Filed 5/26/17 P. v. Zazueta CA2/8

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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. REYES ZAZUETA, Defendant and Appellant.	B270655 (Los Angeles County Super. Ct. No. BA422112)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Dabney, Judge. Affirmed in part, reversed in part and modified.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Reyes Zazueta of two counts of sexual penetration with a child aged 10 years old or younger (counts 1 and 9; Pen. Code, § 288.7, subd. (b))[1] and seven counts of lewd act upon a child (counts 2-8; § 288, subd. (a)). The trial court imposed two consecutive terms of 15 years to life on the sexual penetration convictions in counts 1 and 9. On the lewd act convictions in counts 2-8, the court imposed an aggregate consecutive determinate term of 8 years, comprised of the upper term of 8 years on count 4, and six concurrent upper terms of 8 years on each of the convictions in counts 2-3 and 5-8.

Zazueta contends his convictions for sexual penetration must be reversed because the trial court did not instruct the jury sua sponte on the lesser included offense of attempted sexual penetration. Further, Zazueta contends the evidence is insufficient to support one of his sexual penetration convictions. We reverse on count 9, make a minor modification concerning AIDS testing as discussed below, and otherwise affirm the judgment.

FACTS

The March 2014 Sexual Penetration Crime

H.D. (the victim) was born in September 2004, and, at all relevant times, lived with her mother, B.D, and adult brother, F.D. Further, H.D.'s maternal grandmother, I.A., lived on the same block. Zazueta lived in a backhouse at I.A.'s property.

On March 2, 2014, B.D. went to work, leaving H.D. at home with F.D. At some point around noon, F.D. went outside to the front area of the family home to clean a car with some friends, while H.D. was in her room watching television.

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

While H.D. was watching television, Zazueta entered her room. As we will note below, H.D. had reason to be afraid of Zazueta and tried to run, but he blocked the door. When H.D. tried to scream for F.D., Zazueta covered her mouth.

Zazueta began rubbing his fingers on H.D.'s breasts and "private parts" over her clothes, then moved his fingers inside her underwear, and began to touch her on the skin, all while telling her not to tell her mother. Eventually, H.D. felt Zazueta's fingers "going inside" her."

Zazueta's attack ended when I.A. walked into H.D.'s room and asked Zazueta "what the fuck" he was doing. Zazueta began sniveling, "I'm sorry. I'm sorry. I'm not doing anything. No, no, no."

The Discovery of More Sex Crimes

After B.D. got home from work, I.A. reported what she had seen. B.D. immediately talked to H.D. who reported that Zazueta had entered her room and "touched" her. When B.D. asked H.D. where Zazueta had had touched her, H.D. pointed to her vagina. The next day, B.D. took H.D. to the police.

Los Angeles Police Department (LAPD) Officer Irene Gomez talked to H.D. at the police station. H.D. reported what had happened the day before, specifically stating that Zazueta had vaginally penetrated her with his finger. Further, H.D. told Officer Gomez that Zazueta had touched her breasts and made her touch his penis on other occasions. H.D. reported two separate incidents of penetration, the one the day before in her bedroom, and the other on a prior occasion in Zazueta's room

"at her grandma's house." H.D. said that Zazueta used his fingers both times.[2]

After the interview, Officer Gomez accompanied H.D. and B.D. to the hospital. Mary Cabrera, a sexual assault nurse examiner, examined H.D. and talked with her about where she had been touched. H.D. reported that she had been touched both over and under her clothing on her breasts and genital area, and "described a finger being inserted into her vaginal area." Cabrera found two scratch marks on H.D.'s labia majora and labia minora, which were consistent with digital penetration.

LAPD Detective Sunny Romero investigated H.D.'s report involving Zazueta's March 2014 sexual assault. During the course of his investigation, Detective Romero interviewed both H.D. and Zazueta.[3] H.D. told the detective that Zazueta had touched her on a number of occasions. H.D. told the detective that, in Zazueta's room, he had touched her "under her clothes between her legs" for "ten seconds," and that it "tickle[d]."

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[2] At trial, H.D. testified about a series of acts of touching that Garcia committed on "different days" in a patio area and in Zazueta's room at her grandmother's house some time "between Halloween and Thanksgiving of 2013." We discuss this part of H.D.'s testimony below in addressing Zazueta's claims of error on appeal.

[3] The interview with Zazueta was recorded and played for the jury at trial.

