Filed 3/29/13 P. v. Castillo CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JORGE ANTONIO CASTILLO, Defendant and Appellant.	B239859 (Los Angeles County Super. Ct. No. BA372843)

APPEAL from a judgment of the Superior Court of Los Angeles County. Custis B. Rappe, Judge. Affirmed.

Nancy L. Tetreault, 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, Senior Assistant Attorney General, Shawn McGahey Webb and Jonathan M. Krauss, Deputy Attorneys General, for Plaintiff and Respondent.

Jorge Antonio Castillo appeals from a judgment which sentences him to an indeterminate term of 80 years to life plus a determinate term of 20 years in state prison for the sexual abuse of his stepdaughter. On appeal, Castillo contends the court committed various instructional errors. We find no error and affirm the judgment.

FACTS

Castillo married L.M. (Mother) in 2000. Mother had two young children at that time, A.C. and B.C. Castillo and Mother then had J. in 2008. Castillo lived with Mother and the children in a one bedroom apartment. A.C. and B.C. slept in a bunk bed in the laundry room. Castillo was not regularly employed. Mother often worked nights at the airport as a baggage supervisor and left the children either with a babysitter, Maria D., or Castillo. Castillo also took care of the children when Mother went to Mexico.

In January 2011, Castillo was charged with molesting A.C. over a period of years. He was charged with two counts of aggravated sexual assault of a child (Pen. Code, § 269, subd. (a)(1)),[1] three counts of committing a forcible lewd act upon a child (§ 288, subd. (b)(1)), one count of continuous sexual abuse (§ 288.5, subd. (a))[2] and two counts of sexual intercourse with a child under 10 (§ 288.7, subd. (a)). He pled not guilty and a jury trial commenced in January 2012.

I. A.C.'s Testimony

A.C. testified at trial that Castillo began sexually molesting her when she was six or seven and in first grade. Castillo threatened to hurt her or her mother if she told anyone. The molestation occurred more often than once a month when she was in first and second grade and then occurred less often in third grade.

When Mother was working the night shift, Castillo would call A.C. to the living room or the bedroom and take off her clothes. A.C. testified that Castillo would "put his private part in mine." Although she felt "something bad" between her legs, she did not feel any discomfort or pain. Castillo also put his mouth in her "private part" and forced

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

[2] This charge was dismissed at trial.

her to put her mouth on his "private part." If she tried to move her mouth away from his "private part," he would push her head back. Although he put his "private part" between her buttocks, there was no pain or discomfort, and he did not touch her anus. When he was done, Castillo used toilet paper to clean a watery substance off her back and she would go back to sleep. Castillo also made her watch a video of "people naked and being on top of each other." Once, when Mother was in Mexico and her brothers were at her grandmother's, Castillo hit her on her buttocks when she told him she did not want to "do it."

Castillo and Mother separated in February 2009 and Castillo rented a room from the children's babysitter, Maria. The children continued to spend time with Castillo at Maria's home and he continued to molest A.C., including "put[ing] his private and everything on [her]." He also made her watch pornographic videos on his DVD player. A.C. testified that she felt "sad" and "weird" when Castillo molested her.

A.C. told B.C. about the molestation but did not want him to tell anyone about it because she was afraid Castillo would hurt her or Mother. B.C., in turn, did not tell anyone for fear that Castillo would hurt him. A.C. later told her babysitter's granddaughters, Jacqueline and Angela, that Castillo "used to rape her." Jacqueline told her mother about the abuse and Jacqueline's mother told Maria. Maria then alerted Mother to the abuse. Mother approached A.C. about the abuse but A.C. was reluctant to admit it happened. When she finally did, Mother reported it to the police.

II. Other Testimony

A.C. was examined by a nurse at the Santa Monica UCLA Sexual Assault Center in April 2010. A.C. told the nurse that Castillo made her "touch his privates and he put his hand over mine. He told me to go up and down but fast." According to the nurse, A.C. "indicated that there was penile vaginal contact with some associated discomfort. Penile anal contact again with associated discomfort" as well as oral copulation and genital fondling. A.C. also confirmed to the nurse that Castillo would turn her over and put a liquid on her back that "came from his privates." A.C. saw Castillo use a lubricant

from a bottle. A.C. also told the nurse that she was shown videotapes on the VCR in the living room and "they were doing the same thing that he was doing to me but faster."

