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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JUAN MANUEL ARRIAGA, Defendant and Appellant.	G042636 (Super. Ct. No. 07NF2210) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Kevin Vienna, Deputy Attorney General, for Plaintiff and Respondent.

Juan Manuel Arriaga appeals from a judgment after a jury convicted him of two counts of oral copulation with a child under 14 years of age. Arriaga argues the trial court erroneously admitted a photograph of his penis because it was unduly prejudicial. His contention has no merit, and we affirm the judgment.

FACTS

John Doe's family was close to Arriaga, and Doe's father worked with him at a local auto shop, One Stop Under Car (the Auto Shop), for several years. By 2002, Arriaga was visiting Doe's home at least three times a week, and the two had grown close enough that Doe referred to Arriaga as "uncle," despite not being related by blood. At age 12, Doe started working for Arriaga at his part-time business selling sportswear at a local swap meet.

The next year, during an afternoon commute between Doe's home and the swap meet, Arriaga pulled his truck to the side of the road and began touching Doe's clothed leg near his penis. At the swap meet that evening, Arriaga asked Doe if he liked men or "ever [had] a boyfriend," to which Doe replied he had not been involved in any sexual relationships, but he "was attracted to men." Two days later, Arriaga began rubbing Doe's penis "skin-to-skin" at the swap meet, stopping only when customers came to his stall. On the ride back to Doe's house that night, Arriaga asked Doe if he would be interested in performing oral sex, to which he responded, "I don't know."

Some days later, Arriaga and Doe closed the swap meet booth at midnight and drove to the Auto Shop. Arriaga suggested that he and Doe "were going to try something new." Doe hesitated, but when Arriaga offered him $10, he agreed to follow Arriaga to a small office on the side of the shop. Arriaga removed his pants and masturbated with one hand while "trying to do the same thing" to Doe's penis. This continued until Arriaga positioned his erect penis near Doe's face. Unsure of what to do, Doe placed his lips around Arriaga's penis. He tried to pull away after finding "it tasted nasty," but Arriaga told him to "just keep going." Arriaga grabbed Doe by the neck and

forced his head into position while Arriaga gyrated back and forth until he ejaculated in Doe's mouth.

This "routine" continued for eight months. Arriaga would rub Doe's penis at the swap meet, then they would engage in oral sex at the Auto Shop on their way home. During this time, Doe noticed Arriaga had "a mole under the head of his penis" that was "almost the size of a freckle" but "a little bit popped up." When questioned about the mole, Arriaga told Doe it was not a disease, but "it made the women feel better."

Sometime after his 16th birthday, Doe told his mother of Arriaga's actions. Doe's mother informed the police, and Arriaga was arrested.

An information charged Arriaga with five counts of unlawful participation in an act of oral copulation with a person under 14 years of age and more than 10 years younger than defendant, though three counts were later dismissed. (Pen. Code, § 288a, subdivision (c)(1).)

Before trial, the prosecutor moved for a proceeding *in limine* to discuss the inclusion of a clinical photograph of Arriaga's penis as demonstrative evidence of the mole's size and location. The prosecutor suggested the photograph "may become a significant piece of evidence in this case," but because of its subject matter, it should be "put into a sealed envelope . . . and provided to the jury in that sealed envelope, so that if they determine it is necessary, important and relevant to their analysis of the case, it would be available to them." When asked if he had any objections, Arriaga's defense counsel said he guessed he "could make [an Evidence Code section 352] argument, because it is over-kill . . . ." The trial court then determined, "I would think the photograph is admissible. It's pertinent because the obvious argument is, if [Doe] didn't see [Arriaga's penis], how could he describe it? If it is something that is very common, generic, or non-unique, it is a whole different universe, than if it is either specifically described or has uniqueness. So, its actual appearance is relevant, so I'll allow it." The

trial court found the probative value—that Doe could not have described Arriaga's penis without having personally seen it—outweighed any undue prejudice that would befall Arriaga should the photograph be admitted.

The trial court admitted the photograph into evidence during the testimony of Jerry Von Gries, the investigating officer who ordered the photograph taken. The prosecutor handed the photograph to Von Gries and asked him what was depicted. Von Gries responded, "That's [Arriaga's] penis" and the photograph was returned to its envelope. When the trial court reviewed the evidence, the prosecutor placed the photograph into an unsealed envelope, "so [the jury] can take it out if they wish to do so." The record is silent as to whether the jury viewed the photograph.

Arriaga testified on his own behalf. Arriaga denied ever touching Doe or engaging in any sexual relations with him.

The jury convicted Arriaga of two counts of oral copulation with a person under the age of 14. The trial court sentenced Arriaga to six years in prison.

DISCUSSION

Arriaga argues the trial court improperly admitted the photograph of his penis because it was offensive, highly inflammatory, and unduly prejudicial. The Attorney General contends Arriaga forfeited appellate review of the issue, the trial court properly admitted the photograph, and any error was harmless. We conclude Arriaga preserved appellate review of the issue, but his claim has no merit.

A. Preservation of Issue

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike evidence that was timely made and so stated as to make clear the specific ground of the objection or motion . . . ." (Evid. Code § 353.) A party must object to the admission of evidence to preserve the issue for appellate review.