Zazueta initially denied any wrongdoing, but admitted he innocently touched H.D. on occasions when they were "playing."[4] Ultimately, however, Zazueta admitted that he had digitally penetrated H.D. during the incident in her bedroom. Zazueta explained that he had not been "trying" or "planning" to penetrate H.D., but she "would throw herself at [him]," and it happened. Zazueta showed which finger he used. Zazueta described another day when he and H.D. were playing with the dogs "in the yard" and "hanging out for a long time."
He described touching her breasts on that other occasion. The interview then includes a series of vague questions and answers about "her house," and Zazueta stating that H.D. "liked to be on top" and that she "jumped on [him]" about "four or five times." Detective then asked Zazueta: About how many times did you touch her vagina?" and Zazueta answered, "Right there, just two times." Zazueta then explained that he used his finger. When the detective asked how far by pointing to his own finger, Zazueta said (by agreeing with the location on the detective's finger), that he put his finger in H.D. up to the first knuckle.

The Criminal Case

In October 2014, the People filed an information charging Zazueta with two counts of sexual penetration of a child aged 10 years or younger (§ 288.7, subd. (b)), count 1 relating to the events in March 2014 in H.D.'s bedroom and count 9 relating to the events in his residence on or between September 2012 and

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[4] Detective Romero interviewed with Zazueta in Spanish. The English transcription of the interview was read into the record and admitted into evidence.

February 2014. Further, the information alleged seven counts of lewd acts on a child (counts 2-8; § 288, subd. (a)).

The charges were tried to a jury, at which time the prosecution presented evidence establishing the facts summarized above. Zazueta did not present any defense evidence. His trial counsel argued to the jury that the prosecution's evidence was not persuasive enough to find him guilty beyond a reasonable doubt. The jury returned verdicts finding Zazueta guilty as charged.

Zazueta timely appealed.

DISCUSSION

I. The Instructional Error Claim

Zazueta contends both of his sexual penetration convictions must be reversed because the trial court did not instruct the jury sua sponte on the lesser included offense of attempted sexual penetration. We disagree as to count 1, but agree the court should have instructed on the lesser included offense of attempted sexual penetration as to count 9. We find the error as to count 9 was not harmless.

The Governing Law

"'"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the [evidence], and which are necessary for the jury's understanding of the case."'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Under these principles, a trial court has a sua sponte duty to instruct on a lesser offense necessarily included in a charged offense when there is substantial evidence the defendant is guilty only of the

lesser offense. (*People v. Shockley* (2013) 58 Cal.4th 400, 403-404.) Further, this duty exists whether or not the defense requests instructions on a lesser included offense, and even over a defense objection. (*People v. Breverman, supra*, 19 Cal.4th at p. 153.)

"Conversely, even on request, a trial judge has no duty to instruct on any lesser offense *unless* there is substantial evidence to support such instruction." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008.) Evidence is substantial for the purpose of instructions when it could cause a jury composed of reasonable persons to conclude that the defendant committed the lesser, but not the greater, offense. (*Ibid.*) A court is not required to instruct on a lesser offense when "the defendant is either guilty of the offense charged or not guilty at all." (*People v. Anderson* (1979) 97 Cal.App.3d 419, 425.)

Attempted sexual penetration is a lesser included offense of the completed crime. (*People v. Ngo* (2014) 225 Cal.App.4th 126, 157.)

On appeal, a reviewing court applies a de novo standard of review to a defendant's claim that the trial court erred in failing to instruct on a lesser included offense. (*People v. Licas* (2007) 41 Cal.4th 362, 366.) An error in failing to give lesser included instructions where required is reviewed under the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Breverman, supra*, 19 Cal.4th at p. 165.) Under this standard, "in some circumstances it is possible to determine that although an instruction on a lesser included offense was erroneously omitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should be

deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support a finding that the lesser was committed has been rejected by the jury." (*People v. Sedeno* (1974) 10 Cal.3d 703, 721.)

Analysis

As to the sexual penetration charge alleged in count 1, involving the events in H.D.'s bedroom in March 2014, we find no error in the nature of a failure to instruct on attempted sexual penetration. The trial court had no duty to instruct on attempted sexual penetration because Zazueta was "either guilty of the offense charged or not guilty at all." (*People v. Anderson, supra,* 97 Cal.App.3d at p. 425.) The evidence, including H.D.'s trial testimony, her pre-trial reports to Officer Gomez, Detective Romero, and the sexual assault nurse, and Zazueta's own admissions during his taped interview with Detective Romero was uniformly consistent. It showed that Zazueta put his finger into H.D.'s vagina. The jury had the unmistakable binary choice of either finding the evidence met the prosecution's burden of proof or that it did not. Zazueta has cited us to no evidence in the record that would support a jury's finding that Zazueta only attempted to sexually penetrate H.D. As we have said, Zazueta was "either guilty of the offense charged or not guilty at all." (*Ibid.*)

As to the sexual penetration charge alleged in count 9, related to the events in Zazueta's room between September 2012 and February 2014, we have a different view on the issue of whether an attempt instruction should have been given. On this issue, the record on appeal shows there was room in the evidence to support a jury conclusion that no penetration occurred.

