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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JESUS ALBERTO DE PAZ ARGUETA, Defendant and Appellant.	B291301 (Los Angeles County Super. Ct. No. BA452635)

APPEAL from the judgment of the Superior Court of Los Angeles County. James R. Dabney, Judge. Affirmed.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * *

A jury convicted defendant and appellant Jesus Alberto De Paz Argueta with committing two sex crimes against his minor daughter. He was sentenced to state prison for 15 years to life, plus 8 years. Defendant challenges his conviction on the grounds of instructional error. He also contends the court's imposition of various statutory fines and fees was improper, citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged with sexual intercourse or sodomy with a child 10 years or younger (Pen. Code, § 288.7, subd. (a) [count 1]), oral copulation or sexual penetration with a child 10 years or younger (§ 288.7, subd. (b) [count 2]), and lewd act upon a child (§ 288, subd. (a) [count 3]).

The case proceeded to a jury trial in May 2018. Testimony at trial established the following material facts.

Ana De Paz married defendant in 2011. She had a son, Mathew, from a prior relationship. After she and defendant got married, they had two daughters, R.D., born in 2009, and J.D. born in 2012. In September 2016, Mrs. De Paz, defendant, Mathew (who was 18 at the time) and the two minor girls lived in a two-bedroom, one-bath home in Los Angeles. The two girls shared a room, Mrs. De Paz and defendant shared the second bedroom, and Mathew slept on a mattress in the living room.

On the afternoon of September 17, 2016, a Saturday, Mrs. De Paz went to one of the homes where she worked as a housekeeper, leaving defendant home with their two daughters and Mathew. At some point, Mathew left for about 45 minutes to visit a friend who lived down the street. R.D. and J.D. were watching television in the living room.

When Mathew came back home, he saw that J.D. was watching television alone. He heard some sort of noise coming from the back bedroom where his mother and defendant slept. The door was closed. Mathew started to open it and he saw defendant standing just inside the door. Defendant pushed the door shut. Mathew yelled "what the f—k are you doing?" Mathew became "aggravated" and "slammed" the door open.

R.D. was standing near the bed, naked. She had what looked like pink sweat pants wrapped around her head, covering her face. R.D. pulled the pants from around her head and started putting her underwear back on. R.D. looked scared. Defendant, who was shirtless and wearing only shorts, looked nervous. Mathew yelled at defendant again to explain what he was doing or he was going to beat him up or kill him. Defendant's attempts to explain the situation did not make sense, so Mathew yelled at him to get out of the house.

Mathew started to cry and asked R.D. what happened. She told him that when he and their mother were not home, defendant would make her "suck his private parts, touch him and that he would touch her." Mathew called his mother and told her that defendant was gone and that they needed to talk when she got home.

When Mrs. De Paz arrived home, Mathew told her R.D. needed to tell her something. R.D. had difficultly explaining things to her mother. She seemed scared and had tears in her eyes. R.D. eventually blurted out, "Dad's been touching me," using the word "*cuca*" (the word R.D. knew for vagina). Mathew told his mother what he observed when he came home from his friend's house.

Mrs. De Paz did not immediately report the incident to law enforcement because R.D. was scared. But the following Monday, Mrs. De Paz made an appointment to speak with a counselor at R.D.'s school. Thereafter, the Los Angeles County Department of Children and Family Services was notified of the situation. The social worker from the Department called the police. Officer Fernando Cazares was assigned to the case and interviewed R.D. at school. She confirmed to him that her father had touched her groin area with his private parts.

R.D. was eight years old at the time of trial and described the incident of September 17, 2016, as follows. She was watching television with her little sister when defendant called her into the bedroom he shared with her mother. Defendant took off R.D.'s shorts and underpants and put his wife's pajamas (a Hello Kitty print) over R.D.'s eyes. She could hear defendant taking off his shorts and then "he touched [her] middle part with his middle part." When defendant touched her "*cuca*" that way it hurt and made her scared. A white "slimy" substance came out of defendant's middle part and got on her. She had to wipe herself clean. Defendant used his T-shirt to wipe himself off. Then, R.D. heard her brother Mathew come home and yell at defendant through the door. Defendant "said a lie" and told Mathew he was only cleaning R.D. with "a wipee." Mathew yelled at him and ordered him to get out of the house. Mathew started to cry, knelt down and gave R.D. a hug. R.D. said the same thing had happened before several times. She said she did not tell anyone it was happening because she was frightened.

Mary Cabrera, a sexual assault nurse examiner, testified she interviewed R.D. several weeks after the incident. Ms. Cabrera was an experienced examiner, having performed

approximately 4,000 examinations of victims, 75 percent of whom were children. Ms. Cabrera said R.D. was "guarded" during the interview, seemed exhausted and whispered to her that it was her "daddy" who had touched her. R.D. said her father touched her in the genital and anal areas, sometimes having to point to pictures in order to fully explain what happened. R.D. said it hurt when her father touched her. Ms. Cabrera stated the physical examination of R.D. was normal and she could not confirm or negate that sexual abuse had occurred, but she concluded that sexual abuse was "highly suspected" based on her interview of R.D.

Monica Borunda, a forensic interviewer from the Children's Advocacy Center, also interviewed R.D. The videotaped interview was played for the jury. During the interview, R.D. explained the incident of September 17, 2016, in substantially similar terms.

