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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. HUMBERTO AGUIRRE VILLARREAL, Defendant and Appellant.	B239045 (Los Angeles County Super. Ct. No. KA094618)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Judge. Affirmed.

Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and Appellant, Humberto Aguirre Villarreal, appeals from the judgment entered following his pleas of no contest to two counts of committing a lewd act upon a child (Pen. Code § 288, subd. (a)),[1] continuous sexual abuse (§ 288.5, subd. (a)), sexual penetration by a foreign object upon a child under 14 years of age (§ 289, subd. (a)(1)(B)), forcible oral copulation on a child under 14 years of age (§ 288a, subd. (c)(2)(B)) and two counts of forcible sexual penetration by a foreign object (§ 289, subd. (a)(1)). The trial court sentenced Villarreal to 38 years in prison. We affirm.

FACTUAL AND PROCEDURAL HISTORY

1. *Facts*.[2]

Susana D. moved from Tijuana to Los Angeles County in April of 2009. Her two daughters, the oldest of which, M., is now 12, joined her in July of 2009.[3] When they came to Los Angeles, Susana D. and her daughters moved in with Susana D.'s boyfriend, 37-year-old defendant and appellant, Villarreal, and his mother.

Susana D. had various jobs, most of which required her to work in the afternoon and at night. During those times, a babysitter would pick up the girls from school then, when he got home at 3:00 or 3:30 in the afternoon, Villarreal would take over the child care. He would stay with M. and her sister throughout the afternoon and into the night.

At times when Susana D. was at home, she would see Villarreal become "aggressive [and] angry." Although they had done nothing to warrant it, he would discipline the girls. He had temper tantrums and threatened to leave Susana D., who depended on him for food and housing. Although he was angry much of the time, Susana D. hoped that he would change.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The facts have been taken from the transcript of the preliminary hearing.

[3] M.'s younger sister, C., is now six years old. In Mexico, the girls had lived with their mother and grandmother.

One night between July 1, 2009 and September 1, 2009, Susana D. was at work and Villarreal's mother was in the living room.[4] M., who had gotten into her pajamas, was in the bed where she, her sister, her mother and Villarreal all slept. While her sister was sleeping, Villarreal came into the room, got into the bed and, while he was lying down beside her, touched M. on the vagina. He rubbed her vagina with his hand on top of her clothes. Villarreal, with his palm up, touched M.'s vagina a second time on a night between September 2 and October 31, 2009.

On another occasion, around Christmas time, M. was in the living room. Villarreal's mother no longer lived with them, her sister was asleep on the bed and her mother was at work. While M. and Villarreal were lying down on the floor, Villarreal reached underneath M.'s clothing and "squeezed" her breast several times. He then put his mouth on her mouth and kissed her.

Beginning in November of 2009, Villarreal put his mouth on M.'s mouth, then had her remove her shirt. He first touched M.'s breasts with his hand, then placed her breasts in his mouth.

On a later date, sometime between January 1 and February 1, 2011, M. was getting out of the shower and had wrapped herself in a towel. Villarreal came into the bathroom, had M. go into her bedroom and take off the towel. After placing his mouth on her vagina, he put two fingers into her vagina and "rubbed" her there.

There were times when Villarreal told M. to take her clothes off. She cooperated because she "didn't want him to get mad." M. was afraid of Villarreal and he threatened her. He told her that if she did not do as he wished, she would be going back to Mexico. M. did not want to go back to Mexico because she and her family had been extremely poor there. Things were better in Los Angeles.

At some point in 2010, Villarreal started having M. "lick" and rub his penis until he ejaculated. On several occasions he placed his fingers in her anus and he continued to

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[4] M. was able to remember the approximate dates of these events based on where the family was living at the time.

place them in her vagina. During these incidents M.'s sister was generally asleep and her mother was at work. Villarreal began to sexually assault M. between two and four times a week. This went on for several months. On the last occasion, in June of 2011, both Villarreal and M. were naked and M. was on top of Villarreal. M.'s sister walked into the room and saw them. She then told the girls' mother what she had seen. Susana D. went to M.'s school and spoke with a school counselor that same day.

