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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. PABLO GARCIA FLORES, Defendant and Appellant.	B237361 (Los Angeles County Super. Ct. No. BA378869)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen A. Kennedy, Judge. Affirmed.

David H. Goodwin, 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, and Mary Sanchez and Louis W. Karlin, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Pablo Garcia Torres appeals from the judgment entered following his convictions by jury on count 1 – continuous sexual abuse (Pen. Code, § 288.5, subd. (a)),[1] eight counts of lewd act upon a child who was 14 or 15 years old and at least 10 years younger than appellant (§ 288, subd. (c)(1); counts 2 – 9), count 10 – oral copulation of a minor (§ 288a, subd. (b)(1)), and count 11 – unlawful sexual intercourse with a minor more than three years younger than appellant (§ 261.5, subd. (c)). The court sentenced appellant to prison for 25 years. We affirm the judgment.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established Mariela A. (Mariela) and appellant were born in September 1993, and August 10, 1961, respectively. Mariela lived with her mother and appellant from the time she was five years old until she was 17 years old. For a period before Mariela was 16 years old, she lived in a residence on 11th in Los Angeles, and when she was 16 years old she moved to a residence on 64th in Los Angeles.

Except as to count 10, there is no dispute as to the sufficiency of the evidence appellant committed the above sexual offenses against Mariela. In particular, from about September 2, 1998 to September 1, 2007, appellant committed continuous sexual abuse (count 1). (We will later provide additional facts as to this offense.) From about September 2, 2007 to September 1, 2009, appellant committed eight violations of section 288, subdivision (c)(1) (counts 2 – 9). From about September 2, 2007 to December 4, 2010, appellant committed a violation of section 288a, subdivision (b)(1) (count 10). About December 2, 2010, appellant committed a violation of section 261.5, subdivision (c) (count 11).

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

ISSUES

Appellant claims (1) the trial court erred by giving CALCRIM No. 1120 as to count 1 and CALCRIM No. 1110 as to counts 2 through 9, (2) insufficient evidence supports his conviction on count 10, and (3) the trial court erroneously failed to give a unanimity instruction as to each count.

DISCUSSION

1. *The Trial Court Did Not Err by Instructing the Jury the Touching Need Not Be Done in a Lewd or Sexual Manner (Counts 1 – 9).*

First, appellant argues the trial court erroneously gave CALCRIM No. 1120 as to count 1. In particular, he argues (1) section 288.5, subdivision (a) "incorporates the elements of lewd act on a minor as defined in section 288(a)," (2) an element of section 288, subdivision (a) is the defendant "lewdly" commits the requisite act, or, phrased differently, that the defendant must act or touch in a lewd manner, (3) CALCRIM No. 1120, states "[t]he touching need not be done in a lewd or sexual manner," and (4) that clause conflicts with the above mentioned element.

We assume appellant is arguing it was error for the trial court to give CALCRIM No. 1120 as to count 1 because (1) section 288.5, subdivision (a) requires "*lewd* or lascivious conduct, as defined in Section 288" (italics added), (2) CALCRIM No. 1120 contains the clause "[t]he touching need not be done in a *lewd* or sexual manner" (italics added), (3) that clause conflicts with the above mentioned requirement of "*lewd* or lascivious conduct" (italics added), and (4) the act or touching had to be sexual in nature. However, *People v. Martinez* (1995) 11 Cal.4th 434 (*Martinez*), and *People v. Sigala* (2011) 191 Cal.App.4th 695 (*Sigala*) reject this argument.

In *Martinez*, the defendant, using force, touched or grabbed a girl's chest. (*Martinez, supra,* 11 Cal.4th at pp. 439-440.) The information alleged as count 2 that the defendant violated section 288, subdivision (b). (*Martinez*, at p. 440.) Subdivision (b) prohibited commission of an "act described in subdivision (a)" by use of force or other

aggravating means. (*Id.* at p. 442, fn. 5.) After the court gave a CALJIC instruction on subdivision (b), the jury convicted the defendant. (*Martinez,* at pp. 440-441.)

On appeal, the parties disputed whether the instruction was correct when it indicated subdivision (a) was satisfied when a defendant engaged in (1) "any" (*Martinez, supra,* 11 Cal.4th at p. 441) touching of an underage minor with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child (i.e., with sexual intent) instead of (2) a " 'lewd *and* sexual' " (*ibid.*, italics added) touching of said minor with sexual intent.

