Filed 12/18/17 P. v. Duenas CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE DUENAS, Defendant and Appellant.	B278539 (Los Angeles County Super. Ct. No. GA097757)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Villalobos, Judge. Reversed in part with directions, affirmed in part.

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, Stephanie C. Brenan and Jonathan M. Krauss, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Jose Duenas was convicted of sexual intercourse or sodomy with a child 10 years old or younger, attempted sexual intercourse or sodomy with a child 10 years old or younger, and oral copulation or sexual penetration with a child 10 years old or younger. He challenges the sufficiency of the evidence on the count for sexual intercourse or sodomy, and we find that the evidence was sufficient to support the conviction. We therefore affirm the conviction.

Defendant also challenges the court's order that he undergo testing for HIV/AIDS; the Attorney General agrees this order was erroneous. We therefore reverse the court's order regarding testing. Defendant further asserts that the abstract of judgment incorrectly characterized his conviction on one count of attempted sexual intercourse or sodomy with a child 10 years old or younger; the Attorney General agrees and the record supports defendant's assertion. We therefore direct the trial court to correct the abstract of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. Information

The Los Angeles County District Attorney (the People) filed an information charging defendant with three counts of sexual intercourse or sodomy with a child 10 years old or younger (Pen. Code, § 288.7, subd. (a),[1] counts 1, 4, and 7); three counts of oral copulation or sexual penetration with a child 10 years old or younger (§ 288.7, subd. (b), counts 2, 5, and 8), and three counts of sending harmful matter to a minor (§ 288.2, subd. (a), counts 3,

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

6, and 9). The People alleged that counts 1, 2, and 3 occurred between July 2011 and July 2012; counts 4, 5, and 6 occurred between July 2012 and July 2013, and counts 7, 8, and 9 occurred between July 2013 and July 2014. Defendant pled not guilty. The court granted the People's motion to dismiss counts 3, 6, and 9. The case proceeded to trial in September 2016.

Defendant challenges the sufficiency of the evidence relating to count 7, sexual intercourse or sodomy with a child 10 years old or younger between July 2013 and July 2014. We therefore focus on portions of the trial relevant to that count.

B. Evidence presented at trial

M.[2] testified that she was 12 at the time of trial. She lived with defendant and her mother from the time she was in second grade until she was in fifth grade. The first time defendant touched her, they were at home watching television and she was on his lap. Defendant began touching M.'s genitals, and he inserted his finger into her vagina. M. took defendant's hand away several times because it made her uncomfortable, but he kept putting it back.

M. testified that after the first incident, defendant often touched her while her mother was at work. While M. was sleeping in the room her mother and defendant shared, defendant would wake her up, take off her clothes, put pornography on the television, and take off his own clothing. Defendant rubbed his penis and he asked M. to rub it; she did not want to, but defendant picked up her hand and rubbed it on him. When defendant did this, he moaned. When he would "rub it too much" a "whitish" liquid would come out. M. testified that afterwards,

---

[2] We refer to the victim and her mother by initials to protect their privacy. (See Cal. Rules of Court, rule 8.90(b)(4).)

"he would tell me to put on my clothes and I had to get ready for school."

M. testified that the abuse was "usually the same thing," but sometimes defendant "would want me to lick his penis, but then I would say no. I never licked." Defendant licked M.'s genitals "several times." "More than once," M. awoke to find that her pants were off and defendant was licking her genitals. If she woke up while defendant was taking off her pants, M. would try to pull on her pants to keep them on. M. did not remember if defendant licked her butt. Most of the time, as the abuse was happening, pornographic movies would be on the television. Sometimes defendant would rub M.'s genitals hard and cause her pain. Defendant also touched M. on her "boobs."

M. testified that "[o]ne time he tried to put his penis in my butt." They were in M.'s mother's bedroom, and defendant took off M.'s clothing. M. testified, "He would try to make his penis go in my butt, but it would hurt so I would tell him no, to stop." When the prosecutor asked, "Did it go inside?" M. answered, "Not all the way." M. said this happened twice, the same way both times. M. later testified that defendant once put a condom on and tried to insert his penis in her butt, and another time he put a condom on and just rubbed his penis.

