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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JUAN CARRILLO, Defendant and Appellant.	2d Crim. No. B231085 (Super. Ct. No. KA090599) (Los Angeles County)

Juan Carrillo appeals from the judgment after a jury convicted him of two counts of forcible lewd act on a child under the age of 14 (counts 1 & 7; Pen. Code, § 288, subd. (b)(1))[1], three counts of lewd act on a child under the age of 14 (counts 2, 4, & 6: § 288, subd. (a)), two counts of oral copulation/sexual penetration of a child 10 years old or younger (counts 3 & 8; § 288.7, subd. (b)), and lewd act upon a child (count 5; § 288, subd. (c)(1)). The trial court sentenced appellant to state prison for 58 years 8 months to life. We affirm with directions to amend the abstract of judgment.

Facts

Before his May 10, 2010 arrest, appellant lived with his parents-in-law, his wife and sisters-in-law, and their children in a large house in El Monte. The jury received evidence that appellant molested three nieces who lived in the house.

[1] All statutory references are to the Penal Code.

N.T. - Counts 1-4 & 8

N.T. (dob October 2000) testified that appellant touched her vagina and breasts when she was eight to nine years old. On five occasions, appellant licked the inside of N.T.'s vagina and bit the outside of her vagina. (Count 8.)

When N.T. was nine years old, appellant pulled down her pants and put his penis on her vagina. Appellant threatened to shoot or stab her parents if N.T. told anyone. On another day, appellant tried to force N.T. to orally copulate him in the garage.

The first time appellant pulled down her pants, appellant put his finger in N.T.'s vagina and tried to put his penis inside her. (Count 3; § 288.7, subd. (b).) Appellant showed her pictures of men and women having sex, asked her to let him "do it," and took a picture of her vagina.

On two occasions appellant bit N.T.'s breast. When N.T.'s mother, C.T. saw the first bite mark, N.T. said that she hurt herself. Appellant bit N.T.'s breast again a month later. On May 10, 2010, C.T. saw the bite mark and asked what happened. N.T. said that appellant had bit her. N.T.'s sister, K.N., saw the bite mark and said that appellant had also touched her.

C.T. took her daughters (N.T. and K.N.) and their cousin (K.C.) to the police station and reported the molestations.

K.C. - Counts 5-6

K.C. (dob May 1994) testified that appellant repeatedly touched her vagina and breasts when she was in the third grade. It all started when appellant showed her a pornographic magazine in the garage. Appellant touched K.C. while playing with her and poked her vagina with his fingers.

. On another occasion appellant came up behind K.C. and grabbed her vagina. K.C. told him to stop, pushed him away, and threatened to tell her father. Appellant warned K.C. to "think of your cousins" [i.e., appellant's children] and told her they would have to grow up without their dad if she said anything.

When K.C. was 13 years old, appellant tried to touch her in her bunk bed.. K.C.'s dog bit appellant. On other occasions, appellant came up behind K.C. and rubbed

his erect penis against her buttocks. Appellant last touched K.C. a week before he was arrested. K.C. stated that he grabbed her in the hallway and "squished" her vagina with his hand.

K.N. – Count 7

K.N. (dob September 1994), NT.'s older sister, was first molested in 2004. Appellant pushed K.N. against the wall, touched her breasts and vagina, and said "Shut up. You're going to like it" On other occasions, appellant poked K.N.'s vagina while swinging her.

When K.N. was in the fourth grade, appellant grabbed her breasts and vagina and tried to make her touch his penis. On another occasion, appellant held K.N. against the wall and touched her. K.N. cried and told her cousin, K.C.

On another day. K.N. was wearing snug pajamas. Appellant held her against the wall, touched her, and said "You're going to like it. Stop whining."

In the fifth or sixth grade, appellant held K.N. against the wall and rubbed her vagina. In the seventh grade, K.N. awoke one morning to find appellant humping on her. Appellant was erect and pushing his penis on her bottom.

In May 2010, K.N. stayed home from school and talked to her boyfriend. When K.N. came back inside, appellant chased her into her bedroom, and grabbed and rubbed her vagina. K.N. screamed and struggled. Appellant held her against the wall and inserted his finger into her vagina.

