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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. ONOFRE ALVARADO ROBLERO, Defendant and Appellant.	B267225 (Los Angeles County Super. Ct. No. KA093106)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Modified and, as modified, affirmed.

Marcia C. Levine, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Onofre Alvarado Roblero of crimes arising from his sexual abuse of his daughters. His primary contention on appeal is the trial court erred by admitting evidence that one daughter, Je., attempted suicide. We reject the contention, but, because there is an error in the sentence imposed, we modify the sentence and affirm the judgment as modified.

FACTUAL BACKGROUND

I. Factual background

Defendant and Yo. had three children: Je. (born in 1994), Ja. (born in 1999) and Jorge (born in 1997). From the time Je. was approximately five years old until she was about 12 or 13, her father sexually abused her. The abuse included sexual intercourse, perhaps several times a year, and forced oral sex. After sex, defendant gave Je. money and told her never to " 'ask for less. Always ask for more.' "

The first incident Je. could remember occurred when she was five years old, in approximately 1999. She was "bent over the bed" with her bottoms down. Her father tried to penetrate her with his penis, and when she said it hurt, he told her to be quiet because the neighbors might hear. The next incident Je. could recall occurred when she was in third grade. She and her father were in the playroom, and he had "intercourse" with her. After, he told Je. to clean up. When she wiped, she saw a "creamy white substance" on the tissue. Je. recalled another incident that occurred when she was 11 or 12 and had braces; during oral sex, her father's foreskin got stuck on her braces. The last incident occurred when Je. was approximately 12; by the time she got home from afterschool activities, her mother was also home.

Defendant also abused Je.'s younger sister, Ja., who testified that her father had sexual intercourse with her from the time she was in third grade to sixth grade.[1] Over the years, he had sex with her 15 to 20 times.[2] Her father gave her money "to keep [her] mouth shut."

Feeling guilty and disgusted with herself, Je. wanted to ignore what was happening, to suppress it. It wasn't until January 2, 2011 that Je. told her mother about the abuse. That same day, they reported the abuse to the police. Je. talked to Officer Avila, but Je. didn't feel comfortable telling him certain things. Je. then had an interview at the Child Advocacy Center (CAC) on January 18, 2011. Je. still didn't feel comfortable being "explicit, so descriptive." But, by the time of the September 23, 2014 preliminary hearing, it was easier for her to talk about the abuse because she'd had counseling. A suicide attempt in December 2013 precipitated the counseling.

II. Procedural background

On April 16, 2015, a jury found, as to counts concerning Je., defendant guilty of count 1, lewd act on a child under 14 on or between January 5, 1999 and January 4, 2001 (Pen. Code, § 288, subd. (a));[3] count 2, lewd act on a child under 14 on or between January 5, 2001 and January 4, 2005 (§ 288, subd. (a));

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[1] The first incident she could remember occurred when she was in third grade.

[2] A sexual assault nurse examined Ja., then 11, and found she had missing hymenal tissue, which was consistent with a penetrating trauma and the patient's history.

[3] All further undesignated statutory references are to the Penal Code.

count 3, continuous sexual abuse on or between January 5, 2006 and January 4, 2008 (§ 288.5, subd. (a)); and count 4, lewd act on a child under 14 on or between January 5, 2006 and January 4, 2008 (§ 288, subd. (a)).

As to counts concerning Ja., the jury found defendant guilty of count 7, lewd act on a child (§ 288, subd. (a)). But the jury found him not guilty of sexual intercourse with a child under 10 on or between February 9, 2007 and December 31, 2008 (§ 288.7, subd. (a), count 5) and of oral copulation or sexual penetration with a child under 10 on or between February 9, 2007 and December 31, 2008 (§ 288.7, subd. (b), count 6).

The jury found true an allegation under section 667.61, subdivision (b), that the crimes alleged in counts 1, 2, 4 and 7 were committed against more than one different victim.

On August 18, 2015, defendant was sentenced to consecutive 15-years-to-life terms on counts 1, 2, 4 and 7. On count 3, the trial court initially sentenced defendant to 16 years, stayed under section 654. But, as reflected in a minute order, the court later struck its judgment as to count 3 and ambiguously entered "judgment on count 3 as reflected in this minute order." Defendant's total term therefore was 60 years to life in prison.

DISCUSSION

I. Evidence of Je.'s suicide attempt

Defendant contends that the trial court prejudicially erred by admitting evidence of Je.'s suicide attempt. The contention is meritless.

A. *Additional background*

On January 2, 2011, the police interviewed Je. about the abuse. Weeks later, on January 18, a CAC interviewer spoke to Je. Je., however, didn't disclose all she remembered about the

abuse during these interviews. Then, in December 2013, Je. attempted suicide, after which she received counseling. At the September 2014 preliminary hearing, Je. revealed previously undisclosed details about the abuse.

Before trial, the defense moved to exclude evidence of Je.'s December 2013 suicide attempt on the ground it and related evidence were irrelevant. The prosecutor responded that Je.'s attempted suicide and subsequent counseling enabled her to talk more openly about the abuse. Therefore, to the extent the defense intended to elicit discrepancies between what Je. told interviewers in 2011 and her testimony at the preliminary hearing in 2014, there was an explanation for the discrepancies. The trial court's tentative was to allow the evidence but deferred "its introduction until cross-examination" so that the court could more properly weigh its probative value and prejudicial effect. The court added, "But I think it's virtually common knowledge that molestations of not only young but extremely young children can lead to emotional or psychological issues and to preclude it is to basically devoid the People's case of evidence of any sustained injury by the children."

