Filed 4/30/15 P. v. Flores CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JUAN DEDIOS FLORES,<br><br>Defendant and Appellant. | B257339<br><br>(Los Angeles County<br>Super. Ct. No. MA060680) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles A. Chung, Judge. Affirmed in part and reversed in part with directions.

Carlos J. Perez for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Yun K. Lee and Nathan Guttman, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Juan Dedios Flores appeals from the judgment entered following a jury trial in which he was convicted of two counts of sexual intercourse with a child of 10 years of age or less, two counts of oral copulation or sexual penetration of a child of 10 years of age or less, and a single count of continuous sexual abuse of a minor.

Defendant contends the evidence was insufficient to support any of his convictions, his confession should have been suppressed as taken in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602] (*Miranda*), and his sentence was excessive. We conclude sufficient evidence supported each of defendant's convictions and defendant forfeited his *Miranda* claim by failing to raise it in the trial court. Because the trial court erroneously believed it was required to impose consecutive sentences for all counts, we remand for resentencing to allow the trial court to exercise its informed discretion.

## BACKGROUND

### 1. Count 5: continuous sexual abuse of a minor (Pen. Code, § 288.5, subd. (a))[1]

In 2011, G. F., then eight years old, lived with her mother, grandparents, and defendant, who is her uncle, in a house in Littlerock, in Los Angeles County. G. testified that one day in August of 2011, defendant walked up behind her as she was using his computer in his room in the house, reached inside her trousers and underwear, and touched her genitals, moving his hand side to side for approximately two minutes. He then said, "'I'll hurt your mom.'" G. believed him and therefore did not tell anyone what defendant had done. Defendant did the same thing to G. on about three other occasions before G. and her mother moved from the house in Littlerock to a house in Rosamond around the end of 2011.

While G. and her mother Karla lived in Rosamond, Karla and defendant worked in a market owned by their parents. Karla took G. to work with her every day, and G. watched television in the market's office. G. testified that on at least one occasion in

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[1] Undesignated statutory references pertain to the Penal Code.

2012 while Karla was working at the cash register, defendant came into the office, reached inside her underwear, put his hand on her genitals and moved it around, then exposed his penis and made her "move it back and forth" with her hand.

G. and Karla moved from Rosamond to Palmdale sometime in 2012. Defendant and G.'s grandparents moved to Bakersfield around April or May of 2013. Sometime before August of 2013, Karla and G. visited them in Bakersfield. G. testified that as she was watching television in defendant's room, defendant placed his hand beneath her underwear, put his fingers inside her vagina, and moved them around for about a minute. G. was 10 years old at the time.

**2. Counts 3–4: sexual intercourse and oral copulation or sexual penetration of a child 10 years of age or younger on August 10, 2013 (§ 288.7, subds. (a), (b))**

On August 10, 2013,[2] Karla held a party at her home in Palmdale to celebrate her father's birthday. Defendant and other relatives attended. While G. (still 10 years old) was alone in her bedroom, defendant came into the room and shut the door. He reached inside her underwear and rubbed her genitals for about 30 seconds. He then put his fingers inside of her vagina and moved them "back and forth" for about 90 seconds. He then pulled down her trousers and underwear and attempted to insert his penis into her vagina for about a minute. G. testified she felt pressure and pain and asked defendant to stop. Defendant also made G. move her hand back and forth on his penis, placed his penis in her mouth, moved his penis back and forth in her mouth for about two and one-half minutes, and licked G.'s genitals for about a minute. When defendant left G.'s room, he again told her, "'I'll hurt your mom.'"

**3. Counts 1–2: sexual intercourse and oral copulation or sexual penetration of a child 10 years of age or younger on August 31, 2013 (§ 288.7, subds. (a), (b))**

On August 31 Karla held another family party at her home in Palmdale. G. (still 10 years old) testified she again was alone in her bedroom when defendant came into the

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[2] Unspecified date references pertain to 2013.

room and shut the door. This time, he placed a hamper in front of the door. He again reached inside her underwear, rubbed her genitals, pulled down her trousers and underwear, placed his fingers inside of her vagina and moved them back and forth, and again attempted to insert his penis into her vagina. She asked him to stop and tried to push him away, but he threatened, "I'm going to hurt your mom," and continued trying to enter her for "about less than five minutes or so." G. felt pressure and pain. Defendant then licked G.'s genitals for about for about a minute and again put his finger inside her vagina. At some point, he also put his penis in G.'s mouth and used his hands to move her head back and forth.

