Filed 12/27/19 P. v. Sun CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DAVID SUN, Defendant and Appellant.	B291763 (Los Angeles County Super. Ct. No. VA143663)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed with directions.

Joshua L. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Nancy Lii Ladner, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found David Sun guilty of offenses arising out of his sexual abuse of his daughter. On appeal, Sun contends that the trial court improperly admitted a detective's testimony about the victim's credibility, his guilt, and profile evidence. He also raises instructional and sentencing errors. We conclude that remand for resentencing is necessary but reject Sun's other contentions.

BACKGROUND

I. The sexual abuse

The victim lived with her mother but visited her father, Sun, on Wednesdays and slept over on the occasional Friday night. Sun also watched the victim when mother was busy. The victim testified that Sun first touched her inappropriately when she was six years old. He put his penis, which she called his "thing," in her "butt" and vagina. After, Sun wiped himself with a sock. This happened whenever she went to Sun's home. Sometimes, he put his penis in her mouth. Once, he put his penis in her vagina after showering with her.

The victim was at Sun's house on December 27, 2016. She was then eight years old. When mother picked her up, the victim told mother that Sun had been molesting her. Mother immediately reported the abuse. The next day, the victim had a forensic examination which resulted in no findings. The victim's hymen was intact and no semen or saliva was detected on her body.

II. The investigation

Detective Maricruz Perez testified as both the investigating officer and as an expert. For over 11 years, she has worked for the Los Angeles County Sheriff's Department's special victim's bureau, which handles sexual abuse of minors. According to the

detective, sexual abuse victims commonly delay reporting the abuse for various reasons: fear, they are being threatened, the abuser is the family's sole provider, or they do not understand that what is happening is wrong. Commonly, the abuser is an immediate family member. In the cases the detective has handled, it has been more common to have no forensic findings.

When the detective begins investigating a case, she reads the reports, reviews medical examinations, and checks the alleged perpetrator's criminal background. It is common that the alleged perpetrator has never committed a crime. Not often has the alleged perpetrator previously been convicted of a similar offense.

Detective Perez separately questioned the victim and Sun. The detective asked the victim a series of questions to determine if she could tell the difference between the truth and a lie. Based on the victim's answers, the detective felt that the victim knew the difference. The victim's level of detail about what occurred, which included using her hands to demonstrate the touching, was unexpected for an eight year old. Based on everything the detective discussed with the victim, the detective concluded that sexual conduct had occurred between the victim and Sun.

The detective next interviewed Sun twice. When Detective Perez first asked Sun about the victim's allegations, he denied them. Using a ruse, she told him that his semen was found on the victim's body. He explained that he had masturbated into a sock and given it to the victim to wipe herself after she urinated. Based on this, the detective got a "gut feeling" that if she questioned him again, then "maybe he would be truthful." The second time the detective questioned Sun, he said that his daughter initiated the sexual contact. According to him, the

victim touched his penis when they showered together. Once or twice he masturbated in front of her. And, once or twice a month the victim would rub her vagina against his penis. The last time he babysat the victim, he took off their underwear, and she put Sun's penis between her legs and moved back and forth. Sun ejaculated on a sock, and she wiped herself with the same sock. He denied fully penetrating the victim. He admitted that the victim kissed his penis.

At trial, Sun recanted his confession.

III. Verdict and sentence

The jury found Sun guilty of five counts of sexual intercourse or sodomy with a victim 10 years or younger (Pen. Code,[1] § 288.7, subd. (a); counts 1, 2, 3, 4 & 5) and two counts of oral copulation or sexual penetration with a victim 10 years or younger (*id.*, subd. (b); counts 6 & 7). On August 1, 2018, the trial court imposed consecutive 25-year-to-life terms on counts 1 to 5 and consecutive 15-year-to-life terms on counts 6 and 7.

DISCUSSION

I. Admissibility of Detective Perez's testimony

Sun contends that Detective Perez improperly opined on the victim's credibility and on Sun's guilt and offered profile evidence, in violation of state law and Sun's federal constitutional due process rights.[2] We disagree that any prejudicial error occurred.

---

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

[2] The defense did not object to the evidence it now challenges on appeal, thereby forfeiting the issue on appeal.

Sun first argues that the detective improperly opined on the victim's credibility. While an expert may give opinion testimony if the subject matter of the testimony is sufficiently beyond common experience such that the opinion would assist the trier of fact (Evid. Code, §§ 720, 801; *People v. Vang* (2011) 52 Cal.4th 1038, 1044), an expert may not opine that a witness is telling the truth, as this is an issue for the trier of fact (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82). Thus, police officers' opinions on a victim's truthfulness during limited contacts with the victim do not have a reasonable tendency to prove or disprove the victim's credibility and are therefore not relevant. (*People v. Sergill* (1982) 138 Cal.App.3d 34, 40; *People v. Julian* (2019) 34 Cal.App.5th 878, 888–890.)

