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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. PEDRO GAYOSSO LUNA, Defendant and Appellant.	B272260 (Los Angeles County Super. Ct. No. KA107335)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed.

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

No appearance for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Pedro Gayosso Luna appeals from a judgment following his conviction. A jury convicted defendant of two counts of lewd or lascivious acts on a child under the age of 14 in violation of Penal Code[1] section 288, subdivision (a). The jury also found defendant committed these acts against more than one victim within the meaning of section 667.61, subdivisions (b) and (e). Defendant received a sentence of 15 years to life for each count, to run concurrently. We affirm the judgment.

II. BACKGROUND

A. Information

On February 3, 2015, the Los Angeles County District Attorney filed an information against defendant. The district attorney alleged the following. In count 1, on or about August 28, 2014, defendant committed a lewd act upon G.G., a child under the age of 14 years. In count 2, on or about September 2, 2014, defendant committed a lewd act upon G.G. In count 3, on or between January 1, 1997 and December 31, 1998, defendant committed a lewd act upon E.G., a child under the age of 14 years. All alleged acts were in violation of section 288, subdivision (a).

B. Trial

Following jury deliberation, the trial court declared a mistrial with respect to count 2. We focus on counts 1 and 3.

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[1] Further statutory references are to the Penal Code.

1. Prosecution Case

a. G.G.'s Testimony

G.G. testified to the following. Around August 28, 2014, when she was 11 years old, she lived in El Monte, California with her parents, her uncle Eric, her cousin Julian, her grandmother Margaret, and defendant. Defendant was married to her grandmother.

Defendant and Eric were drinking beer outside with G.G.'s parents while G.G. watched television. G.G. went outside, and her mother told her to go back inside. As she walked into the living room, G.G. hit her toe against a table, and began to cry.

Defendant came inside the house and asked G.G. what was wrong. G.G. told him that her toe hurt, and defendant asked if she needed a hug. She said "no." Defendant went into the bathroom and stayed there for quite awhile. In the meantime, G.G. stopped crying and watched television. G.G. was by herself at the time. Defendant came out of the bathroom and asked G.G. if she was ok. She said "yes." Defendant then touched G.G. on the area of her right breast. G.G. told him to "stop" and pushed his hand away. Defendant then went outside.

About 30 minutes later, defendant came back inside the residence. After using the restroom, defendant touched G.G.'s left breast. Once again, G.G. told him to "stop" and pushed his hand away. Defendant then touched G.G.'s crotch outside of her clothing. G.G. told defendant to stop and pushed him away. Defendant's reaction was simply to go outside.

G.G. went to her room, grabbed a sweater, and went back to the living room to watch television. G.G. did not tell anyone at the time because defendant was drunk and she did not believe he touched her on purpose.

b. E.G.'s Testimony

E.G. is G.G.'s mother. Defendant was in a relationship with E.G.'s mother (Margaret), and they had been together for 20 years. On September 2, 2014, E.G. called the police after G.G. told her that defendant had touched her.

Defendant had touched E.G. when she was 10 years old. On the weekends, E.G. lived with defendant and her mother. During her visits, she regularly woke to the sensation of defendant touching her vaginal area over her clothes. Defendant's hand was open and he rubbed her vaginal area in a circular fashion. This occurred around five times from when E.G. was 10 to 12 years old. Although E.G. told her brother and was "pretty sure" she told her mother, the police were not called. E.G. believed her family did not want to deal with the issue or did not believe her.[2]

c. Interview Transcript

Defendant was interviewed twice by the police.[3] The jury received excerpts from the second conversation. In that interview, defendant admitted he made a mistake and that G.G. was telling the truth. Defendant admitted he touched G.G. and rubbed her vagina. Defendant brushed her breast after touching

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[2] Margaret testified E.G. told her that defendant touched her however, at that time, Margaret did not think E.G. was telling the truth.

[3] The interviews occurred the day after his arrest. The first one was at 11:00 a.m. and lasted 23 minutes. The second was at 1:47 p.m. and went for about three hours (but with substantial periods of downtime).

her vagina. Defendant thought it was "natural" for him to touch G.G.'s vagina.

Defendant admitted to touching E.G. sexually. This occurred when E.G. was around 12 years old. Defendant remembered touching E.G. on her breasts and her vagina. It was about three or four years between the first and last time defendant touched E.G. The touching always occurred over the clothing.

2. Defense Case

The beginning of the police interview, i.e. the portion not presented in the prosecution case, was provided to the jury. Therein, defendant denied touching G.G.'s breasts or vagina. He indicated it was possible E.G. was forcing G.G. to accuse him of sexual abuse to get him in trouble. Defendant denied touching E.G. on her breasts or vagina in a sexual manner.

III. DISCUSSION

We appointed counsel to represent defendant on appeal. After examination of the record, appointed appellate counsel filed a brief in which no issues were raised. Instead, counsel requested we independently review the entire record on appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441. (See *Smith v. Robbins* (2000) 528 U.S. 259, 257-284.) On September 6, 2016, we advised defendant that he had 30 days within which to personally submit any contentions or arguments he wishes us to consider. Defendant filed a supplemental brief on September 30, 2016.

In his supplemental brief, defendant asserts violations of his Fifth Amendment rights, citing *Miranda v. Arizona* (1966) 384 U.S. 436. His position is not persuasive.

In order to protect a suspect's Fifth Amendment rights, he "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will appointed for him prior to any questioning if he so desires." (*Miranda v. Arizona* (1966) 384 U.S. 436, 479.) But, even if the officer complies with *Miranda,* the interrogating officer must cease the interrogation if the suspect "clearly requests an attorney." (*Davis v. United States* (1994) 512 U.S. 452, 461.)

Defendant does not cite anything in the record to support his claim. The trial court considered *Miranda* arguments proferred by the defense prior to the start of trial. The trial court noted defendant was advised of his rights at the initial interview. Defendant was again advised approximately two hours and forty-seven minutes later. The trial court found defendant made inquiries about whether it was in his interest to wait to speak to an attorney but did not unequivocally indicate he no longer wanted to speak.

We can find no evidence in the record to dispute the trial court's conclusions. Indeed, defense counsel represented to the trial court that, not only was defendant advised of his *Miranda* rights at the first interview, but he was readvised at the second interview whereupon defendant said he "didn't know" whether it would be better to speak to an attorney. Thus, it was undisputed that defendant was advised per *Miranda*. And, because defendant's comment after the second advisement did not

constitute an unequivocal invocation of his desire to consult with an attorney, the officer was not required to cease questioning. (See *Davis v. United States, supra,* 512 U.S. at p. 459; see also *People v. Michaels* (2002) 28 Cal.4th 486, 509-511.)

Defendant also contends that excerpts from the second interview should not have been admitted into evidence because it occurred during the administration of a polygraph examination. Evidence Code section 351.1, subdivision (a) provides in pertinent part: "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings . . . unless all parties stipulate to the admission of such results." However, defendant fails to cite any case law prohibiting the use of a transcript of the interview during a polygraph examination as evidence. Rather, Evidence Code section 351.1, subdivision provides, "Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible." There is nothing in the record to suggest defendant's statements during the polygraph examination were inadmissible.

DISPOSITION

The judgment is affirmed.

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KUMAR, J. *

We concur:

TURNER, P. J.

KRIEGLER, 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.