Eventually, Karla opened the door to G.'s room, saw defendant "getting up from top of [G.] and sitting next to her and he put his face on [her] private part" while also touching himself. Karla screamed and defendant said, "Be quiet, please don't do this to me, be quiet." Karla testified G. appeared to be dazed. Karla stepped in a liquid she believed was semen on the carpet next to G.'s bed. G.'s grandparents ran in and her grandfather struck defendant. Defendant walked out and continued going, even though Karla told him he had to stay.

Karla phoned the police and took G. to a hospital, where sexual assault response team (SART) nurses interviewed and examined G. The nurses collected G.'s underwear and a number of swabs of her body for scientific testing, including swabs of her external genitals. The nurses noted a fresh abrasion on her posterior fourchette, which is the lower meeting point of the labia minora. A dye solution indicated that the abrasion had occurred at some time within the previous 24 hours. One of the nurses testified that this injury was consistent with a stretching of G.'s vaginal opening by penetration of a penis past the labia minora. The nurse further testified that both G.'s labia minora and labia majora (outer structure) were tender to the touch.

Defendant turned himself in to law enforcement the next day, and, although he said he had washed, officers took him to the hospital for collection of evidence. One of

the same nurses who examined G. drew a blood sample from defendant and swabbed his penis and scrotum.

DNA testing of G.'s underwear and the swabs collected by the nurses revealed the following: defendant was a possible contributor of DNA extracted from semen found on the inside crotch of G.'s underwear, with a random match probability for the Hispanic population of 1 in 44 trillion; defendant was a possible contributor of DNA extracted from a swab of G.'s external genitals, with a random match probability for the Hispanic population of 1 in 33 trillion; G. was a possible contributor of DNA extracted from a swab of defendant's scrotum, with a random match probability for the Hispanic population of 1 in 2,020.

**4. Defendant's confession**

Los Angeles County Sheriff's Detective Chris Wyatt interviewed defendant on September 1, 2013. Defendant already had been advised of his rights pursuant to *Miranda*, *supra*, 384 U.S. 436. The interview was recorded, and the recording was played at trial.

In the interview, defendant admitted he had pulled down G.'s trousers and underwear, rubbed her clitoris in an attempt to arouse her, inserted his finger into her vagina, then attempted to insert his penis into her vagina. He did not know how far he was able to insert it. When she told him he was hurting her, he stopped and licked her clitoris. He then masturbated and ejaculated on the carpet next to G.'s bed, just before Karla walked in.

Defendant further admitted he had "done this stuff with" G. on three prior occasions, then told Wyatt about four prior events. Defendant said when the family lived in Littlerock, he masturbated and ejaculated while G. watched. Defendant admitted that in the family's market in Rosamond, he rubbed G.'s clitoris on one occasion and, on another occasion, put his penis in her mouth, causing her to vomit. Defendant also admitted that on August 10 he rubbed G.'s clitoris and masturbated in her presence.

**5. Testimony of defendant's mother**

Defendant's mother, Graciela Flores, testified that during the August 31, 2013 party at Karla's home, Karla went to check on G., then began yelling. When Flores reached G.'s room about five minutes later, both defendant and G. were fully dressed, though G.'s trousers were "lowered a little." Flores opined, "G. wasn't scared. She wasn't anything." Karla did not tell defendant to stay. Flores, who was not a medical professional and had no special training regarding sexual assaults, examined G. and testified she observed no semen in her underwear and no redness or injuries to her genitals.

**6. Verdicts and sentencing**

The jury convicted defendant of two counts of sexual intercourse with a child of 10 years of age or younger, two counts of oral copulation or sexual penetration of a child of 10 years of age or younger, and a single count of continuous sexual abuse of a minor.

The court sentenced defendant to 25 years to life for counts 1 and 3, 15 years to life for counts 2 and 4, and 16 years for count 5, all consecutive, for an aggregate term of 96 years to life.

## DISCUSSION

**1. Sufficiency of evidence**

Defendant contends the evidence was insufficient to support any of his convictions. He argues the evidence "was too general in nature and the victim too unsure of the number of times each thing occurred and what occurred."