Detective Perez, however, did not comment on the victim's credibility. The detective asked the victim a series of questions; for example, if the detective said she had a baby on her lap when she did not, would that be a lie or the truth? As the victim answered it would be a lie, the detective testified that the victim knew the difference between a lie and the truth. This, however, is not the same as testifying that the victim was telling the truth. That the victim knew the difference between a lie and the truth did not mean that the victim was telling the truth.

Nor did the detective otherwise opine on the victim's credibility. The detective said that the victim knew about sex acts a victim of her age generally does not know. That was appropriate expert opinion, as the detective had worked extensively with child sexual abuse victims. Similarly, the

---

Nonetheless, we address the issue because Sun has raised ineffective assistance of counsel for failure to object.

detective's statement that she discovered nothing during her investigation to contradict the victim's allegations was merely a comment on the investigation. That it may have buttressed the victim's credibility does not render the detective's testimony improper commentary on credibility. Evidence that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact. (Evid. Code, § 805.)

Although the detective did not improperly opine on the victim's credibility, some of her other testimony was arguably objectionable. The detective testified that, based on her interview with the victim, sexual conduct had occurred when the victim was six, seven, and eight years old with father. After her first interrogation of Sun, the detective got a "gut feeling" that if she interviewed him again, "maybe he would be truthful." To the extent this evidence commented on Sun's guilt, it was inadmissible. (See *People v. Vang*, *supra*, 52 Cal.4th at p. 1048.)

Further, the detective's testimony about common characteristics of sexual abusers was improper profile evidence. "A profile is a collection of conduct and characteristics commonly displayed by those who commit a certain crime." (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084.) A profile expert compares the defendant's behavior to the pattern or profile and concludes the defendant fits the profile. (*People v. Prince* (2007) 40 Cal.4th 1179, 1226.) Profile evidence is generally inadmissible to prove guilt because it is inherently prejudicial. (*Robbie*, at pp. 1084–1085.) It lacks sufficient probative value when the conduct fitting the profile is as consistent with innocence as with guilt. (*People v. Smith* (2005) 35 Cal.4th 334, 358.) Profile evidence, however, is distinguishable from evidence offered to address a misleading stereotype, for example, that a typical

molester is an old man luring children in playgrounds with candy. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1302–1303.)

Here, Detective Perez testified that sexual abuse is commonly committed by the victim's immediate family and by someone having no prior criminal conviction. Because Sun was the victim's father and there was no evidence he had a criminal record, this testimony, he contends, was improper profile evidence. Even if this was improper profile evidence and, as such, inadmissible, reversal would not be required unless the error caused a miscarriage of justice under the standard in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Richardson* (2008) 43 Cal.4th 959, 1001.) A miscarriage of justice occurs when, after examining the entire cause, including the evidence, it is reasonably probable a result more favorable to the appealing party would have been reached absent the error. (*Watson*, at p. 836.)

We cannot find such a reasonable probability here, even in the absence of the profile evidence and the detective's statements alluding to Sun's guilt. Rather, the victim told Detective Perez in detail what her father did to her. Other evidence corroborated her testimony, notably, Sun's own confession. The victim, for example, said Sun had touched her in the shower. Mother testified, verifying she told Sun not to shower with the victim. Sun told the detective that the touching between him and the victim began in the shower. The victim also mentioned an unusual detail, that Sun wiped himself with a sock. Notably, Sun corroborated this testimony by saying he ejaculated on a sock. Sun mentioned the sock without the detective first mentioning it. Also, Sun denied fully penetrating the victim, which was consistent with the physical findings. Finally, consistent with

the victim's statement, Sun said that he had last molested his daughter on the day she told her mother about the abuse. Given that Sun corroborated details of the victim's story, and notwithstanding his recantation at trial, it is not reasonably probable a different result would have occurred in the absence of the challenged evidence.

Nor does any error render the trial arbitrary or fundamentally unfair such that Sun's due process rights were violated. (See *People v. Partida* (2005) 37 Cal.4th 428, 439.) As we have said, some of the complained-of evidence was admissible. Sun also had the opportunity to respond to the evidence, denying that the abuse happened and explaining that he gave a false confession out of fear and duress.

As we have found no prejudicial error, we need not reach whether defense counsel's failure to object to the evidence constituted ineffective assistance. (See generally *Strickland v. Washington* (1984) 466 U.S. 668, 690; *People v. Brown* (2014) 59 Cal.4th 86, 109.)

