Filed 2/3/17 P. v. Huerta CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EMILIANO CRUZ HUERTA, Defendant and Appellant.	B271439 (Los Angeles County Super. Ct. No. BA431872)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund Willcox Clarke, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant was convicted of sexually abusing his stepdaughter. We have conducted an independent examination of the entire record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), and conclude that no arguable issues exist. We therefore affirm.

Defendant was charged by information with sexual intercourse or sodomy with a child 10 years of age or younger relating to victim E.L. (counts 1 and 2, Pen. Code, § 288.7, subd. (a)[1]), lewd act upon a child relating to victim E.L. (counts 3 and 5, § 288, subd. (a)), continuous sexual abuse of E.L. (count 4, § 288.5, subd. (a)), lewd act upon a child relating to victim D.L. (counts 6 and 7, § 288, subd. (a)). Counts 3, 4, 5, 6, and 7 included the additional allegation that the crimes were committed against more than one victim. (§ 667.61, subds. (b), (c), and (e).)

At trial, the prosecution introduced an audio recording and transcript of a 911 call E.L. made on November 28, 2014 at 4:37 a.m. The audio recording was played for the jury. At the beginning of the call, E.L. asked if she could report something, and the 911 operator asked, "Like what?" E.L. responded, "Like if your dad is in a – like sexually abusing you and you feel like he might be abusing your sister and you just want him gone." In the course of the call, which lasted approximately 15 minutes, E.L. said that her father had been "touching me for some days and I'm scared that he might be doing it to my sister." She later said, "He's actually been like trying to like rape me, like barely rape me." E.L. said defendant was in a bedroom "talking to my sister and I'm scared that he's doing something to her." E.L. reported

---

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

that she was 12 years old, and her sister was 10 years old. The 911 operator stayed on the phone with E.L. until the police came, and E.L. stayed in the bathroom while she waited for the police. When the operator asked E.L. how old she was when the molestation began, E.L. said, "I don't know. I don't remember how old I was." E.L. agreed, however, that defendant had been molesting her for years. The call ended when police arrived at the home.

Los Angeles police officer Brandon Alvarez testified that he responded to E.L.'s 911 call, and took E.L. to a rape treatment center. Jennifer McLean-Madera, a nurse at the rape treatment center who examined E.L., testified about that examination. E.L. reported to McLean-Madera that she had been sexually abused for three years, and the most recent assault had happened two days before. E.L. said that defendant "put something wet in my bottom. He put his penis in my bottom. When he's done, he cleans me and we watch T.V. or sometimes I leave." The exam did not reveal any injuries associated with sexual assault. McLean-Madera testified that it is "not uncommon in a sexual assault to not see any injuries."

Los Angeles Police detective Oscar Garza testified about investigating the alleged crime, including interviewing defendant. The prosecution introduced an audio recording and a transcript of defendant's interview in Spanish and English. The audio recording of the interview was played for the jury. In it, when asked when he began doing this, defendant replied that it had been four months. He said he had been drunk and did not realize what he was doing. He did it "two or three times, tops." He said he did not do anything to the other girl, presumably meaning D.L. The interviewing officers told defendant that E.L.

had reported that defendant used a lubricant on her behind, and defendant said he never put anything on her, but he "come[s] out with the lubricant, on my own" because "I shower with lubricant." Defendant said he did not penetrate E.L.: "Not penetrate, not penetrate. I just wanted to penetrate, but obviously, she's small, man." So when he tried to penetrate her, "it just slips and it goes up and down, and it's and it's just rubbing and rubbing." He also said, "And it rubs downward and slips. And that's where I came." Defendant said that when he was done, he cleaned E.L.

Nicole Farrell, a forensic interview specialist, testified about interviewing D.L. about the allegations in this case. The prosecution submitted a video and transcript of Farrell's interview of D.L. from December 2014. The video was played to the jury. In the interview, D.L. said she was in fifth grade. She reported that defendant "touched me in the butt." When asked for more information, D.L. said defendant rubbed her butt cheeks with his hand over her clothes, more than once. D.L. thought it began happening when she was five years old. D.L. also said defendant rubbed her breasts with his hand over her clothes, more than once. D.L. said that after he touched her, defendant said he was trying to protect her because her biological father was not around, and that he would hit her if she told anyone what happened. On cross-examination, Farrell said that children age 12 and under often have trouble placing events in a timeline with accuracy.

D.L. testified at trial. She said defendant "touched me in my butt" by "putting his hand over it, over clothes, and was rubbing it." She said this happened "years ago" and the day police came to their home. D.L. testified that defendant touched her when she was in 5th grade, at 10 or 11 years old. Defendant

told D.L. that if she told anyone what happened, he would beat her up.

E.L. also testified. She described defendant taking off the bottom of her school uniform and her underwear, and "he put his penis in my anus," and it was moving in and out. E.L. testified that it hurt. E.L. testified about another instance when defendant did the same thing after taking off E.L.'s pajama shorts. She said that time was not painful, because defendant poured onto her "kind of a lotion thing, but it wasn't lotion." E.L. also testified that defendant would "feel" her breasts over her clothes.

E.L. could not remember with precision how old she was when defendant first penetrated her, and much of the direct questioning and cross-examination involved attempts to establish how old E.L. was at the time. On direct examination, E.L. testified that it first happened toward the end of fourth grade, when she was 10 years old. On cross-examination, defense counsel presented testimony from the preliminary hearing when E.L. said she was sure that defendant first penetrated her after spring break of her fifth grade year, when E.L. was 11 years old. E.L. testified that after defendant first penetrated her, it would happen "more than one in a week" "until I called the cops."

After the prosecution rested, defendant moved for an acquittal based on insufficient evidence pursuant to section 1118.1; the court denied the motion. The defense rested without presenting additional evidence. In closing statements, defense counsel told the jury that defendant conceded guilt on counts 3, 4, and 5. Defendant therefore only contested counts 1 and 2 relating to sodomy of E.L. when she was age ten or under, and counts 6 and 7 relating to D.L.

On counts 1 and 2 the jury found defendant guilty of the lesser included offense of simple battery. (§ 242.) On counts 3, 4, and 5, the jury found defendant guilty, and found the multiple victim allegations not true. The jury found defendant not guilty on counts 6 and 7, lewd acts on a child relating to D.L. The court sentenced defendant to 20 years: 16 years as the upper term on count 4 as the base count; on count 3, two years as one-third the midterm, to run consecutively; on count 5, two years as one-third the midterm, to run consecutively; on count 1, six months to run concurrently; and on count 2, six months to run concurrently.

Defendant timely appealed. His appointed counsel on appeal filed a brief requesting that we independently review the record for error. (*Wende, supra,* 25 Cal.3d 436, 441.) We directed counsel to send the record and a copy of the brief to defendant, and notified defendant of his right to respond within 30 days. We have received no response.

We have examined the entire record, and are satisfied no arguable issues exist in the appeal before us. (*Smith v. Robbins* (2000) 528 U.S. 259, 278; *People v. Kelly* (2006) 40 Cal.4th 106, 110; *Wende*, *supra*, 25 Cal.3d at p. 443.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J. WILLHITE, J.