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Tully* (2012) 54 Cal.4th 952, 1006.) Substantial evidence is "'"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."'" (*Ibid*.)

We presume the existence of every fact supporting the judgment that the jury could reasonably have deduced from the evidence and make all reasonable inferences that support the judgment. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Catlin* (2001) 26 Cal.4th 81, 139.)

**a. Count 1**

In count 1 defendant was convicted of violating section 288.7, subdivision (a), which provides, "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." In this context, "'sexual intercourse'" means "penetration of [the victim's] labia majora, not her vagina." (*People v. Dunn* (2012) 205 Cal.App.4th 1086, 1097.)

With respect to the events of August 31, G. testified defendant attempted to insert his penis into her vagina, causing her to feel pressure and pain. Defendant admitted this in his confession to Detective Wyatt. One of the SART nurses who examined G. later that day observed a fresh abrasion on her posterior fourchette, on the labia minora, which the nurse testified was consistent with stretching of G.'s vaginal opening by penetration of a penis past the labia minora, which necessarily would entail penetration of the victim's labia majora. Accordingly, substantial evidence supported defendant's conviction in count 1.

**b. Count 2**

In count 2 defendant was convicted of violating section 288.7, subdivision (b), which provides, "Any person 18 years of age or older who engages in oral copulation or sexual penetration, as defined in Section 289, 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 15 years to life." In pertinent part, section 289, subdivision (k) defines "'[s]exual penetration'" as "the act of causing the penetration, however slight, of the genital . . . opening of any person . . . for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown

object." (§ 289, subd. (k)(1).) It further defines "'[f]oreign object, substance, instrument, or device'" to "include any part of the body, except a sexual organ." (*Id.*, subd. (k)(2).)

With respect to the events of August 31, G. testified defendant repeatedly inserted his finger into her vagina, licked her genitals, and placed his penis in her mouth. Defendant admitted in his confession to Detective Wyatt that he inserted his finger into her vagina and licked her clitoris. Accordingly, substantial evidence supported defendant's conviction in count 2.

**c. Count 3**

In count 3 defendant was again convicted of violating section 288.7, subdivision (a). With respect to the events of August 10, G. testified defendant attempted to insert his penis into her vagina, persisting in this attempt for about a minute, causing her to feel pressure and pain. Given G.'s description, the duration of the attempt, and the pressure and pain G. experienced, a reasonable jury could conclude beyond a reasonable doubt that, at a minimum, defendant penetrated G.'s labia majora on August 10. Accordingly, substantial evidence supported the conviction.

**d. Count 4**

In count 4 defendant was again convicted of violating section 288.7, subdivision (b). With respect to the events of August 10, G. testified defendant put his fingers inside of her vagina, placed his penis in her mouth, and licked her genitals. Accordingly, substantial evidence supported the conviction.

**e. Count 5**

In count 5 defendant was convicted of violating section 288.5, subdivision (a), which provides: "Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, or three or more acts of lewd or lascivious conduct, as defined in Section 288, with a child under the age of 14 years at the time of the

commission of the offense is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years." "To convict under this section the trier of fact, if a jury, need unanimously agree only that the requisite number of acts occurred not on which acts constitute the requisite number." (§ 288.5, subd. (b).)

A lewd or lascivious act in violation of section 288 consists of any touching of a child under the age of 14 committed for the purpose of arousing the sexual desires of either the defendant or the child. (*People v. Martinez* (1995) 11 Cal.4th 434, 452.) "Violation of section 288 requires the defendant to either touch the body of a child or willfully cause a child to touch her own body, the defendant's body, or the body of someone else." (*People v. Lopez* (2010) 185 Cal.App.4th 1220, 1229.) The requisite intent may be inferred from all the circumstances. (*Ibid.*) "'[T]he trier of fact looks to all the circumstances, including the charged act, to determine whether it was performed with the required specific intent.' [Citations.] Other relevant factors can include the defendant's extrajudicial statements [citation], other acts of lewd conduct admitted or charged in the case [citations], the relationship of the parties [citation], and any coercion, bribery, or deceit used to obtain the victim's cooperation or to avoid detection [citation]." (*Martinez*, at p. 445.)

Section 1203.066, subdivision (b) defines "'[s]ubstantial sexual conduct'" as "penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender."