In *Martinez,* our Supreme Court rejected the defendant's suggestion that section 288, subdivision (a) applied only if the defendant had touched the girl in "an inherently lewd manner." (*Martinez, supra,* 11 Cal.4th at p. 442.) *Martinez* observed that three phrases in section 288, i.e., "willfully and lewdly," "any lewd or lascivious act," and the phrase pertaining to sexual intent, were "archaic and logically redundant to some degree." (*Martinez, supra,* 11 Cal.4th at p. 449.)

Martinez stated, "In *In re Smith* (1972) 7 Cal.3d 362 . . . (*Smith*), we relied on this language to determine the circumstances under which an act is 'willfully and lewdly' performed for purposes of indecent exposure under section 314. We concluded that no separate meaning can be ascribed to the literally distinct requirements of section 288, subdivision (a), that the act be done 'willfully and lewdly' and 'with [sexual] intent.' As commonly understood, both phrases overlap and refer to a single phenomenon—'sexual motivation.' [Citation.] [¶] *The additional requirement of a 'lewd or lascivious act' seems redundant for similar reasons*. . . . As suggested in *Smith,* we can only conclude that the touching of an underage child is '*lewd or lascivious*' and 'lewdly' performed depending entirely upon the sexual motivation and intent with which it is committed." (*Martinez, supra,* 11 Cal.4th at p. 449, italics added.) *Martinez* also stated, "we adhere to the long-standing rule that section 288 is violated by 'any touching' of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the

child." (*Id.* at p. 452.) Concluding the trial court properly instructed the jury (*ibid.*), *Martinez* reversed the judgment of the appellate court as to count 2. (*Id.* at p. 453.)

Martinez thus concludes that when a defendant commits *any* touching of an underage minor with the requisite sexual intent (1) the defendant has violated section 288, subdivision (a), and has satisfied its requirements that the defendant "willfully and lewdly commits any *lewd or lascivious act*" (italics added), (2) the touching does not have to be lewd and sexual, and (3) the above phrases "willfully and lewdly" and "*lewd or lascivious act*" (italics added) impose no additional requirement pertaining to the touching. In particular, the act or touching need not be sexual in nature.

Sigala involved a defendant's conviction for a violation of section 288.5, subdivision (a) based on three or more acts of "lewd or lascivious conduct, as defined in section 288, . . ." (*Sigala*, *supra*, 191 Cal.App.4th at p. 698.) The trial court in that case had given CALJIC No. 1120, which contained the clause "[t]he touching need not be done in a *lewd* or sexual manner." (*Sigala*, at pp. 699-700, italics added.) On appeal, the defendant claimed this clause "eliminated the essential element of section 288.5 that the touching is done in a *lewd* manner." (*Id.* at p. 698, italics added.)

Sigala noted that, consistent with *Martinez*, CALCRIM No. 1120 required touching with sexual intent. (*Sigala*, *supra*, 191 Cal.App.4th at p. 701.) *Sigala* then observed, "*Martinez* further states 'the form, manner, or nature of the offending act is not otherwise restricted' and cites authority for the proposition that the touching need not be sexual in nature [citation]; consistent with the *Martinez* holding, CALCRIM No. 1120 advises the jury that the 'touching need not be done in a lewd or sexual manner.' " (*Id.* at p. 701.) *Sigala* rejected the defendant's claim and concluded the instruction correctly stated the law. (*Ibid.*)

Sigala did not explicitly discuss whether that portion of the challenged clause of CALJIC No. 1120 that "[t]he touching need not be done in a *lewd* . . . manner" (italics added) conflicted with the element of section 288.5, subdivision (a), that the defendant engage in "*lewd* or lascivious conduct, as defined in Section 288." (Italics added.)

Sigala concluded the alleged instructional error was, in any event, harmless beyond a reasonable doubt because there was no evidence in that case that the defendant's acts were innocent touchings without sexual intent, and because his conduct was unquestionably of a sexual nature. (*Sigala, supra,* 191 Cal.App.4th at pp. 701-702.)

