's in need of maybe some attention, maybe fill a void, maybe they can be viewed as a second family member, you know, a distant family member. And it's to gain access to the child and ultimately gain the opportunity through that access to sexually molest them."

The prosecution did not ask Detective Jaime about appellant's specific grooming practices. Nor, during cross-examination, did defense counsel ask any questions regarding grooming. The jury was properly instructed on evaluating the weight and credibility of lay witness opinion, specifically, that it was not required to accept such opinion as true or correct.

D. *Appellant's Testimony*

Appellant was 73 years old at the time of trial, and denied the charges against him. He denied being alone with C.P. at the time he installed the filtration system in the New England Street house, because her entire family was in the kitchen. Furthermore, as his invoice showed, his first contact with C.P.'s family was not in July, but in November of 2011. He denied ever accepting money from C.P., although he recalled her brother paying him once. When he reinstalled the filtration system in the Green Avenue house, he was never alone with C.P. and did not interact with her. Appellant also testified that C.P.'s parents were not satisfied with the filtration system and argued with him about it, suggesting a possible motive for the accusations against him. However, they ultimately paid him for all his work.

Appellant conceded that he visited Y.R.2 and Y.R.1's house frequently, sometimes once or twice a week, since his first contact with them in July or August of 2015. He testified that he played

with the girls and taught them how to sing and dance at the request of their mother. He also explained that it was important to his business to maintain good relationships with all the members of a family, including the children. He had a friendly relationship with Y.R.1 and Y.R.2, like the one with his own grandchildren. He denied sexually molesting either girl.

E. *Verdict*

The jury found appellant guilty of counts 3, 4, and 5, and acquitted him of counts 1, 2, and 11. The jury also found true the special circumstance allegation. The trial court sentenced appellant to consecutive terms of 15 years to life on counts 3 and 4, and imposed a concurrent 15-year term on count 5. Appellant timely appealed.

DISCUSSION

A. *Standard of Review*

A trial court's evidentiary rulings during trial are reviewed for an abuse of discretion, and an abuse of discretion occurs when the trial court makes an error of law. (*People v. Yates* (2018) 25 Cal.App.5th 474, 484-485.) A trial court's ruling "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; see Cal. Const., art. VI, § 13.) A "miscarriage of justice" is shown where it appears "reasonably probable" that the appellant would have achieved a more favorable result in the absence of error. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

B. *The Trial Court Erred in Admitting Expert Testimony as Lay Opinion.*

Witnesses must ordinarily testify to facts, not opinions, but an exception exists for expert witnesses and nonexperts, or lay, witnesses in limited situations. (*People v. Williams* (1992) 3 Cal.App.4th 1326, 1332.) "Lay opinion testimony is admissible where no particular scientific knowledge is required, or as 'a matter of practical necessity when the matters . . . observed are too complex or too subtle to enable [the witness] accurately to convey them to court or jury in any other manner.' [Citations.]" (*People v. Williams* (1988) 44 Cal.3d 883, 915.) "A lay witness may offer opinion testimony if it is rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony." (*People v. Leon* (2015) 61 Cal.4th 569, 601; Evid. Code, § 800.)

Expert opinion, on the other hand, must be "(a) [r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and (b) [b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates . . . ." (Evid. Code, § 801.) A witness may still be designated an expert when testifying on a subject "about which jurors are not completely ignorant," but is still sufficiently beyond common knowledge. (*People v. Lindberg* (2008) 45 Cal.4th 1, 45.)

In child molestation cases, police officers have testified as expert witnesses based on their training and experience. (See *People v. Dunnahoo* (1984) 152 Cal.App.3d 561, 577 (*Dunahoo*) [police officers' testimony as to why molested children may find it

difficult to report the abuse to adults was proper expert opinion because "the subject of child molestation and more particularly, the sensitivities of the victims" was sufficiently beyond common experience].) Courts have recognized that testimony regarding the subject of "grooming" in child molestation cases falls within the ambit of admissible expert witness testimony. (See *Simonton v. Evans* (S.D.Cal., Feb. 23, 2009, No. 07cv0431 J LSP) 2009 U.S. Dist. LEXIS 13599, at *15-16 ["the California Court of Appeal[] [that reviewed the petition below] noted that the [detective's] testimony [regarding grooming] did not concern a subject within common knowledge . . . . Petitioner has not shown that the expert's brief testimony regarding 'grooming' was so prejudicial as to render his trial fundamentally unfair. His testimony on the subject of grooming explained the general modus operandi of child molesters. The Ninth Circuit has held that experts may 'testify as to the general practices of criminals to establish the defendants' modus operandi.' [Citation.]"]

As Detective Jaime testified regarding grooming based on his training and experience, his testimony was improperly characterized as lay opinion. The grooming practices of child molesters and the sensitivities of the victims are subjects sufficiently beyond the realm of common knowledge that an expert opinion would be of assistance to the factfinder, as recognized by *Dunahoo* and *Simonton v. Evans*. As the prosecutor acknowledged, it was Detective Jaime's "experience as a detective that separates him from the average person" and qualified him to opine on the practice of grooming, asserting that "technically [this] is an expert opinion."[9] Thus, the trial court

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[9] Evidence Code section 353, cited by the trial court and quoted above, does not address opinion testimony, and the court's

erred in characterizing Detective Jaime's testimony as lay opinion. Nevertheless, as explained below, we conclude the admission of such testimony did not prejudice appellant.