Here, the record shows the following: H.D. testified on direct examination during a morning session of trial. During this testimony, H.D. described in detail the sexual penetration offense that occurred in her bedroom in March 2014. The prosecutor then began questioning H.D. about the earlier sexual penetration offense in Zazueta's room on or between September 2012 and February 2014. A very short time into this questioning, the court recessed the trial for the noon break. When the trial resumed after the noon break, the prosecutor picked up with questions about the earlier sexual penetration crime. During this examination, H.D. stated that the time in her bedroom was the "only time," the "one time," when Zazueta had put placed his finger "inside." After H.D.'s statement, the following exchange ensued:

> "[The Prosecutor]: [H.D.] where was the other time?
> [H.D.]: No. I said it wasn't another time. It wasn't.
> [The Prosecutor]: There was only one time it went inside?
> [H.D.]: Yes."

The exchange noted above prompted the prosecutor to follow-up with some specific questions to clarify H.D.'s testimony about the earlier events in Zazueta's room. During this testimony, the prosecutor was able to get H.D. to agree that Zazueta's fingers were "moving" all "over where you pee," and to agree that she had felt the "skin of his fingers . . . on . . . the skin where you pee." After the prosecutor elicited this explanation, which the record in our view suggests led the prosecutor to believe that he was going to be able to rehabilitate H.D.'s testimony, the following exchange occurred:

"[The Prosecutor]: When his fingers [were] moving, did his fingers ever go inside?
[H.D.]: No."

Although there was other trial evidence -- Officer Gomez's testimony that H.D. had reported that Zazueta committed two acts of sexual penetration, and Zazueta's own admissions that he "touched " [H.D.'s] vagina" "two times," -- H.D.'s testimony summarized above is what it is. Thus, there was evidence that would have supported a jury finding that Zazueta committed only the crime of attempted sexual penetration during the events in his room on or between September 2012 and February 2014 as he had not penetrated H.D. with his finger, but only touched the outside of her vagina. (*People v. Kipp* (1998) 18 Cal.4th 349, 376 [when a defendant acts with the intent to engage in the alleged criminal conduct, and performs an act that goes beyond mere preparation, the defendant may be convicted of criminal attempt].) Here, if the jury accepted H.D.'s trial testimony as the events that occurred in Zazueta's room, then it could have found that he initiated an attempt to commit sexual penetration, but his efforts were ineffectual. In such a case, the evidence would support a conviction for attempted sexual penetration.

Our examination of Zazueta's claim as to count 9 does not end here. As noted above, an error in failing to instruct on a lesser offense is subject to harmless error analysis. Here, we find that the lack of an instruction on the lesser included offense of attempted sexual penetration as to count 9 was not harmless. On the record before us, there is no indication that the jury resolved the issue in favor of the greater offense and rejected the lesser offense. Instead, the evidence shows only that the jury was given the "all or nothing" choice of convicting on the greater or

acquitting him entirely on this count. It has been stressed that our courts "'"are not gambling halls but forums for the discovery of truth."' [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 127.) Had the jury believed that no penetration occurred, the issue counsel put before the jury, it could have been resolved by the jury finding Zazueta was guilty of the lesser offense of attempted sexual penetration

The Attorney General's argument that there was no basis for a lesser included instruction because there was no evidence of an attempt falters. The Attorney General argues the touching was either outside the vagina or inside the vagina, and that there is no evidence of an attempt to penetrate. However, there is nothing more Zazueta could have done to effectuate an attempt without actually penetrating H.D. Given that the slightest penetration is all that is needed to prove this crime, if the defendant made any further action to demonstrate an attempt, he would have penetrated H.D. and thus constitute a completed crime. Accordingly, the error in failing to give an instruction on attempt was not harmless.

At oral argument, defendant indicated he would consent to a modification of the judgment from a sexual penetration charge to an attempted sexual penetration charge, the latter of which carries a determinate, rather than life, sentence. The People did not express a view on the matter. If they so agree after remand, the judgment in this case can be so modified. If not, the count may be retried.