"Generic" testimony describing a series of essentially indistinguishable acts of molestation is acceptable and constitutes substantial evidence in child sexual abuse cases provided that the victim describes (1) "the *kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy)"; (2) "the *number of acts* committed with sufficient certainty to

support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping')"; and (3) "*the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction." (*People v. Jones* (1990) 51 Cal.3d 294, 316.)

G. testified that in August of 2011, defendant reached inside her trousers and underwear and touched her genitals, moving his hand side to side for approximately two minutes. She testified this act occurred while she was using defendant's computer in his room in the house in Littlerock where her family then resided, and defendant threatened to hurt her mother. G. testified this happened about three additional times while she and her mother still lived in that house. This constituted sufficient generic testimony regarding a lewd or lascivious act. The jury could infer the requisite intent from the nature of the act, defendant's threat—whether intended to induce G.'s cooperation or prevent her from telling anyone, and the evidence of defendant's numerous acts of sexual misconduct toward G. presented during the trial. In addition, given defendant's confession that on August 31 he was attempting to arouse G.'s sexual desire by rubbing her clitoris, the jury could infer defendant acted with the same intent in the incidents at the house in Littlerock in 2011.

G. further testified to one incident in the office of her family's Rosamond market in 2012. Defendant again reached inside her underwear, put his hand on her genitals, moved his hand around, then exposed his penis and made her "move it back and forth" with her hand. This constituted sufficient generic testimony regarding two lewd or lascivious acts and an act of substantial sexual conduct. The jury could infer the requisite intent from the nature of the acts, the evidence of defendant's numerous acts of sexual

misconduct toward G. presented during the trial, and defendant's confession regarding his intent during the August 31 incident.

G. further testified that sometime in 2013, but before the August incidents giving rise to the charges in counts 1 through 4, defendant again placed his hand beneath her underwear, put his fingers inside her vagina and moved his fingers around. She testified this occurred in defendant's room in the house he shared with her grandparents in Bakersfield. This constituted sufficient generic testimony regarding an act that was both lewd or lascivious and an act of substantial sexual conduct. The jury could infer the requisite intent from the nature of the acts, the evidence of defendant's numerous acts of sexual misconduct toward G. presented during the trial, and defendant's confession regarding his intent during the August 31 incident.

In addition, defendant confessed to committing one lewd or lascivious act and one act of substantial sexual conduct in the family's market in Rosamond: he rubbed G.'s clitoris and put his penis in her mouth.

Thus, G.'s testimony and defendant's confession showed he committed more than three lewd or lascivious acts and three acts of substantial sexual conduct from 2011 through 2013. During part of this time, defendant resided in the same home as G., and during the rest of the time he had recurring access to her. Accordingly, substantial evidence supported defendant's conviction in count 5.

**2. Alleged *Miranda* violation**

Defendant contends "[t]he trial court should have suppressed" his confession "for a number of reasons." He argues *Miranda* warnings were not given and he did not waive his rights. In the heading for this issue, he characterizes his confession as involuntary, but does not develop this claim with argument or citations to the record and supporting authorities.

Defendant made no attempt in the trial court to suppress his confession on any ground, and thereby forfeited his appellate claim. (*People v. Scott* (2011) 52 Cal.4th 452, 482 [failure to raise purported invocation of *Miranda* rights forfeited by failure to assert

claim in trial court]; *People v. Combs* (2004) 34 Cal.4th 821, 845 [claim of invalid waiver of *Miranda* rights forfeited by failure to raise it in trial court]; *People v. Holt* (1997) 15 Cal.4th 619, 667 [failure to raise *Miranda* claim in motion to suppress for alleged due process violation].)

In an attempt to avoid forfeiture, defendant argues his attorney objected to admission of his statement at trial. A review of the record reveals counsel did not object. When the court addressed potential issues prior to commencement of the trial, it asked, "The admission of the defendant. [¶] Any objection to his statements coming in, [defense counsel]?" Defense counsel replied, "No. I have listened to the recordings, your honor, and assuming that they satisfy one or more provisions of the Evidence Code, for example, admissions, then the court can rule as they will on their admissibility." The court responded, "I don't hear a specific objection, so I'm ruling it will come in. It is a party admission against the defendant so that makes it admissible." Although defense counsel's phrasing was somewhat unusual, his words cannot be construed as an attempt to exclude the statement on any ground, let alone an objection on the ground of a due process or *Miranda* violation.