II. Instructional error

Because Detective Perez testified it is common for sexual abuse victims to delay reporting the abuse, Sun now contends that the trial court should have sua sponte instructed the jury with CALCRIM No. 1193, which is about child sexual abuse accommodation syndrome (CSAAS). CSAAS concerns common reactions to child molestation: secrecy, helplessness, accommodation, disclosure, and recantation. (*People v. Mateo* (2016) 243 Cal.App.4th 1063, 1069.) CALCRIM No. 1193 instructs that such evidence is admissible for the limited purpose of showing that the complaining witness's conduct is consistent with someone who has been abused but is not admissible to show

that the defendant committed the charged offenses. (See *People v. McAlpin*, *supra*, 53 Cal.3d at pp. 1300–1301.)

Detective Perez did not offer complete testimony on CSAAS testimony. She testified about only one CSAAS component, delay in reporting. And, she discussed this component in the limited context of her experience investigating cases of sexual abuse of minors. She did not opine that the victim's behavior was typical of an abuse victim. This is closely related to the ultimate issue of whether abuse actually occurred and in which case at least one court of appeal has found a sua sponte obligation to give a limiting instruction. (*People v. Housley* (1992) 6 Cal.App.4th 947, 958.) However, another court of appeal has held that there is no sua sponte duty to give a limiting instruction. (*People v. Mateo*, *supra*, 243 Cal.App.4th at pp. 1073–1074.)

Given that Detective Perez did not testify about CSAAS and that the prosecutor did not rely on any such evidence in argument, we find that the general limiting instruction on expert witness testimony, CALCRIM No. 332, was sufficient. Per that instruction, the jury was told: "A witness was allowed to testify as an expert and to give an opinion. You must consider the opinion, but you are not required to accept it as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. [¶] You may disregard any opinion that you find unbelievable, unreasonable,

or unsupported by the evidence." Nothing more than this instruction was required.

III. Instruction on lesser included offense

Sun contends that the trial court should have instructed the jury on battery as a lesser included offense to the charged crimes. However, a trial court, even in the absence of a request, must instruct on all general principles of law relevant to the issues raised only by the evidence. Instruction on a lesser included offense is required when there is evidence the defendant is guilty of the lesser offense but not of the greater. (*People v. Banks* (2014) 59 Cal.4th 1113, 1159–1160.) Substantial evidence is evidence a reasonable jury could find persuasive. (*People v. Benavides* (2005) 35 Cal.4th 69, 102.) We independently review whether the trial court erred by failing to instruct on a lesser included offense. (*Banks*, at p. 1160.)

We need not determine whether battery is a lesser included offense of sexual intercourse or sodomy with a child and of oral copulation or sexual penetration with a child. There is no substantial evidence that Sun committed a battery but *not* the charged offenses. Battery is any willful and unlawful use of force or violence on another. (§ 242.) Section 288.7, subdivision (a), provides, in relevant part, that any person 18 years of age or older who engages in sexual intercourse or sodomy with a child who is 10 years of age or younger is guilty of a felony. Section 288.7, subdivision (b), similarly proscribes oral copulation or sexual penetration with a child.

Here, the victim testified that Sun repeatedly penetrated her vaginally and anally and put his penis in her mouth. These acts happened every time she saw him, over the course of about two years. Sun, however, makes much of the victim's isolated

statement that once he put his penis "on" her "booty" and of his confession denying he ever actually penetrated the victim. This is not a complete portrait of the evidence. When the victim told the detective that Sun put his penis on her, she also "placed her hand in between her leg near her vaginal area" and "moved her hand back and forth." The victim described a similar incident in which she simply said her father's penis went inside but not that "far." Again, the victim used her hands to demonstrate how her father moved, which suggested penetration. Although in his confession Sun tried to minimize his sexual contact with the victim, he nonetheless described how she rubbed against his penis and how it went between the victim's vaginal lips. He also admitted that this happened once or twice a month. Based on this, the evidence was not that Sun simply put his penis randomly "on" the victim's body; he repeatedly penetrated her within the legal meaning of that term. That is, sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis. (§ 263; *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371.) Hence, Sun cannot have committed battery without also having committed the greater offenses.

IV. Cumulative error

Having identified only one instance of harmless error, we reject Sun's claim of cumulative error. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305.)

V. Consecutive sentences

Believing it had to do so, the trial court imposed consecutive sentences on the section 288.7, subdivision (a) counts 1 to 5. However, consecutive sentencing was not

mandatory. (§ 667.6, subds. (d), (e).) The People concede that remand is necessary, as the trial court misapprehended the nature of its sentencing discretion. Because we remand for resentencing, we need not reach whether Sun is also entitled to remand for an ability to pay hearing under *People v. Dueñas* (2019) 30 Cal.App.5th 1157.

DISPOSITION

The sentence is vacated and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

LAVIN, J.