Like *Sigala*, *People v. Cuellar* (2012) 208 Cal.App.4th 1067, involved a conviction for a violation of section 288.5, subdivision (a) based on three or more acts of "lewd or lascivious conduct, as defined in section 288, . . ." (*Cuellar*, at pp. 1069-1070.) In that case too, the defendant challenged the clause in CALCRIM No. 1120 that "[t]he ' "touching need not be done in a lewd or sexual manner." ' " (*Cuellar*, at p. 1071.) *Cuellar* observed *Martinez* had expansively defined the phrase "lewd and lascivious act" to include any contact with the victim's body with the requisite sexual intent. (*Cuellar*, at p. 1071.) *Cuellar* asserted the apparent intent of the challenged clause was to indicate the defendant did not have to touch a sexual organ. (*Ibid.*) However, *Cuellar* indicated the challenged clause could be construed to "negate[] the requirement that the touching be done in a lewd or lascivious manner." (*Ibid*.) Accordingly, *Cuellar* characterized the challenged clause as, at best, "unfortunate and possibly confusing." (*Ibid.*)

Cuellar teaches CALCRIM No. 1120's clause that "[t]he touching need not be done in a lewd or sexual manner" is potentially confusing because it could be construed to mean the defendant could violate section 288.5, subdivision (a) by touching an underage child even if the touching was not "lewd or lascivious conduct, as defined in Section 288" (§ 288.5, subd. (a)) and even if the touching was done without sexual intent.

Nonetheless, *Cuellar* concluded any deficiencies in CALCRIM No. 1120 were not prejudicial since it did not mislead the jury. (*Cuellar, supra,* 208 Cal.App.4th at p. 1069.) *Cuellar* noted that virtually all of the trial testimony in that case described touching that was sexual, rather than incidental, in nature, the evidence of appellant's guilt was overwhelming, the prosecutor did not argue to the jury that the defendant would have been guilty even if his touching of the victim had been innocent, and, instead, the

prosecutor argued the defendant touched the victim with the requisite intent. (*Id.* at p. 1072.)

To the extent appellant argues the trial court in this case erroneously gave CALCRIM No. 1120 as to count 1 because that instruction's clause that "[t]he touching need not be done in a lewd or sexual manner" conflicts with the requirement of section 288.5, subdivision (a) that the defendant engage in "*lewd* or lascivious conduct, as defined in Section 288" (italics added), we reject the argument based on *Martinez* and *Sigala*. As a whole, CALCRIM No. 1120 essentially told the jury that "lewd or lascivious conduct, as defined in Section 288" (§ 288.5, subd. (a)) was any touching of an underage child with the requisite sexual intent. The challenged clause was consistent with *Martinez's* holding.

Notwithstanding appellant's argument to the contrary, the fact *Sigala* may have relied on cases such as *Martinez*, i.e., cases which involved CALJIC instructions and which were decided prior to the adoption of CALCRIM instructions, does not compel a contrary conclusion. *Sigala* relied on *Martinez's* statutory construction of section 288, subdivision (a), to determine in *Sigala* whether the clause in CALCRIM No. 1120 that "[t]he touching need not be done in a lewd or sexual manner" conflicted with the phrase "lewd and lascivious conduct" in section 288.5, subdivision (a). That phrase had its origins in section 288, subdivision (a). Appellant's challenge to the same clause in CALCRIM No. 1120 implicates the same issue of statutory construction.

Moreover, based on *Sigala* and *Cuellar*, we conclude that even if the challenged clause was erroneous, it does not follow we must reverse the judgment as to count 1. Count 1 alleged continuous sexual abuse on or between September 2, 1998 and September 1, 2007. As to this period, Mariela testified at trial as follows. When Mariela was five years old, appellant rubbed his penis against her vagina. When she was about five years old, appellant touched her chest and legs, and rubbed her vagina and buttocks under and over her clothes. When Mariela was between five and six years old, appellant began putting his mouth on her chest and vagina.

From the time Mariela was five years old until she was 13 years old, appellant put his mouth on her chest. From the time she was five years old until she was 17 years old, appellant touched her almost every day. On December 6, 2010, Mariela told a school therapist that appellant had been raping Mariela since she was five years old, and told a social worker that appellant had been sexually molesting Mariela since she was five years old. Mariela told a police officer that appellant had been inappropriately touching Mariela since she was five years old.

When Mariela was six years old, appellant touched her chest, rubbed his hands on her vagina, rubbed his penis against her vagina, touched her buttocks, and orally copulated her vagina. He also engaged in sexual intercourse with her in his motor home. From the time Mariela was six years old until she was 15 years old, appellant would rub his penis against her vagina.

