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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ERWIN SOTO, Defendant and Appellant.	B230895 (Los Angeles County Super. Ct. No. NA084686)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edward F. Brodie, Judge. Affirmed.

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

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Lawrence M. Daniels and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Erwin Soto appeals from the judgment entered following his convictions by jury on 12 counts of committing a lewd act upon a child (Pen. Code, § 288, subd. (a)(1); as lesser included offenses of counts 1 - 6, & 8 - 13, alleging forcible lewd act upon a child) and one count of committing a forcible lewd act upon a child (Pen. Code, § 288, subd. (b)(1); count 7). The court sentenced appellant to prison for 16 years. We affirm the judgment.

FACTUAL SUMMARY

1. *People's Evidence*.

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 (*Ochoa*)), the evidence, the sufficiency of which is undisputed, established that in the summer of 2009, 10-year-old M. V. (M.) and her mother Iliana lived in one of two bedrooms in a Long Beach apartment. Appellant and his wife A. Y. (A.) lived in the other bedroom.

One morning in August 2009, M. went to the bathroom to shower. She was wearing a shirt, bra, and pants. Appellant, who was behind M., hugged her around her waist and pressed his penis against her buttocks. M. pushed him away. In August 2009, appellant hugged M. on her waist about 10 to 15 times. Towards the end of that month, he hugged her and put his hands on her breasts.

During September 2009, appellant inappropriately touched M. multiple times in the kitchen. M.'s school year ended in September and, after the school year ended, appellant, on multiple occasions, touched her breasts and kissed her mouth. Appellant kissed M. five to ten times. He told her, " 'te quiero,' " which she said meant he liked her.

In early October 2009, appellant began kissing M. and putting his tongue in her mouth. He did this five to ten times. Shortly after October 2, 2009, appellant grabbed her, kissed her, touched her breasts, then touched her vagina through her panties. This occurred a couple of times in the kitchen. On one occasion in October 2009, M. was in the kitchen when appellant pulled her shorts down and tried to touch her vagina under her

panties. She pushed his hand away, bent over to pull up her shorts, and heard appellant unzip his shorts. Appellant took out his penis, grabbed her hand, and made her touch his penis. M. fled. In October 2009, appellant put his hand under M.'s clothes and digitally penetrated her vagina. He did this five to ten times. He also pressed his hard penis against her buttocks. M. told no one about the incidents because she was afraid and did not think Iliana would believe her since appellant was older.

On October 18, 2009, appellant and M. were watching television in the living room. M., who was wearing shirts and shorts, stood to get water and appellant approached her from behind. Appellant touched her breasts while rubbing his penis against her buttocks. Iliana exited her bedroom and saw appellant. M. testified Iliana was "right across from us" and testified Iliana "looked shocked." Appellant released M. and entered the kitchen. Iliana entered the bathroom, then exited and told M. that Iliana needed to talk with her. M. and Iliana entered their bedroom, M.'s stepfather was there, and Iliana told him that appellant was touching M.'s breasts. After about five or ten minutes, M. heard appellant grab his keys and leave the apartment. He never returned.

2. *Defense Evidence*.

In defense, appellant denied he had ever touched M. inappropriately and testified as follows. Appellant's son lived with appellant. On October 17, 2009, M., her sister, and appellant's son were fighting over a chain of plastic beads which belonged to the girls. Appellant took the chain but the girls got it back.

On October 18, 2009, appellant got up at 6:30 a.m. to go to work in Orange. He entered the living room and watched television. M. entered, sat on another couch for at least 10 minutes, then returned to her bedroom. M. returned to the living room wearing the chain of plastic beads, and she teasingly said, " 'we kept the chain.' "

Appellant stood and M. turned to run to the bedroom. Appellant, from behind, playfully grabbed her, reached around her, and touched her shoulder as if he were going to take the chain. M. fought to prevent appellant from taking it. Iliana went from her bedroom to the bathroom and appellant stopped trying to take the chain. M. sat on the

couch and laughed, teasing appellant that she still had the chain. Appellant entered the kitchen, made coffee, and returned to watch television. He left about 10 minutes later, and arrived at work about 8:00 a.m. or 8:15 a.m.

About 1:30 p.m., A. called appellant and said police were looking for him because his car had been in an accident. Appellant spoke to an officer on the phone and the officer told appellant to call him when appellant returned to Long Beach. Appellant's employer drove appellant to Long Beach so he could talk to the police. En route, A. called appellant and said police were looking for him because Iliana had said he had been hugging M. Appellant continued heading home but A. called again. Appellant then changed his mind and went to a friend's house because appellant wanted to know more about the accusation.

Sometime after October 18, 2009, a lawyer told appellant the following. Appellant could talk with police if he wished, but he was not obligated to do so. If appellant had done nothing wrong he should go on with his life and let the police do their job. Appellant should not return to the apartment or contact Iliana.