Thereafter, on direct examination, Je. testified that January 2, 2011 was the first day she'd ever told anyone about the abuse. She wasn't, however, comfortable talking to Officer Avila. Nor was she comfortable giving explicit details to the CAC interviewer on January 18. But it was easier to talk about the abuse at the preliminary hearing on September 23, 2014 " 'cause I had gone through counseling."[4]

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[4] The prosecutor advised Je. to avoid the specifics of counseling.

On cross-examination, the defense went through discrepancies between what Je. told interviewers in January 2011 and her testimony at the preliminary hearing and at trial. The defense also introduced the video of Je.'s CAC interview. Je. explained that there were "just some things that I was not comfortable with saying at the time. After going through the counseling, I was more open about talking about things that have happened to me." Je. also did not believe she had lied; rather, she omitted details she didn't feel comfortable sharing.

Before the prosecutor began his redirect examination, defense counsel renewed her objection. The trial court overruled it, finding that the probative value of the evidence outweighed any prejudicial effect, particularly "in light of the fact that at least at this point the defense posture is these events never occurred." "Material issue has arisen regarding her series of partial disclosures of what happened. Those partial disclosures may have been affected by whatever counseling she received. Her behavior in response to his alleged conduct is, also, material; and in that if she had not experienced any emotional problems or if her behavior was inconsistent with it, that would be material and relevant so the opposite is true in terms of the emotional events that followed the activity." In response to defense counsel's argument that counseling—not the suicide attempt—empowered Je. to speak, the court responded that was for the jury to decide.

At the close of evidence, defense counsel asked for an instruction limiting evidence of the suicide attempt to an understanding of Je.'s "nondisclosure[s]" during the January 2011 interviews with the police and CAC. The trial court refused to give a limiting instruction because the "counseling and the

suicide attempt are relevant as a possible explanation for her earlier nondisclosures in January of 2011 and her subsequent disclosures at the preliminary hearing." It was also relevant to show the "existence or degree of an emotional impact the alleged events had on her."

B. *Je.'s suicide attempt was properly admitted.* Only relevant evidence is admissible. (Evid. Code, § 350.) " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; see also *People v. Mills* (2010) 48 Cal.4th 158, 193.) But even relevant evidence may be excluded, in the trial court's discretion, if it is substantially more prejudicial than probative, i.e., if it "poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) Evidence is unduly prejudicial if it " ' "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." ' " (*People v. Carter* (2005) 36 Cal.4th 1114, 1168.) We apply the abuse of discretion standard of review to a trial court's ruling on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question. (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.)

Je.'s suicide attempt was relevant and, in the trial court's considerable discretion, admissible under Evidence Code section 352. The suicide attempt was relevant to explain the discrepancies between what Je. told interviewers in 2011 and her more detailed testimony at the 2014 preliminary hearing and at

trial. Her suicide attempt led to counseling, and Je. testified that the incident and counseling brought back memories of the abuse. Thus, it was appropriate for the jury to consider the extent, if any, to which the suicide attempt impacted Je.'s ability to be more forthcoming about the abuse.

Defendant, however, argues that only counseling was relevant to that issue and that there was no causal connection between the suicide attempt and Je.'s subsequent ability to more openly discuss the abuse. Defendant parses the issue too finely. The suicide attempt may have precipitated the counseling, but the two were linked. The suicide attempt lent credibility to Je.'s explanation for her failure to be more forthcoming in her initial interviews: she was traumatized. Moreover, the suicide attempt, in the trial court's words, showed the "existence or degree of an emotional impact the alleged events had" on Je. Stated otherwise, her suicide attempt tended to show that the abuse occurred. Although defendant contends there was no evidence that Je.'s suicide attempt had anything to do with the abuse, it was a more than reasonable inference. We therefore conclude that Je.'s suicide attempt was relevant. And because it was relevant to multiple issues, the trial court properly denied defendant's request for a limiting instruction.

Nor can we find that the trial court abused its discretion by finding the evidence more probative than prejudicial under Evidence Code section 352. As we have explained, it was relevant to multiple issues. Also, given the nature of Je.'s and Ja.'s testimony about the abuse (which included sexual intercourse with Je. when she was five years old), we fail to see how the suicide attempt "uniquely" tended to evoke an emotional bias against defendant, while having only slight probative value

with regard to the issues. (*People v. Carter*, *supra*, 36 Cal.4th at p. 1168.)

Finally, we reject any contention that admitting evidence of Je.'s suicide attempt violated defendant's constitutional rights to due process and to a fair trial. The application of ordinary rules of evidence generally does not impermissibly infringe on a defendant's constitutional rights. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 326-327; *People v. Cornwell* (2005) 37 Cal.4th 50, 82, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Jablonski*, *supra*, 37 Cal.4th at p. 805.)

II. The count 3 conviction must be vacated.

For the time period between January 5, 2006 and January 4, 2008, defendant was convicted of continuous sexual abuse (count 3, § 288.5, subd. (a)) and of lewd act on a child under 14 (count 4, § 288, subd. (a)). Section 288.5, subdivision (c), however, provides: "No other act of substantial sexual conduct, as defined in subdivision (b) of Section 1203.066, with a child under 14 years of age at the time of the commission of the offenses, or lewd and lascivious acts, as defined in Section 288, involving the same victim may be charged in the same proceeding with a charge under this section *unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative*." (Italics added.) If there is a failure to comply with section 288.5, subdivision (c), the unauthorized conviction must be vacated. (*People v. Johnson* (2002) 28 Cal.4th 240, 248.) Because defendant here could not be convicted of crimes under sections 288, subdivision (a), and 288.5 for the same time period, we vacate the conviction of section 288.5.

DISPOSITION

The conviction on count 3 is vacated. The clerk of the superior court is directed to modify the abstract of judgment and forward a modified abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is affirmed as modified.

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ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.