Amended Information

Appellant contends that the trial court erred in amending the information midtrial to conform to proof. The amended information expanded the range of dates as to when counts 1, 4, 5, 6, 7, and 8 were committed. Appellant argued that he had a due process right to have "a preliminary hearing as to those issues . . . ." The trial court overruled the objection and noted that the "underlying testimony is in the prelim transcript . . . . "

We review for abuse of discretion. (*People v. Bolden* (1996) 44 Cal.App.4th 707, 716.) Section 1009 provides that an information may be amended at any stage of the

trial proceedings providing the amendment does not prejudice the defendant or charge an offense not shown by the evidence at the preliminary hearing. (*People v. Graff* (2009) 170 Cal.App.4th 345, 361-362; *People v. Walker* (1959) 170 Cal.App.2d 159, 163; 4 Witkin & Epstein, Cal. Criminal Law (3rd ed. 2000) Pretrial Proceedings § 212, pp. 416-417.

Each victim testified at the preliminary hearing. N.T. could not remember specific dates but stated that the sexual assaults started when she was seven years old and continued through age nine. Based on N.T.'s date of birth (October 9, 2000) and appellant's May 10, 2010 arrest, the trial court did not err in amending the information to allege that the offenses (count 1- forcible lewd act; count 4 - lewd act) occurred from October 9, 2008 through May 10, 2010. Count 8 (oral copulation/sexual penetration of a child 10 years old or younger) was properly amended to allege that the offense was committed on or between October 9, 2008 and May 7, 2010. At the preliminary hearing, N.T. testified that appellant kissed her on the vagina several times when she was eight and nine years old.

Nor did the trial court err in amending the information to allege that count 5 (lewd act upon K.C.) was committed between April 1, 2009 and May 7, 2010 At the preliminary hearing, K.C. testified that her date of birth was May 29, 1994 and that appellant fondled her breasts three weeks before it was reported to the police. K.C. was 15 years old.

Count 6 of the information (lewd act upon a child under the age of 14) was properly amended to allege that the offense was committed between May 29, 2003 and May 28, 2008. At the preliminary hearing, K.C. testified that appellant touched and rubbed her vagina when she was nine years or ten years old.

With respect to count 7 (forcible lewd act on a child under the age of 14), K.N. testified that appellant first touched her breasts and vagina when she was seven years old and that it happened more than a hundred times. Based on K.N.'s date of birth (September 5, 1994), the trial court did not err in amending the information to allege that the count 7 occurred between September 5, 2004 through September 8, 2008.

"Due process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be

taken by surprise by evidence offered at his trial. [Citation.] [¶] . . . . [¶] . . . '[I]n modern criminal prosecutions initiated by informations, the transcript of the preliminary hearing, not the accusatory pleading, affords defendant practical notice of the criminal acts against which he must defend.' " (*People v. Jones* (1990) 51 Cal.3d 294, 317.)

Based on the preliminary hearing testimony, appellant had fair notice of when the alleged offenses occurred and ample opportunity to prepare for trial and present his defense. It is settled that the prosecution of child molestation charges based on generic testimony does not, of itself, result in a denial of a defendant's due process right to fair notice of the charges against him. (*Id*., at p. 318.) The cases cited by appellant are inapposite and involve cases in which the amended information charged a new offense unrelated to the preliminary hearing testimony (*People v. Burnett* (1999) 71 Cal.App.4th 151, 175-176), a case in which the amended charge mooted an alibi defense (*Koontz v. Glossa* (1984) 731, F.2d 365, 369-370), and a case in which the amended information extended the date range of the offense and presented a new factual scenario not shown by the preliminary hearing evidence (*People v. Dominguez* (2008) 166 Cal.App.4th 858, 868-869).

Here the preliminary hearing evidence was consistent with the victims' trial testimony and range of dates alleged in the amended information. Appellant testified that he was not "capable of doing that to any girl" and claimed that the victims' father (Pepe) molested the children. Appellant's defense was not a specific alibi. (*See e.g., People v. Gil* (1992) 3 Cal.App.4th 653, 659; *People v. Moreno* (1989) 211 Cal.App.3d 776, 788.)

Credibility, rather than alibi, is the crux of the defense in most resident child molestation cases. (*People v. Jones*, *supra*, 51 Cal.3d at p. 319.) That was the case here. Appellant makes no showing that he was "sandbagged" or denied a fair trial when the information was amended to conform to proof.

CALCRIM 330

Appellant contends that the CALCRIM 330 instruction on child witness testimony is ambiguous and could be construed to mean that a child witness' testimony

should be treated differently than an adult witness' testimony.[2] Appellant did not object to the instruction or request amplifying or clarifying language, thereby waiving the error. (People v. Dennis (1998) 17 Cal.4th 468, 514.) The jury was instructed that in evaluating a witness's testimony, it should consider the demeanor and behavior of the witness, and whether the witness understood the questions and answered them directly. (CALCRIM 226.) It was instructed to "[p]ay careful attention to all of these instructions and consider them together." (CALCRIM 200.) We presume that the jury understood and followed the court's instructions. (People v. Delgado (1993) 5 Cal.4th 312, 331.)