During her trial testimony, Mrs. De Paz said defendant would often use his T-shirt to clean himself up after they had sexual relations.

Detective Nellie Knight recovered a pair of pajamas with a Hello Kitty print from the family home. When she showed them to R.D., she identified them as the pajamas that defendant would put over her eyes when he abused her.

Defendant offered the testimony of Myra Fregoso Sanchez, a children's social worker. She described her interviews of R.D., Mrs. De Paz and Mathew. Ms. Sanchez said R.D. gave inconsistent responses when describing the incidents and did not mention defendant touching her with his penis or "middle part." R.D. also told her she felt safe at home. Ms. Sanchez testified that Mathew also gave some inconsistent responses. She

described him as rather upset, even crying towards the end of the interview.

Defendant also presented the expert testimony of Bradley McAuliff, a psychology professor. Dr. McAuliff stated his opinions about the factors affecting the suggestibility of children and their ability to accurately remember and relate events, including traumatic events like abuse.

Defendant exercised his right not to testify.

The jury found defendant guilty on counts 2 and 3 and acquitted him on count 1.

The court sentenced defendant to 15 years to life on count 2 and a consecutive upper term of 8 years on count 3. The court awarded defendant 654 days of presentence custody credits and imposed the following fines and fees: $10,000 restitution fine (Pen. Code, § 1202.4, subd. (b)), $40 court security fee (Pen. Code, § 1465.8), and $30 criminal conviction assessment (Gov. Code, § 70373). The court imposed and stayed a $10,000 parole revocation fine (Pen. Code, § 1202.45). The court also imposed a protective order in favor of the minor victim.

This appeal followed.

DISCUSSION

1. Any Instructional Error Was Harmless Beyond a Reasonable Doubt

Defendant contends the trial court committed instructional error by telling the jury that count 2 was a general intent crime. Respondent concedes the court erred in instructing the jury that count 2 was a general intent crime.

We agree. Where, as here, a violation of Penal Code section 288.7, subdivision (b), is based on sexual penetration, the

offense is a specific intent crime. (*People v. Saavedra* (2018) 24 Cal.App.5th 605, 613 (*Saavedra*).)

However, we conclude the instructional error was harmless beyond a reasonable doubt. (*People v. ZarateCastillo* (2016) 244 Cal.App.4th 1161, 1168 [finding instruction that violation of § 288.7, subd. (b) was general intent crime harmless beyond a reasonable doubt in light of additional instructions articulating the specific intent required]; see also *Saavedra*, *supra*, 24 Cal.App.5th at pp. 615-616 [same].)

While the court did erroneously refer to counts 1 and 2 as general intent crimes in the preliminary instructions, the court's instruction to the jury on the elements the prosecution was required to prove on count 2 included the requisite specific intent. The court told the jury that in order to find defendant guilty on count 2, the prosecutor would have to prove defendant engaged in an act of sexual penetration and that sexual penetration "means penetration, however slight, of a genital or anal opening . . . for the purpose of sexual abuse, arousal, or gratification."

It is a fundamental principle of appellate review that the correctness of jury instructions is to be determined from the entire charge to the jury. (*People v. Bolin* (1998) 18 Cal.4th 297, 328.) " 'Additionally, we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' " (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.) Considering the entirety of the court's instructions, the jury was properly instructed and was not misled as to the requisite specific intent for a finding of guilt on count 2.

Moreover, the evidence was overwhelming that defendant engaged in the abuse with the requisite sexual intent. Despite defendant's argument to the contrary, there was no credible

evidence supporting a finding defendant was merely cleaning his daughter with a wipe at the time Mathew discovered them in the bedroom. In order to convict on count 2, the jury necessarily concluded that defendant acted with the requisite intent, rejecting defendant's defense he had no such intent. The instructional error was harmless beyond a reasonable doubt. (*People v. Ngo* (2014) 225 Cal.App.4th 126, 162-163 [finding similar instructional error on intent harmless where evidence supported "no plausible explanation for why the defendant would have intentionally penetrated the victim unless he did so for purposes of sexual arousal, gratification, or abuse"].)

2. Defendant Forfeited Any Objection to the Imposition of Statutory Fines and Fees

Relying on *Dueñas*, *supra*, 30 Cal.App.5th 1157, defendant contends the trial court's imposition of the court security fee, criminal conviction assessment and restitution fine without a finding of his ability to pay violated his due process rights. Defendant concedes he did not object on these, or any, grounds in the trial court.

Defendant has forfeited this contention. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155 (*Frandsen*) [finding forfeiture where no objection raised in trial court to imposition of court operation assessment, criminal conviction assessment and restitution fine]; accord, *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1032-1033; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464; see also *People v. Avila* (2009) 46 Cal.4th 680, 729 [finding forfeiture where the defendant failed to object to imposition of restitution fine under Pen. Code, former § 1202.4 based on inability to pay].)

Defendant urges us to reject *Frandsen* and find the contention has not been forfeited, citing *People v. Castellano* (2019) 33 Cal.App.5th 485, 489. We believe *Frandsen* to be the better reasoned decision and conclude there is no basis for excusing defendant's forfeiture on this issue.

DISPOSITION

The judgment of conviction is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

STRATTON, J.