A physical examination showed no signs of "previous trauma" but the nurse indicated that given the history of abuse reported by A.C., she did not expect to find any evidence of injury, particularly if Castillo used a lubricant and the last incident of abuse was from 2009.

A.C. repeated the details of the abuse to a Los Angeles police officer. B.C. also told the officer that "a couple hours after they would go to bed [A.C.] would start crying when [Castillo] would come get her out of bed." B.C. testified that he sometimes got up during the night and noticed that A.C. was not in her bed. He noticed that the blanket on the bed would be "moving" when he walked by the open door of Mother's and Castillo's bedroom. He believed A.C. and Castillo were in the bed because neither were anywhere else in the small apartment. He recalled that he witnessed this six times and saw Castillo's bare back on one occasion. He also once saw Castillo "getting ready to get on top" of A.C. while she was on her stomach. B.C. was afraid of Castillo because he hit B.C. with his fists, belts or hangers. B.C. sometimes saw A.C. cry on the way to school and realized later that these episodes occurred after Castillo had abused her.

The babysitter testified she sometimes saw A.C. on Castillo's bed after he moved into her home. She once saw them watching TV on his bed and later found a pornographic DVD in the DVD player. She told him she did not want those movies in the house. Mother allowed Castillo to continue to see the children even after he moved out, but stopped taking them to see him when he "basically started becoming crazy" and stalked her in July 2009.

III. Castillo's Admissions

Castillo was interviewed by a Los Angeles police detective on June 23, 2010, after his arrest. Castillo was informed of his *Miranda*[3] rights and waived them. When the detective indicated that he had a medical report showing vaginal trauma, Castillo admitted that "it only happened once" while Mother was working. While Castillo was watching pornography, A.C. walked into the room and he "became curious[.]" He admitted he took off her clothes and "touched her parts." He denied that he penetrated her vagina but admitted to rubbing his penis on her vagina causing her "lips" to separate. He also admitted he touched her "lips" with his hand and scratched it with his fingernail. The detective testified at trial that it was obvious from the context that Castillo meant A.C.'s labia when he referred to her "lips." Castillo denied any oral copulation, sodomy or vaginal penetration occurred.

Castillo initially said the molestation occurred when A.C. was seven, but later stated it occurred three to four months before he moved out in February 2009. He said the relationship was "normal" and that her vagina was "wet" when it happened. He also told the detective that A.C. was the "aggressor" and "wanted to touch him" but he would not allow it. He also told the detective that when he touched her vagina with his penis, "she was already sore and she said, no, no more, that it was hurting." She then cried in the bathroom. He understood why it hurt since "she was a virgin and it's the first time." He denied any penetration, but stated "[i]t did not go all the way in." His penis "only touched the edge." Castillo felt he should not have done it but that he did not blame himself.

IV. Verdict and Sentence

The jury found Castillo guilty of the charges detailed above. Castillo was sentenced to an indeterminate term of 80 years to life in state prison with an additional determinate term of 20 years to be served consecutively. He timely appealed.

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

DISCUSSION

Castillo contends the trial court committed instructional error when it failed to give a modified instruction on unanimity and failed to adequately instruct the jury on lesser included crimes. We find no error.