M. also testified that defendant never tried to put his penis anywhere else, including in her "front side." When the prosecutor asked whether defendant's penis went anywhere near her vagina, M. testified, "No, I don't think so – No. I don't remember." Even after looking at the preliminary transcript and being reminded of things she told the deputy after she reported the abuse, M. said she could not remember.

Sometimes when M. and defendant were alone in the car together, defendant "would take off my pants, and then he would touch me in my vagina and sometimes lick it." When defendant touched her, his fingers went into her vagina. M. testified that this occurred about five times.

M. testified that defendant told her not to tell anyone, and that "everything was my fault." The abuse stopped when M. was in fifth grade, because defendant was not at M.'s house much anymore. One day after that, M. did not want to take a shower because she felt uncomfortable, and her mother asked her what was going on. M. told her mother about the abuse. The same day, M. talked to a sheriff's deputy and told him what had happened. She was crying because she felt guilty, like she had done something wrong.

M.'s mother, M.G., testified that defendant lived with her and her three daughters from the beginning of 2012 to 2014. M.G. worked as a cashier at a gas station six days a week, eight to 16 hours a day. The landlord watched M.G.'s children while she worked, and when defendant got home from work he would watch the kids Defendant moved out in June 2014.

M.G. testified that on April 16, 2015, M. "didn't want to bathe and was really angry." M.G. asked what was going on, and initially M. said that M.G. could not help her. M.G. eventually got M. to talk about what was wrong, but "it was hard for her to tell me." M. told her that defendant "had put his fingers in her intimates part." M. "was very embarrassed. She was crying, and she was very upset." M.G. called the police.

Los Angeles County Sheriff Deputy Javier Gonzalez testified that he responded to M.G.'s call. He encountered M. at the scene, who "was sobbing and had her hands on her face."

Before Gonzalez asked any questions, M. said in Spanish, "[H]e was supposed to be a good person, and I trusted him." M. told Gonzalez that one time defendant put his finger in her vagina. M. said that another time, "She was asleep . . . on her mom's bed and woke up and the suspect was – was in front of her and had his penis inside her vagina." M. said defendant's penis was only halfway inside her because it did not fit, and defendant said that he liked it. M. told Gonzalez about another incident in which defendant put his penis in her mouth and told her to suck it; M. pushed him off and told him no. In another incident, while M. was eight or nine years old, defendant licked M.'s anus. M. said she had never told anyone because defendant had told her that no one would believe her, and it was her fault. During the interview, M. continued to sob intermittently.

Detective Liliana Jara testified that she works in the special victims bureau of the Los Angeles County Sheriff's Department. Jara and her partner arrested defendant on December 18, 2015, and interviewed him the same day. The recording of the interview was played for the jury, and a written transcript with an English translation was provided to the jurors.[3]

In the interview, defendant said he had lived with M.G. and her daughters for about two years, ending in September 2014. Defendant said he and M.G. had broken up when defendant met another woman.

At first defendant denied that he ever touched M. But defendant quickly acknowledged that he first touched M. "not

---

[3] The interview was conducted in Spanish; here we rely on the written translation transcript included in the record on appeal.

long ago," a month or two before he and M.G. broke up. Defendant said he would lie on the couch and M. would come over and lie on top of him, and in a "moment of craziness" he put his hand inside her pants. Defendant said M. would watch the Playboy channel and he would come over and hug her. M. would unbutton defendant's pants and shirt; one time she touched his penis. Defendant later said M. touched him "more than five times." Defendant said one time he used a pink, flavored condom because M. "didn't like it when the semen came out."

Defendant admitted that he put his finger in M.'s vagina sometime around July 2014. He initially said he did not ejaculate while he touched M., but later said that he did. Defendant said that M. asked to be touched and asked him to put his penis in her vagina. Defendant said he thought about penetrating her, but decided not to, and his penis never touched her vagina. Defendant stated, "I never penetrated her." Later, he said that he was going to "put it in," but M. said it hurt so he did not do it. He also said, "[M]aybe it hurt, and when I tried to, because the truth is I did want to, I tried to penetrate her, but I didn't penetrate her."