M.'s six-year-old sister, C. testified that her sister, M., and Villarreal must have been "hot" because, when she saw them, they had no clothes on. They were lying on the bed and M. was on top of Villarreal. When M. saw C., she immediately got off of the bed. Villarreal then told C., " 'You're never [to] tell your mom.' " At that point, C. ran from the room.

C., who was not afraid of Villarreal but was afraid that if she told her mother what she had seen, her mother would cry, waited a little while before she told her. C. did speak to M. Villarreal was present and M. told C. that she, M., was going to go to Mexico.

2. *Procedural history*.

In an amended information filed on January 20, 2012, it was alleged that, between July 1, 2009 and September 1, 2009, Villarreal committed a lewd act upon a child in violation of section 288, subdivision (a) (count 1), that between September 2, 2009 and October 31, 2009, Villarreal committed a lewd act upon a child in violation of section 288, subdivision (a) (count 2), that between March 1, 2011 and June 1, 2011, Villarreal committed continuous sexual abuse in violation of section 288.5, subdivision (a) (count 3), that between January 1, 2011 and February 28, 2011, Villarreal committed sexual penetration by a foreign object when the victim was less than 14 years of age in violation of section 289, subdivision (a)(1)(B) (count 4), that between January 1, 2011 and February 28, 2011, Villarreal committed forcible oral copulation on a victim less than 14 years of age in violation of section 288a, subdivision (c)(2)(B) (count 5), that between January 10, 2010 and September 8, 2010, Villarreal sexually penetrated the victim with a foreign object in violation of section 289, subdivision (a)(1) (count 6), and

between September 9, 2010 and December 31 2010, Villarreal sexually penetrated a victim under the age of 14 with a foreign object in violation of section 289, subdivision (a)(1)(B) (count 7).

At proceedings held on September 21, 2011, Villarreal waived arraignment, the reading of the information, and advisement of his constitutional and statutory rights. He pled not guilty to all seven counts and denied all the special allegations. In addition, Villarreal waived his right to a speedy trial and indicated that the court could set the matter for trial on December 6, 2011, "as zero of ten days on that day."

On January 20, 2012, the trial court indicated that Villarreal had "decided to resolve his case by entering an open plea to the court with no guarantee as to what sentence would be imposed. Mr. Villarreal ha[d] completed an advisement of rights, waiver and plea form and evidently ha[d] considered the consequences of his plea as well as his rights and [was] willing to waive and give up [those] important rights." However, the trial court stated that, before it was willing to accept Villarreal's plea, it wished to make certain Villarreal understood that "although the court had some discussion with respect to aggravating and mitigating factors . . . with both attorneys present, [it could not and was] not allowed to guarantee an actual sentence . . . based upon an open plea." The court continued: "But I will certainly take into consideration what I previously mentioned, [Villarreal's] lack of any record whatsoever. Obviously, I have to consider aggravating factors as well, including the victim's tender age as well as the numerous offenses that may have been committed against her over the course of certain years. [¶] All these factors will have to be considered in terms of selecting an appropriate term . . . ." The court then informed Villarreal that the maximum legal sentence which could be imposed in this case was "64 years in the state prison with limited custody credits. The legal minimum, which means . . . the very least [the court could] impose [in] this case, [was] 33 years." The court addressed Villarreal and stated: "[This] means [that] at the time you are sentenced in this case based on this open plea, you can receive no less than 33 years but no more than 64 years and, again, with no guarantee as to what term the court will select."

After Villarreal indicated that he still wished to enter the plea, the trial court asked him if, by initialing all the boxes on the plea form, he was "further telling this court" that he was waiving and giving up those important rights so that he could enter his plea that day. Villarreal answered, "Yes." The trial court then explained the "immigration consequences" and the impact the Three Strikes law would have should Villarreal plead guilty or no contest. After Villarreal consulted with his counsel, he again indicated that he understood the consequences and still wished to enter a plea. Villarreal also indicated that he understood that he would be required to register as a sex offender for the remainder of his life and that there were a "series of fines and fees" which he would be required to pay from his prison earnings.