II. Substantial Evidence — Count 9

Zazueta contends his sexual penetration conviction in count 9 must be reversed because the jury's verdict is not supported by substantial evidence. We disagree.

When presented with a claim on appeal that the evidence is insufficient to support a jury's verdict, we follow a well-settled standard of review. We must examine the entire record in the light most favorable to the verdict and determine whether the record discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt. (*People v. Smith* (2014) 60 Cal.4th 603, 617.) In undertaking this examination, we must presume in support of the verdict the existence of every fact the trier could reasonably deduce from the evidence. (*People v. White* (2014) 230 Cal.App.4th 305, 315, fn. 13.) "'"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" [Citation.]'" (*Ibid.*)

Regarding the count 9 sexual penetration charge, H.D. testified that she was playing fetch with her grandmother's dogs. After one throw, the dogs could not find the ball, so H.D. went to the back of the yard to help the dogs find the ball, not realizing that Zazueta was at the back of the yard. Zazueta told H.D. to go to his room, and, when she got inside his room, he closed the door. He told H.D. to sit down on the sofa and unzipped his pants. Zazueta made H.D. "squeeze" his penis and told her not to tell her mother or grandmother because he would go to jail. Zazueta touched her breasts and her vagina over her clothes, then moved his hand under her pants and underwear and

touched the skin in H.D.'s vaginal area with his fingers. H.D. felt his fingers "moving" around.

Although H.D. testified, as we discussed above, that Zazueta did not penetrate her during the events in his room, there was evidence that she told Officer Gomez, that Zazueta had penetrated her on two occasions. The time in her room, and on an earlier occasion in his room. Further, Officer Gomez was the first person in authority to whom H.D. spoke after the events of March 2014 came to light, and there is nothing in the record to suggest that H.D. had reason to falsify the report of an earlier act of sexual penetration. H.D.'s prior inconsistent statement supports the jury's finding that Zazueta committed an act of sexual penetration in his room as alleged in count 9. We also note that Zazueta admitted during his interview with Detective Romero that he (Zazueta) touched H.D.'s vagina "just two times." While we view the detective's questions during Zazueta's interview to have been somewhat vague in distinguishing between events in H.D.'s room (count 1) and in Zazueta's room (count 9), we are satisfied that this was an issue for the jury to resolve as the finder of fact. Given the totality of the evidence, reviewed in light of the standard of review noted above, we cannot say that the evidence fails to support the jury's verdict on count 9.

III. AIDS Testing

Zazueta contends that an AIDS testing order included in the abstract of judgment must be stricken because the trial court did not order such testing, and because, in the event the court did impose such an order, it would have erred in doing so. The People concede that Zazueta "is correct on both points." We agree

the AIDS testing order in the abstract of judgment must be stricken.

Under section 1202.1, subdivisions (a) and (e)(1) through (e)(5), a trial court is required to order AIDS testing for defendants who are convicted of certain specified sexual offenses. Under section 1202.1, subdivisions (a) and subdivision (e)(6), a trial court is required to order AIDS testing for persons convicted of a broader range of specified sexual offenses where the court finds "probable cause to believe that blood, semen, or other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim."

Here, the jury convicted Zazueta of sexual penetration of a child 10 years old or younger under section 288.7, subdivision (b) (counts 1 and 9), and of lewd acts upon a child under section 288, subdivision (a) (counts 2 through 8). Section 288.7, subdivision (b), and section 288, subdivision (a), are not listed in section 1202.1, subdivisions (e)(1) through (e)(5), and, thus, the court could not have ordered Zazueta to take an AIDS test based on the specifically listed sex crimes requiring such testing.

Further, the trial court could not have ordered Zazueta to take an AIDS test under the broader provisions of section 1202.1, subdivision (e)(6), absent a finding of "probable cause to believe that blood, semen, or other bodily fluid capable of transmitting HIV has been transferred" from Zazueta to H.D. At Zazueta's sentencing hearing, the court found that no such probable cause existed, and on that basis, declined or order him to undergo AIDS testing.

Because AIDS testing could not have been ordered mandatorily based on Zazueta's crimes, or based on his crimes with the finding that no probable cause existed to believe HIV

may have been transferred to H.D., and because the court did not, in fact, order AIDS testing, we agree with Zazueta that the abstract of judgment must be corrected to reflect that no such testing was ordered.

DISPOSITION

The judgment is reversed as to count 9 and affirmed in all other respects. The matter is remanded to the trial court to correct the abstract of judgment to reflect that AIDS testing was not ordered. If the People and Zazueta so elect, the judgment may be modified to reduce count 9 to an attempted sexual penetration.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.