I. Unanimity Instruction

The trial court instructed on unanimity in accordance with CALCRIM No. 3501. Castillo now contends that CALCRIM No. 3501 was insufficient, and that the trial court was also required to instruct with CALCRIM No. 3500. We first note that Castillo *agreed* to instruct the jury with CALCRIM No. 3501, and further, never requested that CALCRIM No. 3500 also be given. As a result, he has forfeited this claim. " ' "A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." ' " (*People v. Hill* (1992) 3 Cal.4th 959, 997 overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Even if Castillo's contention was preserved for appeal, however, we find it unavailing. According to Castillo, instruction on CALCRIM No. 3501 and CALCRIM No. 3500 was necessary "so that the jury was clear that each count had to be based on a separate act of misconduct occurring on a separate date and unanimously agreed upon by each juror." Castillo contends the same act could have formed the basis for a conviction on the two counts for forcible lewd acts upon a child under 14 because both counts addressed the same time period. He also contends that the same act or acts could have supported his convictions for counts 8 and 9 since both addressed the same time period and the act of having sexual intercourse with a child under 10 (count 9) could also be considered a lewd act upon a child under 14 (count 8). "This presented the risk that appellant could be convicted twice for a single act of sexual intercourse." We disagree, because CALCRIM No. 3501 properly directed the jury on the issue of unanimity.

CALCRIM No. 3501 provides as follows: "The People have presented evidence of more than one act to prove that the defendant committed the crime charged in each count. You must not find the defendant guilty of the crime charged in any count unless, one, you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which acts he committed for each offense or, two, you all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this period of time and have proved that the defendant committed at least the number of offenses charged."

CALCRIM No. 3500, which was not given, states: "The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless 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/she) committed."

A careful reading of the two instructions reveals that the language in CALCRIM No. 3500 is incorporated into the language of CALCRIM No. 3501. Indeed, the only two sentences in CALCRIM No. 3500 are repeated almost verbatim in CALCRIM No. 3501. To provide the jury with both instructions would be redundant. Indeed, the bench notes following CALCRIM No. 3500 clearly indicate that they are alternative instructions and should not be given together: "If the court concludes that the modified jury instruction is appropriate, do not give this instruction. Give CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*." Likewise, the bench notes for CALCRIM No. 3501 instruct: "If the court concludes that the modified jury instruction is appropriate, give this instruction. If the court determines that the standard unanimity instruction is appropriate, give CALCRIM No. 3500, Unanimity."

The Supreme Court's analysis in *People v. Jones* (1990) 51 Cal.3d 294, 321-322 (*Jones*), is instructive on this issue. As in this case, the victims in *Jones* were children who had been molested over several years by a "resident molestor." The victims provided "generic" testimony about repeated acts of oral copulation but were unable to give specific details on times and dates or other distinguishing characteristics as to

individual acts or assaults. (*Id.* at p. 299.) The court analyzed the due process concerns raised when a victim is only able to provide such generic testimony about abuse. The court held that prosecutions based on this type of evidence satisfied due process where the testimony was sufficiently specific as to the kind of acts committed, the number of acts committed, and the general time period during which these acts occurred. (*Id*. at p. 316.)

The court then addressed what type of unanimity instruction is required in such generic testimony molestation cases. It "reject[ed] the contention that jury unanimity is necessarily unattainable where testimony regarding repeated identical offenses is presented in child molestation cases. In such cases, although the jury may not be able to readily distinguish between the various acts, it is certainly capable of unanimously agreeing that they took place in the number and manner described." It explained that the unanimity requirement would be satisfied where the victim testified that oral copulation occurred once a month for three months and the People charged three counts of molestation. (*Jones, supra,* at p. 321.) "Similarly, if an information charged two counts of lewd conduct during a particular time period, the child victim testified that such conduct took place three times during that same period, and the jury believed that testimony in toto, its difficulty in differentiating between the various acts should not preclude a conviction of the two counts charged, so long as there is no possibility of jury disagreement regarding the defendant's commission of any of these acts. [Citations.]" (*Ibid,* italics omitted.)

It concluded, "[i]n a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given. [Citation.] But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim." (*Jones, supra*, 51 Cal.3d at pp. 312-322.)

The *Jones* opinion supports the trial court's decision to provide the modified unanimity instruction, expressed in CALCRIM No. 3501, which provides for both options outlined by the court. Under the unanimity instruction given, the jury was required to either unanimously agree Castillo was guilty of committing the same specific act underlying each charge or agree that every act testified to by the victim was proven, thus satisfactorily proving of each count. This was wholly proper instruction.