Finally, the trial court addressed Villarreal and stated: "Mr. Villarreal, having all [the] consequences in mind that I've advised you [of] here in open court as well as all [the] consequences fully explained in writing and in detail on your advisement of rights, waiver and plea form, are you prepared nonetheless to enter your plea of either guilty or no contest as charged?" Villarreal responded, "Yes, yes." Villarreal then pled "no contest" to the charges as alleged in counts 1 through 7. Villarreal's counsel "join[ed] in [the] waivers, concur[red] in the pleas, [and] stipulate[d] that there [was] a factual basis [for each charge] based upon [his] review of the discovery, including police reports and [the] preliminary hearing testimony." The trial court "accept[ed] the pleas as charged" and found Villarreal "guilty based upon his pleas to counts 1 through 7[.]"

Villarreal was scheduled to be sentenced on February 7, 2012. Instead, he made a motion to withdraw his plea. According to Villarreal's counsel, Villarreal had indicated that "he [had been] unaware as to what the minimum was, the sentence that was possible, the minimum sentence on this case." He had also been acting under the assumption that the trial court was going to review the preliminary hearing transcript and police reports and dismiss some of the charges.

In response, the trial court indicated that it had reviewed the transcript of the plea proceedings and had "clearly advised [Villarreal] of what the legal minimum sentence would be." The court had then specifically asked Villarreal if he understood and he had

responded " 'yes.' " Moreover, at no time had the court indicated that it would review the preliminary hearing transcript and police report, then promise to dismiss some of the charges. The court, which had read and considered a "static 99" and probation report, continued: "The law is fairly clear on what criteria needs to be met [to withdraw a plea and] [b]uyer's remorse is not one of [them]. . . . [Section] 1018 . . . says that a motion to withdraw pursuant to that code section is by a standard of proof called clear and convincing evidence. And mistake, ignorance, or some factor that overcomes [one's] exercise of free judgment; that is good cause . . . to withdraw a plea. I haven't heard that yet from [Villarreal]."

Villarreal, himself, then addressed the court. He indicated that no one had ever investigated his "mother," "woman" or "stepdaughter." No one had gone to the places where they had lived. "They didn't go down there" and Villarreal did not believe that was fair. He wished to defend himself on that basis.

The trial court informed Villarreal that his dissatisfaction with the thoroughness of the investigation of his case was not grounds to withdraw his plea. In fact, the court had considered it a mitigating factor that, at this stage of the proceedings, Villarreal had admitted his liability and had not made the young victim relive "the treatment that she [had] received at [Villarreal's] hands throughout those years."

With regard to his motion to withdraw his plea, the court stated: "I've heard nothing from you with respect to the ignorance or any lack of exercise of your free judgment when you entered your plea on January 20, 2012. All I have heard from you is the fact that you are disappointed, perhaps not satisfied with the investigation that [has so far gone] into this case. Again, that's not grounds to withdraw the plea. [¶] So your motion to withdraw your plea of no contest and/or guilty is denied."

After consulting with counsel, Villarreal indicated there were other issues he wished to present to the court. He stated: "I was so nervous. It was the thing of nerves as well. I suffer from nerves. Because of that, that's why the thing is—I'm not making any excuses of course but that. I wanted a trial that was, how do you call it, a fair trial. A fair trial." The trial court indicated that, after reviewing the record, it appeared that "[a]t

no time did [Villarreal] express nervousness . . . or uncertainty [regarding the] waiver of [his] rights and [his] understanding of the consequences [of the plea]. Whether or not [he was] nervous at the time, perhaps [he was] but [he] certainly did not bring that to [the court's] attention in terms of it affecting [his] ability to think clearly and knowingly and voluntarily . . . . [A]gain, [his] statements, although I understand and acknowledge [them], certainly do not rise to the level of clear and convincing evidence. [¶] . . . [A]gain, [the] motion is denied. I cannot and will not allow [Villarreal] to withdraw [his] plea at this stage [of the proceedings]."

