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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ULISES ORONA, Defendant and Defendant.	B248869 (Los Angeles County Super. Ct. No. BA383879)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Sam Ohta, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Defendant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan S. Pithey, Supervising Deputy Attorney General, Shawn McGahey Webb, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Ulises Orona (defendant) was convicted of committing a lewd act upon a child under 14 (Pen. Code, § 288, subd. (a)[1]). On appeal, defendant contends that the trial court erred in failing to instruct the jury on unanimity. We affirm the judgment.

BACKGROUND

A. Factual Background[2]

1. Prosecution Evidence

J.S. was 10 years old at the time of trial. Defendant is her uncle.

In 2011, when J.S. was eight years old, her family moved to Los Angeles. For the first six months, J.S.'s family lived in a two-bedroom apartment with defendant's family. J.S.'s family stayed in one bedroom and defendant's family stayed in the other bedroom. J.S.'s parents worked at night and during that time, defendant, and her aunt and cousin, took care of J.S. and her sister. When defendant would take care of J.S. and her sister, they would sleep in defendant's bed.

One night, while J.S.'s parents were working, defendant "tickle[d] [J.S.] in the butt." J.S. told her mother about it, but her mother did not think "anything bad about it because [J.S.] said she had been playing with [defendant]."

On another night, defendant touched J.S.'s vagina with his hand. J.S, her sister, aunt, and cousin were sharing a bed, and when J.S.'s sister, aunt, and cousin were asleep, defendant slipped his hand through the top of J.S.'s pajama pants and touched her vagina. J.S. moved defendant's hand and "shooed" him away.

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1 All statutory citations are to the Penal Code unless otherwise noted.

2 The specific facts pertaining to the molestation of C.H. (count 2), for which defendant was acquitted, are omitted because they are not relevant to the appeal.

J.S. told her mother that defendant had touched J.R.'s vagina. J.S's mother was angry and said that they would move out of the home as soon as they could.

J.S.'s mother did not call the police because she was concerned about the family; she was afraid the family would "turn against" her and her daughter. Thereafter, J.S.'s mother noticed that when she shifted J.S. in bed at night, J.S. would say, "No. No. Don't touch me." J.S.'s mother, therefore, took J.S. to the hospital for a medical examination. Someone from the hospital contacted the police to advise of suspected child abuse.

Los Angeles Police Department Officer Tony Villanueva spoke to J.S. and her mother. J.S. told Officer Villanueva and his partner that her uncle had placed his hand underneath her underwear and touched her "private parts" on two occasions, making skin-to-skin contact. In explaining where on her body she had been touched, she pointed to her "front private part." J.S. did not tell Officer Villanueva that defendant tickled her on the butt. A sexual abuse response team exam was not conducted on J.S. because the exam is typically conducted within 96 hours of the sexual assault, and it had been over a month since J.S. had allegedly been touched on her vagina.

Los Angeles Police Department Detective Victor Acevedo, the investigating officer on the case, met with J.S. on several occasions and interviewed her about the incident. J.S. stated that she "had been touched in her private areas including a previous incident where she was tickled by the defendant on the buttocks."

About one month after J.S. told her mother that defendant touched her, J.S. and her immediate family moved out of defendant's home.

2. Defendant's Evidence

Karla Antunez is defendant's niece, and was 19 years old at the time of trial. When Antunez was between the ages of 7 and 12, she and her mother lived with defendant and his wife. J.S.'s father spoke to Antunez about allegations made by another family member against defendant, and asked Antunez if defendant had ever abused her. She said that defendant had not abused her, and it was the first she had heard of the allegations.

B. Procedural Background

The District Attorney of Los Angeles County filed an information charging defendant with committing a lewd act upon J.S., a child under 14 in violation of section 288, subdivision (a) (count 1), and committing a lewd act upon C.H., a child under 14 in violation of section 288, subdivision (a) (count 2). As to both counts, it was further alleged that defendant committed an offense specified in section 667.61, subdivision (c) against more than one victim in violation of section 667.61, subdivisions. (a) and (e).

Following a trial, the jury found defendant guilty on count 1, and not guilty on count 2. The jury also found the multiple victim allegation to be untrue.

The trial court sentenced defendant to state prison for a term of eight years. The trial court ordered defendant to pay various fines and assessments, and awarded defendant 862 days of custody credit consisting of 750 days of actual custody credit and 112 days of conduct credit.

DISCUSSION

Defendant contends that his conviction "must be reversed for the court's failure to instruct the jury on unanimity"[3] Defendant argues that because J.S. testified about two separate incidents of lewd acts, "one involving [defendant's touching of J.S.'s] vagina, one involving [defendant's touching of J.S.'s] butt," "it is impossible to tell from the record" on which act or acts of touching the jury based its conviction.