II. Lesser Included Crimes Instructions

Castillo next contends the trial court erred when it failed to instruct the jury on attempted rape as a lesser included offense of aggravated sexual assault by rape and attempted sexual intercourse as a lesser included offense of sexual intercourse with a child. We also find no instructional error on these grounds.

Both aggravated sexual assault by rape (§ 269, subd. (a)(1)) and sexual intercourse with a child (§ 288.7) required the jury to find penetration. Without penetration, Castillo could only be found guilty of attempting those crimes. Thus, attempted rape and attempted sexual intercourse are lesser included offenses. (*People v. Atkins* (2001) 25 Cal.4th 76, 88.) Castillo contends instructions on the lesser included offenses were required because the evidence created a question of fact on the issue of penetration. According to Castillo, A.C. presented conflicting testimony, stating during direct examination that Castillo "put his private part in mine." During cross-examination, however, she testified that Castillo's penis only touched the outside of her vagina but it never went in. Castillo himself repeatedly denied penetrating A.C.'s vagina with his penis during his interview with the police, but admitted he separated her "lips" or labia. He also told the police his penis "did not go all the way in."

"[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*); *People v. Avila* (2009) 46 Cal.4th 680, 704-705.) Evidence is sufficiently substantial to warrant a lesser included offense instruction if it would cause a reasonable jury to conclude that the

defendant committed the lesser but not the greater offense. (*Breverman, supra*, 19 Cal.4th at p. 162.) "In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury." (*Ibid*.) We apply a de novo standard of review to the trial court's failure to instruct on a lesser included offense. (*People v. Licas* (2007) 41 Cal.4th 362, 366.) Error in failing to give lesser included instructions where required is reviewed under the harmless error standard articulated by *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Breverman, supra*, 19 Cal.4th at p. 165.)

We conclude the trial court was not required to instruct the jury on the lesser included offenses. There was not sufficient evidence for a reasonable jury to conclude that Castillo committed the lesser offenses of attempted rape and attempted sexual intercourse but not the greater offenses. Contrary to Castillo's contentions, the testimony was not contradictory regarding whether penetration occurred. A.C. testified about multiple incidences of molestation and repeatedly stated that he "put his private part in mine." Although Castillo denied penetrating A.C.'s vagina, it is clear that he believed penetration involved "go[ing] all the way in." It is well established under the law that penetration, however slight, "'of the [victim's] external genital organs is sufficient to constitute sexual penetration and to complete the crime of rape even if the rapist does not thereafter succeed in penetrating into the vagina.'" (*People v. Quintana* (2001) 89 Cal.App.4th 1362, 1366, quoting *People v. Karsai* (1982) 131 Cal.App.3d 224, 232 [penetration of external genital organs such as labia majora and labia minora sufficient].) Thus, penetration of no more than the lips of the vagina is sufficient to constitute rape. (*People v. Esposti* (1947) 82 Cal.App.2d 76, 78.) Here, Castillo admitted that he parted A.C.'s "lips" or labia. He told the police that "when I touched her vagina with my penis she was already sore and she said, no, no more, that it was hurting." He also told the police that A.C. straddled him to "sit over" his penis and that "it hurt her because maybe it's - I mean, she was a virgin and it's the first time." There was no substantial evidence warranting instruction on the lesser included offenses.

Even if the trial court did err in failing to give instructions on the lesser included offenses, however, it does not require reversal. The error was not prejudicial because it is not reasonably probable that Castillo would have obtained a more favorable result. (*Breverman, supra,* 19 Cal.4th at p. 162; *Watson, supra,* 46 Cal.2d at p. 836.) Castillo himself admitted to the police that he molested A.C. and separated her labia. Though he denied penetrating her, he qualified it by stating that it did not go all the way in. Moreover, A.C.'s repeated descriptions of the abuse to the nurse, to the police and at trial were consistent, including that he put his private parts inside hers. As discussed above, the evidence that he achieved penetration under the law was strong. There was not sufficient evidence from which a reasonable jury could conclude that he was guilty merely of attempted rape and attempted sexual intercourse rather than the completed crimes.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.