When Mariela was between 12 and 14 years old, appellant digitally penetrated her vagina a few times. When Mariela was in the seventh or eighth grade, appellant began fully inserting his penis into her vagina almost daily. When Mariela lived on 11th, appellant orally copulated her vagina when she was in bed and while she was on the floor, and engaged in sexual intercourse with her in the bathroom, on the floor, and on a bed.

E. Garcia (Garcia), appellant's son, was born in December 1992 and testified as follows. One night when Garcia was about 13 years old, Mariela got out of bed and lay on the floor next to appellant. Garcia heard "saliva noises" and sucking noises coming from appellant's location. After about an hour, appellant said, " 'Just stop. Your mom is coming home. You better go to your bed.' " On a later occasion, Garcia heard the same sucking sounds and saw Mariela lift her head and later lower it. It appeared Mariela was orally copulating appellant.

Following appellant's arrest, Garcia visited appellant in jail. Appellant gave to Garcia a written statement containing false information to which appellant wanted Garcia to testify. Appellant had Garcia write the statement so Garcia could memorize it.

According to the written statements, Mariela made Garcia provide false information to police and everything was Mariela's fault. Garcia's copy of the statement was admitted into evidence.

In sum, there was overwhelming evidence that during the period at issue in count 1, appellant engaged in three or more acts of "lewd or lascivious conduct, as defined in Section 288" within the meaning of section 288.5, subdivision (a) (including with the requisite sexual intent), even if that subdivision required that appellant commit those acts "lewdly" or that his acts be sexual in nature. There was no evidence appellant engaged in innocent touching without sexual intent. Moreover, the prosecutor's argument supports a conclusion no prejudice occurred.[2] Any alleged instructional error was harmless beyond a reasonable doubt.

Second, appellant appears to argue the trial court erroneously gave CALCRIM No. 1112 as to counts 2 through 9. In particular, he appears to argue (1) section 288, subdivision (c)(1) incorporates an "act described in [section 288,] subdivision (a)," (2) one element of section 288, subdivision (a) is the defendant "lewdly" commits the requisite act, (3) CALCRIM No. 1112 contains the clause "[t]he touching need not be done in a lewd or sexual manner," and (4) that clause conflicts with the above mentioned element. However, CALCRIM No. 1112 did not contain the clause "[t]he touching need

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[2] Appellant argues page 1292 of the reporter's transcript reflects "the prosecutor emphasized that the touching did *not* have to be done in a lewd manner." (Italics added.) No such emphasis occurred there. Page 1292 of the transcript reflects the prosecutor quoted in passing two sentences from CALJIC No. 1120, namely, "[l]ewd or lascivious conduct is any willful touching of a child accomplished with the intent to sexually arouse the perpetrator or the child. The touching need not be done in a lewd or sexual manner." The prosecutor then commented, "[b]ut here there is no question that, . . . the touching was used to sexually arouse the perpetrator and that the touching *was* done in a lewd or lascivious manner." (Italics added.) The prosecutor then stated, "[i]t doesn't have to be a touching of the private part, but in this case you have that . . . you have more than you need in this situation." The prosecutor explained appellant touched Mariela's chest before she had breasts, touched her breasts when she developed them, touched her private parts with his hand, touched her vagina with his penis, and digitally penetrated her vagina. The prosecutor argued that all of appellant's acts were sexual.

not be done in a lewd or sexual manner." There is no need to address the rest of appellant's argument on that issue.

Finally, appellant argues the trial court erroneously gave CALCRIM No. 1110 as to counts 2 through 9. We reject the argument. The court never gave CALCRIM No. 1110 as to any count.

2. *There Was Sufficient Evidence of Oral Copulation (Count 10).*

Count 10 of the information, as amended by interlineation, alleged appellant committed oral copulation with a minor in violation of section 288a, subdivision (b)(1), between September 2, 2007 and December 4, 2010. The People presented evidence at trial that during this period, i.e., when Mariela was 14 or 15 years old, she and appellant were in his taxi when she put her mouth "on" his penis. When Mariela was around 14 or 15 years old, appellant had Mariela put her mouth "on his private." This happened in appellant's taxi and in his van. The jury convicted appellant on, inter alia, count 10.