A pediatrician who examined M. on October 19, 2009, testified M.'s hymen was normal and there were no signs of bruising or scratches on her body. The pediatrician did not have specialized training in examining sexual assault victims.

A forensic psychologist testified, inter alia, to the effect Child Sexual Abuse Accommodation Syndrome (CSAAS) caused children sexually abused by a parent or step-parent not to disclose the abuse unless asked. CSAAS was inapplicable in this case because (1) there was no dispute as to what had happened since Iliana saw the alleged abuse and M. explained what had happened and (2) appellant was not a member of M.'s family. Character witnesses testified to the effect, inter alia, appellant would not have inappropriately touched M. A female police detective's testimony relating what M. told her about the present case occasionally differed from what M. told a male police officer concerning the matter.

3. *Rebuttal Evidence*.

In rebuttal, a forensic nurse specializing in sexual assault examinations testified vaginal tissue is pliable and heals quickly. If the nurse conducted a sexual assault examination of a child who was M.'s age and whose hymen had been digitally penetrated, the nurse more likely than not would not observe hymenal injury. A psychologist testified to the effect CSAAS could explain a child's response to being sexually abused by an adult male entrusted with the child's care.

ISSUE

Appellant claims the trial court erred by instructing the jury on flight as evidence of consciousness of guilt.

DISCUSSION

The Flight Instruction Was Proper.

During its final charge to the jury, the court, based on the events of October 18, 2009, and over appellant's objection, gave CALCRIM No. 372 which stated, "If the defendant fled or tried to flee immediately after the crime was committed or after he was accused of committing the crime, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. [¶] However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

Appellant claims as previously indicated. We reject the claim. In general, a flight instruction is proper when the evidence shows the defendant departed the crime scene under circumstances suggesting the defendant's movement was motivated by consciousness of guilt. Flight requires neither the physical act of running nor the reaching of a far-away haven. Flight does require, however, a purpose to avoid being observed or arrested. Mere return to familiar environs from the scene of an alleged crime does not warrant an inference of consciousness of guilt, but the circumstances of departure from the crime scene may sometimes do so. (*People v. Smithey* (1999) 20 Cal.4th 936, 982.)

In the present case, viewing the evidence in the light most favorable to the People and presuming in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence presented by the parties (*Ochoa, supra,* 6 Cal.4th at p. 1206), we conclude there was substantial evidence as follows. On October 18, 2009 (and thus before appellant allegedly contacted a lawyer), M., wearing a shirt and shorts, stood in the living room. Appellant touched her breasts while rubbing his penis against her buttocks. Iliana saw what appellant was doing and looked shocked. Appellant saw Iliana's reaction and immediately released M. He offered no exculpatory explanation at the time to M. or Iliana as to what he had done. He was concerned Iliana had caught him molesting M. Shortly after appellant released M., appellant, who earlier had been leisurely watching television, grabbed his keys and left the apartment.

Under the above circumstances, a jury reasonably could have concluded that on October 18, 2009, appellant departed the crime scene, i.e., the living room, under circumstances suggesting his movement was motivated by consciousness of guilt, and that his purpose in departing was to avoid being observed or arrested. The court properly gave the flight instruction. (Cf. *People v. Howard* (2008) 42 Cal.4th 1000, 1020-1021; *People v. Smithey, supra,* 20 Cal.4th at pp. 982-983.) The fact an alternative innocuous inference(s) might have been drawn from the evidence does not compel a contrary conclusion. (Cf. *People v. Shea* (1995) 39 Cal.App.4th 1257, 1270.)[1]

Finally, even if the trial court erred as urged, it does not follow we must reverse the judgment. The People presented evidence appellant committed the multiple offenses of which he was convicted and appellant presented evidence he had committed no offense. There is no dispute the court gave the flight instruction based solely on the events of October 18, 2009. The jury convicted appellant of multiple offenses as previously indicated.

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[1] In light of our analysis, there is no need to reach the issue of whether any conduct of appellant on October 18, 2009, after he left the apartment might have supported the flight instruction.

The parties' respective evidence as to whether appellant committed the above multiple offenses was so dramatically different that, even absent evidence of flight on October 18, 2009, the jury, when convicting appellant, reasonably must have concluded the defense evidence that appellant committed no offense was fabricated.[2] That fabrication permitted an inference of consciousness of guilt (see *People v. Barber* (1959) 166 Cal.App.2d 735, 741) of multiple offenses, i.e., an inference far stronger than that arising solely from flight following the single incident of October 18, 2009. The alleged instructional error was not prejudicial. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

KLEIN, P. J. ALDRICH, J.

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[2] During the sentencing hearing, the trial court commented that M.'s testimony appeared to the court to be very honest and open, and that that was certainly why the jury convicted appellant. The court also commented the jury rejected appellant's testimony and "[a]s best I can tell, it's because it's not true."