Defendant also attempts to avoid forfeiture by arguing that "the statements which were made by the detective and the failure of the Defendant to waive his Miranda rights constitute plain error and fall under the plain error doctrine." Defendant cites as support two federal appellate cases addressing issues of prosecutorial misconduct. California courts do not apply the federal "plain error doctrine" excusing a failure to object (Fed. Rules Crim.Proc., rule 52(b), 18 U.S.C. ["plain error that affects substantial rights may be considered even though it was not brought to the court's attention"]), and we are not required to follow federal lower court precedents, even on federal questions. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3). Moreover, even if we were to assume the cases cited by defendant could be extended to apply to admission of an unchallenged confession, it is far from clear that any error, let alone "plain error" occurred here. As far as the appellate record reveals, defendant was advised of his rights pursuant to *Miranda*

and waived them. When Detective Wyatt began interviewing defendant, defendant acknowledged that Deputy Bringus had previously spoken to defendant and "read [him his] rights and all that stuff." Wyatt then asked defendant, "[D]o you still want to talk to me? Okay. Is that yes?" Defendant replied, "Well yeah, tell me [unintelligible]." "[W]e presume that a judgment or order of the trial court is correct, '"[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown."'" (*People v. Giordano* (2007) 42 Cal.4th 644, 666.) Defendant has not shown error.

Finally, we note defendant makes the following unsupported assertion without citation to the record or elucidation: "It is a violation of basic due process when the prosecutor manipulates the evidence, particularly where the evidence is not overwhelming, to get opinion testimony into evidence when none was given during the trial under oath or gets evidence that the Defendant was in jail pending trial which tends to show evidence of guilt. . . ." We cannot discern from defendant's briefs what evidence he contends the prosecutor manipulated, what opinion testimony he contends the prosecutor somehow introduced without such testimony being given during the trial, what evidence was introduced showing that defendant was in jail pending trial, or how any of these alleged matters pertains to defendant's *Miranda* claim. Accordingly, we do not consider these assertions.

**3. Sentencing**

Defendant contends that his sentence was excessive. He argues the aggravating factors of cruelty and vulnerability cited by the trial court were unsupported and the court did not consider mitigating factors, such as the absence of any prior criminal record and defendant's acknowledgement of "wrongdoing prior to his arrest and at an early stage in the criminal process." The Attorney General argues defendant forfeited these claims by failing to object. We need not address this point, however, because the Attorney General's brief raises a more important issue: the trial court misunderstood its sentencing discretion.

The trial court stated that consecutive sentencing was mandated as to all counts by section 667.6, subdivision (d). In pertinent part, section 667.6, subdivision (d) provides, "A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions." The only offense of which defendant was convicted that is listed in subdivision (e) of section 667.6 is count 5, a violation of section 288.5.

"Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.)

Here, the record establishes that the trial court was unaware that section 667.6, subdivision (d) did not mandate consecutive sentences on all counts, but only on count 5. The Attorney General argues this does not require resentencing because there were ample aggravating factors for the court to use to impose consecutive sentences. This argument misses the mark.

The record unequivocally reveals that the trial court believed it had no discretion with respect to imposing either consecutive or concurrent terms for counts 1 through 4, and thus did not exercise the informed discretion to which defendant was entitled. As the trial court stated, "So I am going to sentence him under Penal Code section 667.6(d), which mandates consecutive sentencing." Although the court may choose to make the terms on counts 1 through 4 run consecutively upon remand and resentencing, we must remand to allow the court to exercise its discretion properly. (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1421 ["when the record indicates the court misunderstood or was unaware of the scope of its discretionary powers, we should remand to allow the court to properly exercise its discretion"].) At the time of resentencing, defendant may raise his objections to the aggravating circumstances and ask the court to consider the mitigating

circumstances, and the prosecutor may reiterate aggravating circumstances meriting the imposition of consecutive sentences.

**DISPOSITION**

Defendant's sentence is reversed and the cause is remanded with directions to the trial court to exercise its sentencing discretion in accordance with this opinion. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

BENDIX, J. *

We concur:

CHANEY, Acting P. J.

JOHNSON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.