Defendant also said initially that he never penetrated M.'s anus. When Jara asked if there was a time defendant penetrated M.'s anus even a little bit, defendant said that M. would pull her pants down and put her back toward him, so he would put his penis on her butt. Defendant added, "Maybe then, but I'm not aware of ever penetrating her. Like you said, it might have been a little bit, but I don't, I wasn't aware of penetrating her." Defendant also said he put his penis on M.'s "butt cheeks" "just to feel it" but he did not go inside. Jara referenced defendant's statements that M. asked for certain sexual contact, and asked,

"[T]hat time with the anus, did she ask you to put it in her anus?" Defendant responded, "She practically put it there; she looked for ways to be close." Jara said, "Okay, and she put your penis in her anus." Defendant responded, "Yes." Jara asked, "[D]id it go slightly in?" Defendant said, "No, I can't, how can I put it? I can't . . . I can't." Jara asked, "So, is she lying when she says it did go in?" Defendant said, "Maybe. How can I put it? The thing is I don't, I'm not sure, I didn't feel it going in." Later Jara asked again, "[I]f she's saying it did go in, is she lying?" Defendant responded, "Maybe not."

Defendant also said that once he kissed M. on the mouth and "I put my tongue, but not like, I mean, that was it." Defendant also admitted that several times he "kissed" and licked M.'s genitals.

Defendant initially said he had sexual contact with M. about five times. Defendant later said it happened eight to ten times. Even later, he said, "It might have been like once a week, maybe."

C. Instructions, verdict, and sentence

As relevant to the counts for sexual intercourse or sodomy with a child (including count 7, the count at issue on appeal), the court instructed the jury, "[S]exual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis. Ejaculation is not required. Sodomy is anal penetration, no matter how slight, of the anus of one person by the penis of another person. Ejaculation is not required." (CALCRIM No. 1127.) The court also instructed the jury as to the lesser-included offenses of attempted sexual intercourse and attempted sodomy.

The jury found defendant not guilty on count 1 (sexual intercourse or sodomy from July 2011 to July 2012), guilty on count 2 (oral copulation or sexual penetration from July 2011 to July 2012), guilty of the lesser-included offense on count 4 (attempted sexual intercourse or attempted sodomy from July 2012 to July 2013), guilty on count 5 (oral copulation or sexual penetration from July 2012 to July 2013), guilty on count 7 (sexual intercourse or sodomy from July 2013 to July 2014), and guilty on count 8 (oral copulation or sexual penetration from July 2013 to July 2014).

The court sentenced defendant to 55 years to life, calculated as follows: a term of 25 years to life on count 7; a consecutive term of 15 years to life on count 8; a consecutive term of 15 years to life on count 5; a concurrent term of 15 years to life on count 2; and a concurrent term of 7 years on count 4. The court awarded defendant presentencing credits and imposed various fines and fees. In addition, the court ordered defendant to undergo HIV/AIDS testing.

Defendant timely appealed.

DISCUSSION

A. Substantial evidence for the conviction on count 7

Defendant asserts that for his conviction on count 7, sexual intercourse or sodomy, there was "insufficient evidence to establish that [defendant] had sexual intercourse or sodomy with the victim." When reviewing a conviction for sufficiency of the evidence, "we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible,

and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for 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 upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

In count 7, defendant was convicted of violating section 288.7, subdivision (a), which states, "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 and shall be punished by imprisonment in the state prison for a term of 25 years to life." "Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis." (*People v. Mendoza* (2015) 240 Cal.App.4th 72, 79.) "Any sexual penetration, however slight, is sufficient to complete the crime of sodomy." (§ 286, subd. (a).) Defendant asserts that the testimony at trial did not establish beyond a reasonable doubt that penetration occurred.

M. testified that defendant penetrated her anus. She said that defendant "would try to make his penis go in my butt," and when asked if it went inside, M. said, "Not all the way." By saying it did not go in "all the way," the implication is that it did go in at least some of the way. In determining whether there was sufficient evidence for the jury to find defendant guilty beyond a reasonable doubt, we presume the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Nelson* (2016) 1 Cal.5th 513, 550.) It may be reasonably deduced from M.'s testimony that defendant's penis penetrated M.'s anus, and this evidence alone is sufficient to support the conviction. "Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction." (*People v. Elliott* (2012) 53 Cal.4th 535, 585.) The events described in M.'s testimony were neither physically impossible nor inherently improbable. Her testimony is sufficient to support the conviction.