Appellant claims there is insufficient evidence supporting his conviction on count 10.[3] We reject the claim. Section 288a, subdivision (b) generally proscribes "[o]ral copulation" with a minor. Subdivision (a) defines "[o]ral copulation" as "the act of copulating the mouth of one person with the sexual organ or anus of another person." Appellant does not dispute the validity of this definition. Nor is there any dispute there was sufficient evidence that, during the period alleged in count 10, Mariela put her mouth "on" appellant's penis. Instead, relying on early appellate court cases concluding oral copulation required penetration, appellant argues there is insufficient evidence to support his conviction on count 10 as a matter of law because copulation requires penetration and mere contact is insufficient.

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[3] Appellant suggests that the jury convicted him of oral copulation with a minor (§ 288a, subd. (b)(1)) as to count 11 as well, and that insufficient evidence supports that conviction. We reject the suggestion. The jury convicted appellant of unlawful sexual intercourse (§ 261.5, subd. (c)) as to count 11. Count 11 originally alleged oral copulation with a minor but, after the presentation of evidence and with appellant's consent, the court amended the count to allege unlawful sexual intercourse.

Our Supreme Court has settled this issue. For purposes of section 288a, subdivision (a), " '[A]ny contact, however slight, between the mouth of one person and the sexual organ of another person constitutes oral copulation. Penetration of the mouth or sexual organ is not required.' " (*People v. Dement* (2011) 53 Cal.4th 1, 41-42.)

3. *The Trial Court Did Not Erroneously Fail to Give a Unanimity Instruction.*

As mentioned, count 1 alleged that on or between September 2, 1998 and September 1, 2007, appellant committed continuous sexual abuse. Counts 2 through 9 alleged that on or between September 2, 2007 and September 1, 2009, appellant committed lewd act upon a child who was 14 or 15 years old and at least 10 years younger than appellant. Count 10 alleged that on or about September 2, 2007 to December 4, 2010, appellant committed oral copulation of a minor, and count 11, amended by interlineation, alleged that on or between December 1, 2010 and December 4, 2010, appellant committed unlawful sexual intercourse with a minor more than three years younger than appellant. The People presented evidence as to each of these charges, including, as to counts 2 through 10, generic testimony concerning multiple qualifying acts, and the jury convicted appellant on all counts.

Appellant claims the trial court erroneously failed to give a unanimity instruction as to counts 1 through 11. We reject the claim. As to count 1, a unanimity instruction is not required where, as here, a defendant is charged with one count of continuous sexual abuse, even if the offense is based on a series of acts over time. (Cf. *People v. Jennings* (2010) 50 Cal.4th 616, 679; *People v. Lueth* (2012) 206 Cal.App.4th 189, 196 (*Lueth*).)[4]

[4] We note the trial court gave CALCRIM No. 1120 as to count 1, and appellant does not explicitly dispute that that instruction correctly told the jury, "[y]ou cannot convict the defendant unless all of you agree that he committed three or more acts over a period of at least three months, but you do not all need to agree on which three acts were committed."

As to counts 2 through 10, appellant fails to mention the court gave a modified CALCRIM No. 3501 unanimity instruction[5] applicable whether the jury disagreed as to whether a particular act(s) for which the People presented evidence occurred, or whether the jury agreed all such acts occurred. (See *People v. Jones* (1990) 51 Cal.3d 294, 321-322.) As to count 11, the unlawful sexual intercourse was based on a single act that occurred about December 2, 2010. "[A] unanimity instruction is not required when the evidence shows only one discrete crime." (*Lueth, supra,* 206 Cal.App.4th at p. 196.)

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[5] CALCRIM No. 3501 is entitled "Unanimity: When Generic Testimony of Offense Presented." The modified CALCRIM No. 3501 given by the trial court stated, "The defendant is charged with Lewd Act with a Child in Counts 2 through 9 sometime during the period of September 2, 2007 to September 1, 2009, and with Oral Copulation of a person under 18 sometime during the period between September 2, 2007 to December 4, 2010. [¶] The People have presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless: [¶] 1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed for each offense; [¶] 2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period and have proved that the defendant committed at least the number of offenses charged." Other instructions indicated count 10 alleged the above oral copulation.

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

CROSKEY, Acting, P. J.

ALDRICH, J.