We reject the argument that CALCRIM 330 violated appellant's right to jury trial, right to due process, or right to present a defense and confront witnesses. CALCRIM 330 derives from section 1127f which adopts the modern view regarding the credibility of child witnesses, namely "that a child's testimony cannot be deemed insubstantial merely because of his or her youth." (*People v. Jones, supra*, 51 Cal.3d at p. 315; see also *People v. Catley* (2007) 148 Cal.App.4th 500, 506-508 [addressing constitutionality of section 1127f in the context of CALCRIM 331].)

Our courts have consistently held that CALCRIM 330 and its predecessor, CALJIC 2.20.1, do not violate a criminal defendant's due process rights. (*People v. McCoy* (2005) 133 Cal.App.4th 974, 979-980; *People v. Jones* (1992) 10 Cal.App.4th 1566, 1572-1574; *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1393; *People v. Harlan* (1990) 222 Cal.App.3d 439, 455-457.) CALCRIM 330 does not violate "the accused's right to confront a child witness nor 'requires[s] the jury to draw any particular inferences from a child's cognitive ability, age and performance as a witness. Rather it instructs the jury to consider

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[2] The CALCRIM 330 instruction stated: "You have heard testimony from a child who is age 10 or younger. *As with any other witness,* you must decide whether the child gave truthful and accurate testimony. [¶] In evaluating the child's testimony, you should consider all of the factors surrounding that testimony, including the child's age and level of cognitive development. [¶] When you evaluate the child's cognitive development, consider the child's ability to perceive, understand, remember, and communicate. [¶] While a child and an adult witness may behave differently, that difference does not mean that one is any more or less believable than the other. You should not discount or distrust the testimony of a witness just because he or she is a child." (Emphasis added.)

such factors in evaluating a child's testimony.' [Citation.] . . . 'The instruction tells the jury not to make its credibility determinations solely on the basis of child's 'age and level of cognitive development,' but at the same time invites the jury to take these and all other factors surrounding the child's testimony into account. The instruction provides sound and rational guidance to the jury in assessing the credibility of a class of witnesses as to whom "traditional assumptions" 'may previously have biased the factfinding process. Obviously a criminal defendant is entitled to fairness, but just as obviously he or she cannot complain of an instruction the necessary effect of which is to increase the likelihood of a fair result.' [Citation.]" (*People v. McCoy, supra,* 133 Cal.App.4th at p. 979.)

Appellant argues that N.T.'s trial testimony was vague and reflects a "relatively low level of cognitive ability." The record shows that N.T. understood and responded to the questions and accurately described when the offenses occurred. N.T.'s testimony was corroborated by the bite marks on her breast, photos of the bite marks, the testimony of the other victims and N.T.'s mother, and photos of the shed, house, and garage where appellant carried out the sexual assaults. On redirect, N.T. identified a drawing she made at the police station depicting how appellant penetrated her vagina with his finger, where appellant bit her on the right breast, and how appellant tried to put his penis in her anus. The evidence was overwhelming, rendering the alleged instructional error harmless under any standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710]; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Abstract of Judgment

Appellant contends, and the Attorney General agrees, that the abstract of judgment erroneously states that appellant was convicted on count 3 of "continuous sexual abuse." The jury convicted appellant of violating section 288.7, subdivision (b), oral copulation/sexual penetration of a child 10 years old or younger. Page three of the abstract of judgment further states that consecutive sentences of "30 years to Life" were imposed on counts 3 and 8 but the sentence was 15 years to life on each count. Where there is a discrepancy between the oral pronouncement of judgment and the abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

Conclusion

The judgment is affirmed with directions to amend the abstract of judgment to reflect that: (1) on count 3, appellant was convicted of oral copulation/sexual penetration of a child 10 years old or younger (§ 288.7, subd. (b)), and (2) that consecutive 15-year-to-life sentences were imposed on counts 3 and 8. The total aggregate sentence remains the same: 58 years 8 months to life state prison. The trial court is directed to send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

David Brougham, Judge

Superior Court County of Los Angeles

Nancy King , under appointment by the Court of Appeal, for Defendant and Appellant.

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