The conviction is also supported by M.'s testimony that defendant's actions caused her pain, so she asked him to stop. A victim's pain is circumstantial evidence of penetration in a sodomy case. (See, e.g., *People v. Thomas* (1986) 180 Cal.App.3d 47, 55-56; *People v. Ribera* (2005) 133 Cal.App.4th 81, 86; *People v. Gonzalez* (1983) 141 Cal.App.3d 786, 790, disapproved by *People v. Kurtzman* (1988) 46 Cal.3d 322, 330.)

Moreover, additional evidence presented at trial supports a finding of sodomy. Defendant admitted to Detective Jara that penetration may have occurred: "I'm not aware of ever penetrating her. Like you said, it might have been a little bit, but I don't, I wasn't aware of penetrating her." And when Jara said, "Okay, and she put your penis in her anus," Defendant

responded, "Yes." When Jara asked, "[I]f she's saying it did go in, is she lying?" Defendant responded, "Maybe not."

Defendant argues that the jury could not rely only on defendant's statements because "the corpus delicti or body of the crime . . . cannot be proved by *exclusive* reliance on the defendant's extrajudicial statements." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1165 [emphasis in original].) As noted above, however, M.'s testimony is sufficient to support the conviction; exclusive reliance on defendant's statements is not at issue here.

Defendant argues that "there was insufficient solid and credible evidence of sexual intercourse or sodomy in count 7." However, he has not asserted any arguments that M.'s testimony was not credible or that his own admissions were not admissible. It is not enough for the defendant simply to contend that the evidence is insufficient to support the judgment of conviction, "[r]ather, he must *affirmatively demonstrate* that the evidence is insufficient." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) Defendant has not met his burden to show that there was insufficient evidence to support his conviction.[4]

Defendant also asserts that because the evidence was insufficient, his due process rights under the Fourteenth Amendment of the United States Constitution were violated. Because we have determined that there was sufficient evidence to allow a rational trier of fact to find the challenged element of the crime proven beyond a reasonable doubt, due process protections

---

[4] The Attorney General argues that there was sufficient evidence to support a finding that the sodomy occurred between July 2013 and July 2014. Defendant did not challenge any findings with respect to the time frame alleged in the information, and therefore we do not address the evidence as it pertains to the dates the sodomy occurred.

have been satisfied. (*People v. Osband* (1996) 13 Cal.4th 622, 690.)

B. HIV/AIDS testing

During sentencing, the trial court ordered defendant to undergo HIV/AIDS testing. Defendant asserts, and the Attorney General agrees, that the order was erroneous. Section 1202.1 provides that the court shall order that a defendant convicted of certain sexual offenses to be tested for AIDS. (§ 1202.1, subd. (a).) The statute specifies which sexual offenses require testing. (*Id.*, subd. (e).) Defendant was convicted under section 288.7, which is not one of the enumerated offenses. "Involuntary AIDS or human immunodeficiency virus (HIV) testing is strictly limited by statute." (*People v. Guardado* (1995) 40 Cal.App.4th 757, 763.) The court's order for HIV/AIDS testing was therefore erroneous, and should be stricken. (See *People v. Green* (1996) 50 Cal.App.4th 1076, 1090.)

C. Abstract of judgment

Defendant also asserts that the abstract of judgment is erroneous as to count 4, and the Attorney General agrees. On count 4, defendant was convicted of the lesser included offense of attempted sexual intercourse or sodomy with a child 10 years old or younger. (§§ 664, 288.7, subd. (a).) The abstract of judgment, however, shows count 4 as a conviction for sexual intercourse or sodomy with a child 10 years old or younger under section 288.7, subd. (a), instead of the lesser offense.

"An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) An appellate court may correct errors in abstracts of judgment.

(*Ibid*.) We therefore direct the trial court to correct the abstract of judgment to correctly reflect defendant's conviction on count 4.

DISPOSITION

The order requiring defendant to submit to testing for HIV/AIDS is reversed. The trial court is directed to amend the abstract of judgment to correctly reflect that on count 4, defendant was convicted of attempted sexual intercourse or sodomy with a child 10 years old or younger under Penal Code sections 288.7 subd. (a) and 664. The trial court is directed to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.