C. *The Error was Harmless.*

Under *Watson*, an appellant who has established state-law error must demonstrate that "it is reasonably probable that a result more favorable to [the appellant] would have been reached in the absence of the error." (*Watson*, *supra*, 46 Cal.2d at p. 836; see *People v. Pearson* (2013) 56 Cal.4th 393, 446 [applying *Watson*'s harmless error analysis to erroneous admission of expert testimony].) Appellant argues that in light of the minors' "uncorroborated," "inconsistent," and "unreliable" testimony, Detective Jaime's testimony "persuaded the jury" of appellant's guilt and was thus prejudicial. We disagree.

In light of the brief, limited nature of Detective Jaime's testimony, and the strong evidence of appellant's guilt, we are not convinced that a different verdict would have been reached in the absence of this harmless error. The length and scope of improperly admitted testimony, as well as the nature of other evidence presented and relied upon, are relevant considerations in discerning error. (See *People v. Benavides* (2005) 35 Cal.4th 69, 91 (*Benavides*) [finding harmless error in admission of evidence with little probative value "[i]n light of the strong evidence against defendant"]; *People v. Medina* (1990) 51 Cal.3d 870, 887 [finding no error in allowing deputy sheriff to provide lay testimony regarding defendant's state of mind, considering the "nature of the other evidence" presented and the "limited

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observation that the subject of grooming may have been within the "common knowledge" of a police officer with similar training is not the standard imposed by Evidence Code section 801.

responses elicited" from him]; *Simonton v. Evans*, *supra*, 2009 U.S. Dist. LEXIS 13599, at *18 [brief testimony of child abuse detective which did not specifically address defendant but only referred to general grooming practices of criminals was not prejudicial].) Here, Detective Jaime's testimony was brief and limited in scope. He testified only to the definition of grooming and its general purpose in furthering sexual molestation, without discussing appellant's particular grooming practices, or opining on whether appellant's conduct conformed to the pattern of a child molester. Defense counsel did not raise the subject of grooming in his cross-examination. Furthermore, the jury was properly instructed on its discretion to disregard all or part of Detective Jaime's testimony based on its assessment of weight and credibility. It is not "reasonably probable" that this brief, limited testimony "persuaded the jury" of appellant's guilt. Appellant argues that Detective Jaime's description of general grooming practices such as befriending families, conversing with parents, and playing games with children led jurors to the conclusion that appellant must be a child molester, because he had engaged in these acts. However, during appellant's own testimony, he explained his attempts to build rapport with all members of a family because of the importance of such relationships to the success of his business. The trial court's error caused no discernible prejudice to appellant's defense.

Even without Detective Jaime's testimony, there was strong evidence of appellant's guilt to convict him on the three counts. The minors testified consistently about how appellant gained access to their homes by installing or selling water filtration systems; each alleged that he had touched them inappropriately on their breasts, buttocks or vaginal area in a

manner that did not seem accidental and made them feel uncomfortable; and each recalled that he had told them not to report the touching. Furthermore, each minor reported the touching to their respective mothers, who then reported it to the police. Y.R.2 and her mother confirmed Y.R.1's account that appellant asked Y.R.2 to get water while they were playing Candyland, and Y.R.1 and her mother confirmed that Y.R.2 played hide-and-seek with appellant. The parents and police officers who testified at trial generally corroborated the minors' allegations, including the timeline and location of events, the nature of the families' relationship with appellant, the manner of the touching, and how it was reported to them. They identified appellant as the person the minors accused of molesting them. The jury evaluated the evidence and found each of the minors credible; it convicted appellant of three counts of lewd conduct upon C.P., Y.R.2 and Y.R.1. Although the most serious charge, count 11, was dismissed, the underlying act committed against Y.R.1 formed the basis of appellant's conviction on count 5. Thus, it is not "reasonably probable" that the jury would have reached a different verdict in the absence of Detective Jaime's brief testimony.

Appellant also argues that the trial court's evidentiary error violated his constitutional rights by denying him effective assistance of counsel, the right to confrontation, and due process. As our Supreme Court has held, generally "violations of state evidentiary rules do not rise to the level of federal constitutional error." (*Benavides, supra,* 35 Cal.4th at p. 91, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70; see *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1175, citing *Dowling v. United States* (1990) 493 U.S. 342, 352 ["the scope of the federal due process clause

does not accomplish the constitutionalization of every issue arising under the applicable rules of evidence; to the contrary, the category of evidentiary infractions which violate due process will be construed narrowly."].) Even if appellant could establish that his constitutional rights were violated by the admission of expert testimony, for the reasons discussed above, he fails to establish prejudice. (See *Blanco*, *supra*, at p. 1176 [applying harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 22-24 to arguable constitutional error]; *People v. Davis* (1995) 10 Cal.4th 463, 506 [finding no prejudice even if defendant could establish counsel's deficient performance].) Appellant's claim of prejudice is also refuted by the trial court's jury instructions on the weight and credibility of lay witness opinion. (*Davis,* at p. 506.) Accordingly, the trial court's evidentiary error was harmless.[10]

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[10] Because we conclude that Detective Jaime's expert testimony caused appellant no prejudice, we need not address his contention that the testimony was inadmissible profile evidence.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

WILLHITE, J.

MICON, J.*

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