Defense counsel objected to the photograph during *in limine* proceedings, stating, "I guess I could make [an Evidence Code section 352] argument, because it is over-kill." Arriaga's indirect objection preserved the issue for appellate review. Thus, we will address the merits of Arriaga's claim.

B. Relevance and Prejudicial Effect

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code § 210.) "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . ." (Evid. Code § 352.) Evidence Code section 352 thereby gives the trial court wide latitude to balance the evidence's probative value against the risk of undue prejudice. (*People v. Crittenden* (1994) 9 Cal.4th 83, 133-134.) As a result, the trial court's "exercise of . . . discretion will not be disturbed on appeal unless the probative value . . . is clearly outweighed by [its] prejudicial effect." (*People v. Howard* (2008) 42 Cal.4th 1000, 1023.)

Applying the deferential abuse of discretion standard, we conclude the trial court properly admitted the photograph of Arriaga's penis. The mole on his penis was a continual subject during testimony, and both Arriaga and the prosecutor devoted considerable time questioning Doe, Doe's mother, and Von Gries about its presence, location, and description. The photograph at issue, depicting the mole, was relevant at trial. The photograph was taken in a clinical style and, given the extent of Doe's testimony surrounding Arriaga's acts, could not have incited emotions against Arriaga. We too find the photograph's probative value outweighed the risk of undue prejudice.

With respect to the photograph's probative value, photographs play a valuable role in the modern courtroom, helping jurors visualize and corroborate testimony. Here, there were few other ways to support Doe's statements. While

Von Gries and Doe's mother merely mentioned the mark on Arriaga's penis, Doe's testimony was far more detailed: disclosing the shape, size, color, and even the size of the mole. Without the photograph, it would have been difficult for the jury to determine Doe's truthfulness given the variance between the testimony. Further, it is inconsequential Arriaga "[did not] plan on attacking [Doe's] description of the mole" when he instead focused on damaging Doe's credibility. The attack forced the prosecutor to reinforce Doe's testimony and fueled the need to verify Doe's truthfulness through the photograph. With Doe's credibility dependent on how he could describe the penis without having seen it himself, the photograph became the only reliable way the jury could properly assess whether Doe was truthful on that issue. Because the description of Arriaga's penis was an ongoing subject during the trial and Doe could not otherwise prove he was testifying truthfully as to the penis' description, the photograph was highly probative.

Probative value is only the first half of the equation, and we must now consider whether admission of the photograph was unduly prejudicial. According to Arriaga, the photograph was "highly inflammatory," "offensive," "extremely prejudicial," and "tipped the balance in the prosecution's favor." We remind Arriaga prejudice and undue prejudice are not synonymous, and shifting the balance in one party's favor is not itself a call for exclusion. (*People v. Zapien* (1993) 4 Cal.4th 929, 958 [stating Evidence Code section 352 is not designed to prevent the "damage to a defense that naturally flows from relevant, highly probative evidence"].) Instead, "evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information . . . to reward or punish one side because of the jurors' emotional reaction. . . .' [Citation.]" (*People v. Escudero* (2010) 183 Cal.App.4th 302, 310.)

Arriaga asserts the photograph caused an "improper inference" or "negative emotions," but never clarifies exactly what the jury could have improperly inferred or

negatively emoted. Given the depth of Doe's testimony which enumerated, in great detail, Arriaga's many sexual acts, we cannot accept that a clinical photograph of Arriaga's penis, in comparison to what was described, is unduly prejudicial. If the jury was going to form a negative opinion of Arriaga, it would have done so during Doe's testimony. Doe graphically recounted times when Arriaga masturbated, forced oral sex, ejaculated into Doe's mouth, sodomized Doe, and molested Doe, such that by the time the photograph could even be viewed by the jury—more than a day later, during deliberations—a reasonable jury would have digested Doe's testimony and been prepared to view a comparably innocuous photograph. Even if the clinical photograph could be considered obscene or discomforting, our state's history is replete with cases allowing images that were certainly more unpleasant than a photograph depicting the size and location of a mole on a penis. (*People v. Burney* (2009) 47 Cal.4th 203, 243 [permitting a photograph of a bleeding gunshot wound on victim's head]; *People v. Lewis* (2009) 46 Cal.4th 1255, 1281-1284 [permitting numerous photographs of a blood-splattered sexual assault victim]; *People v. Howard* (2008) 42 Cal.4th 1000, 1023 [permitting a very large photograph of a hemorrhaging vagina]; *People v. Farnam* (2002) 28 Cal.4th 107, 185-186 [permitting photographs displaying more than seventy wounds on a torture victim's body].)

Arriaga also encourages us to find the photograph should be excluded because it is cumulative, or "over-kill" as he described it during trial. We disagree. Photographs should not be "excluded as cumulative if the facts for which the photographs are offered have been established by testimony." (*People v. Price* (1991) 1 Cal.4th 324, 441). The photograph here was offered after Doe, his mother, and Von Gries testified about the mole on Arriaga's penis. Additionally, Arriaga had confronted Doe's credibility, so the need for the jury to determine if Doe was testifying truthfully was crucial. Since the only other descriptions of Arriaga's penis were vague, the jury needed the opportunity to view the photograph to determine if it matched Doe's description.

That is enough to establish the photograph should not have been excluded. Thus, the trial court properly admitted the photograph of Arriaga's penis.

DISPOSITION

The judgment is affirmed.

O'LEARY, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.