After Villarreal's counsel waived arraignment for judgment and sentencing, the trial court imposed "as [the] base term the low term of three years on count 1[,] . . . a violation of . . . section 288, subdivision (a). [¶] Subordinate to that term, the court select[ed] one-third of the six-year mid-term on count 2, [or] two years . . . for a violation of . . . section 288, subdivision (a)[, the term] to run consecutive[ly to that imposed for count 1]. So the aggregate term to be imposed under [section] 1170.1 applie[d] . . . to counts 1 and 2 only [and was] five years [in] state prison."

For "[c]ounts 3 through 7," the court indicated it would sentence pursuant to section 667.6, subdivision (d). The court stated: "The court understands that mandatory consecutive sentencing pursuant to 667.6, subdivision (d) requires the defendant to be convicted of at least two of the enumerated violent sex crimes listed in [section] 667.6, subdivision (e). [¶] As reflected in counts 3 through 7, the defendant has suffered five qualifying convictions . . . . [¶] Furthermore, the court finds as to each crime that pertains to counts 3, 6, and 7, [that] they were committed against the same victim on different occasions. This is apparent given the separate time frames charged for each of those counts. So the court has no discretion and it must sentence to full term consecutive as to counts 3, 6, and 7."

With regard to counts 4 and 5, the court determined that, "although they qualify as . . . violent sex crime[s] . . . , it is unclear, given the identical time frames [in which they were] charged, whether the offenses were committed on the same or separate occasions . . . ." However, even if they were committed on the same occasion, the court indicated

that it had "discretion under [section] 667.6, subdivision (c) to impose[,] and [would] impose[,] full, separate, and consecutive sentences for those offenses as well."[5]

Accordingly, the trial court selected the low term of six years with regard to count 3, the six years to run full term and consecutively to the other terms imposed. As to count 4, the trial court imposed the low term of eight years, the term to run "full term consecutive." For count 5, the court imposed the low term of eight years, the term to run "full term consecutive." The court selected the low term of three years for count 6, the term to run "full term consecutive." Finally, with regard to count 7, the trial court imposed the low term of eight years, the term to run "full term [and] consecutive" to the other terms imposed.

The total term imposed with regard to section 667.6 was 33 years in state prison. That term was to run consecutively to the five years imposed for counts 1 and 2. Accordingly, in total, Villarreal was sentenced to 38 years in state prison.

The trial court noted that, the reason it had selected the low term on most counts was "the fact that the defendant, at least at the time he entered his plea in January of this year, on his own volition decided to accept responsibility for his conduct involving this child. And the court placed great weight on his willingness to accept responsibility for his actions and also to relieve that child of the horror of having to relive those events [by] testifying in front of a jury."

The trial court awarded Villarreal presentence custody credit for 237 days actually served and 35 days of good time/work time, for a total of 272 days. It ordered Villarreal to pay a $240 restitution fine (§ 1202.4, subd. (b)), a stayed $240 parole revocation restitution fine (§ 1202.45), a $40 court operations fee (§ 1465.8, subdivision (a)(1)), a $30 criminal conviction fee (Gov. Code, § 70373) and to make restitution to the victim pursuant to section 1202.4, subdivision (f). In addition, Villarreal was to pay a $500

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[5] The trial court is directed to correct the abstract of judgment filed February 8, 2012 to show the sentences imposed for counts 3 through 7 as running consecutively, rather than concurrently, to those imposed for all other counts. A corrected copy is then to be forwarded to the Department of Corrections.

"sexual habitual fine," a $1,400 penalty assessment and a 20 percent state surcharge in the amount of $100, for a total amount of $2,000 pursuant to section 290.3.

Villarreal filed a timely notice of appeal.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed June 5, 2012, the clerk of this court advised Villarreal to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. No response has been received to date.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.