[3] Defendant does not identify the unanimity instruction that he contends should have been given. Defendant is presumably referring to CALCRIM No. 3500, which provides, in relevant part, "The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

1. Standard of Review

"We review de novo a claim that the trial court failed to properly instruct the jury on the applicable principles of law. [Citation.]" (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 850.)

2. Applicable Law

Section 288, subdivision (a), provides, in pertinent part, "any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, 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." "Section 288 . . . 'is part of a statutory scheme that recognizes that some touchings of children are *always* harmful and improper, whereas others may or may not be, depending upon the actor's intent. [¶] . . . [¶] Lewd or lascivious conduct in violation of section 288, subdivision (a) . . . requires 'the *specific intent* of arousing, appealing to, or gratifying the lust of the child or the accused.' ([Citation], italics added.)" (*People v. Warner* (2006) 39 Cal.4th 548, 556-557.)

In a criminal case, a jury verdict must be unanimous. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "It is established that some assurance of unanimity is required where the evidence shows that the defendant has committed two or more similar acts, each of which is a separately chargeable offense, but the information charges fewer offenses than the evidence shows." (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 611-612.) "Therefore, cases have long held that when the evidence suggests more than one discrete crime [but the defendant has not been charged with every crime suggested by the evidence], either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*People v. Russo*, *supra*, 25 Cal.4th at p. 1132.) A unanimity instruction is required when the evidence shows more than one act that could constitute the charged offense. (*People v. Davis* (2005) 36 Cal.4th 510, 561; *People v. Diedrich* (1982) 31 Cal.3d 263, 280-282.) "The duty to instruct on unanimity

when no election has been made rests upon the court sua sponte." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) A unanimity "instruction is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed." (*People v. Sutherland*, *supra*, 17 Cal.App.4th at p. 612.)

3. Background Facts

The prosecutor stated during closing arguments that, "[J.S.] did the right thing. She told her mother. She told the first time, Hey, he tickled my butt, and I didn't like it. And, the mom thought, well, he's kind of jumpy. He could have been just playing, you know, and [J.S.'s mother] didn't really do anything about it then. It wasn't until [J.S.] said, wait, he touched my private and/or she pointed to her vaginal area, and that that point the mother decided, hey, it's time to get out of this home." The prosecutor also stated during closing arguments, "What are the facts? The big ones here . . . you got to hear over the last several days[.] [J.S.] said she was touched two times. One time [defendant] tickled [J.S's] butt and one time he touched her vaginal area. [J.S.] always said it was hands—it was [defendant's] hands and it was skin to skin . . . . [¶] . . . [¶] And [J.S.] pretty much has been consistent throughout this process about those big facts. Let's go over. She told her mom. Okay? And, remember, she told her mom previously about the tickling of the butt. And the mom said, well, I'm not going to do anything. It could have been just playing around. And then she told her about the vaginal touching. . . . [¶] . . . [¶] [T]he one thing [J.S.] did not tell Officer Villanueva—and we don't know if Mr. Villanueva clarified [it] because he told us he wasn't comfortable talking with children, spend about 20 minutes total with her—there is no mentioning of tickling of the butt. But [J.S.] mentions and clarifies that during the brief filing interview . . . . And there you see that that's similar to the preliminary hearing transcript testimony . . . , and then two years later here you are in trial and as to these facts she's consistent."

During jury deliberations, the jury submitted in writing several questions to the trial court asking, inter alia, "Is there any testimony that clarifies where the butt touching occurred, i.e., was this in a bed or some other location? Also who witnessed it?"

4. Analysis

The Attorney General contends that no unanimity instruction was required because the prosecutor "elected," during the introduction of evidence and closing arguments, "to focus" on defendant's touching of J.S.'s vagina, rather than his "tickl[ing]" of J.S's "butt," as the basis for a conviction under count 1. We disagree; the trial court erred in not giving a unanimity jury instruction.

The prosecution's election as to the act upon which he or she seeks to convict the defendant must be "clearly communicated to the jury." (*People v. Melhado, supra,* 60 Cal.App.4th at p. 1539.) "To hold otherwise would leave open the door to allowing a prosecutor's artful argument to replace careful instruction. If the prosecution is to communicate an election to the jury, its statement must be made with as much clarity and directness as would a judge in giving instruction. The record must show that by virtue of the prosecutor's statement, the jurors were informed of their duty to render a unanimous decision as to a particular unlawful act." (*Ibid.*)

The Attorney General does not contend, and the record does not provide, that the prosecutor advised specifically the jury that she was seeking to convict the defendant on count 1 based on his touching of J.S.'s vagina only. And, assuming that on balance, the prosecutor chose "to focus" on defendant's touching of J.S.'s vagina, rather than his "tickl[ing]" of J.S's "butt," as the basis for a conviction under count 1, it is insufficient. As stated in *People v. Melhado, supra,* 60 Cal.App.4th 1529, "It is possible to parse the prosecution's closing argument in a manner which suggests that more emphasis was placed on the 11 a.m. event than on the others. However, even assuming that this was so, we find that the argument did not satisfy the requirement that the jury either be instructed on unanimity or informed that the prosecution had elected to seek conviction *only* for the 11 a.m. event, so that a finding of guilt could only be returned if each juror agreed that

the crime was committed at that time. Because the prosecutor did not *directly* inform the jurors of his election and of their concomitant duties, it was error for the judge to . . . disregard his sua sponte duty [to give a unanimity instruction]." (*Id*. at p. 1536; italics added.)

In addition, during jury deliberations, the jury specifically asked the trial court, in writing, if there was any testimony stating whether J.S. was located in a bed or somewhere else when the alleged "butt touching" occurred, and who witnessed that incident.[4] It is reasonable to assume, therefore, that the jury, or at least one juror, considered defendant's "tickl[ing]" of J.S's "butt" as a possible basis for a conviction under count 1.

Because the prosecutor did not clearly and directly communicate to the jury of her election, it was error for the trial court to not instruct the jury, sua sponte, on unanimity. (*People v. Melhado, supra,* 60 Cal.App.4th at p. 1534 ["The duty to instruct on unanimity when no election has been made rests upon the court sua sponte"].)

The error, however, was harmless. There is a split of authority whether the harmless error standard to be applied when a trial court erroneously fails to give a unanimity instruction is under *Chapman v. California* (1967) 386 U.S. 18, 24 [harmless beyond a reasonable doubt standard] or *People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable probability of a more favorable result standard]. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 576 [noting split of authority and stating the "majority of the courts that have addressed the issue have applied *Chapman*"]; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 185-186 [*Chapman* standard applies]; see *People v. Vargas* (2001) 91 Cal.App.4th 506, 562 [applying the *Watson* standard].) Under either standard the error was harmless.

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[4] The Attorney General contends that the written jury question "was not actually submitted to the [trial] court," arguing it was not signed by the jury foreperson and the record does not disclose that it was discussed by the trial court and counsel. We reject the Attorney General's contention because the written jury question bears a stamp indicating that it was filed with the trial court while the jury was deliberating.

Under *Chapman v. California, supra,* 386 U.S. 18, "[W]here the defendant offered the same defense to all criminal acts and 'the jury's verdict implies that it did not believe the only defense offered,' failure to give a unanimity instruction is harmless error. [Citation.] . . . The error is also harmless '[w]here the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence . . . .' [Citation.]" (*People v. Hernandez, supra,* 217 Cal.App.4th at p. 576; *People v. Jones* (1990) 51 Cal.3d 294, 307; *People v. Thompson* (1995) 36 Cal.App.4th 843, 853.)

"[C]ases found harmless any error in failing either to select specific offenses or give a unanimity instruction, if the record indicated the jury resolved the basic credibility dispute against the defendant and would have convicted the defendant of *any* of the various offenses shown by the evidence to have been committed. [Citations.] [¶] For example, in [*People v.*] *Winkle* [(1988) 206 Cal.App.3d 822,] the court sustained a conviction of one count of lewd conduct based on testimony by the child victim that defendant, her uncle, molested her regularly each week at her home or at his workplace. Although no prosecutorial election was made and no unanimity instruction was given, the court concluded that no prejudicial error occurred. The defendant made only a weak attempt to assert an alibi defense; in essence the trial involved a question of credibility, and the jury's verdict necessarily implied that it believed the victim. Under such circumstances, no unanimity instruction was needed." (*People v. Jones, supra*, 51 Cal.3d at p. 307.)

Here, the case relied almost exclusively on J.S.'s testimony for defendant's conviction under count 1; she testified that she was touched improperly by defendant on two occasions—defendant "tickled" her butt, and touched her vagina. In support of count 1, the prosecutor did not introduce physical evidence that the touchings occurred, nor did she introduce testimony from anyone that he or she witnessed the touching. Defendant did not testify, but his sole defense was essentially that J.R. might have actually thought "something happened to her in the nature of being touched for sexual gratification purposes but she's wrong." In essence the trial involved a question of credibility, and the

jury's verdict necessarily implied that it believed J.S. The jury's verdict reflects that it resolved the basic credibility dispute against defendant and, therefore, would have convicted him of all alleged lewd acts. That is, the jury would have convicted defendant regardless of whether a unanimity instruction was given, and therefore any error by the trial court in not giving the instruction was harmless.

DISPOSITION

The judgment is affirmed.

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MOSK, J.

I concur:

KRIEGLER, J.

I concur in the judgment. My disagreement is limited to the issue of whether the jury was correctly instructed. In my view, there was no duty to provide a unanimity instruction because there was an alleged uncertainty as to exactly how defendant committed the crime. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1376-1377.) The prosecutor clearly stated she was seeking to convict defendant based upon the touching of the vagina. No violation of any pertinent Constitution occurred.

TURNER, P. J.