Filed 10/30/13 P. v. Juarez CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MAURICIO JUAREZ, Defendant and Appellant.	B242402 (Los Angeles County Super. Ct. No. PA070227)

APPEAL from a judgment of the Superior Court of Los Angeles County, David B. Gelfound, Judge. Modified, and as modified, affirmed with directions.

Mark D. Lenenberg, 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, Linda C. Johnson and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Mauricio Juarez appeals from the judgment entered following his conviction by jury of continuous sexual abuse of a child (Pen. Code, § 288.5, subd. (a)). The court sentenced appellant to prison for 16 years. We modify the judgment and, as modified, affirm it with directions.

FACTUAL SUMMARY

1. *The Present Offenses.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, i.e., the testimony of 12-year-old Jennifer L. (Jennifer), established that between August and October 2004, when Jennifer was five or six years old, appellant began living with her in her family's home in Los Angeles County.

One afternoon about three months after appellant began living in the home, appellant and Jennifer were there alone. Appellant took Jennifer by the hand into his bedroom and closed the door. He laid her on the bed with her legs dangling over its edge. Appellant covered Jennifer's face and shoulders with a blanket. Appellant pulled down his pants, pulled down Jennifer's pants and underwear, and rubbed his erect penis on Jennifer's vagina. After appellant finished, he told Jennifer it was their little secret.

The last time appellant sexually touched Jennifer was in about May 2006. When the prosecutor asked Jennifer to describe this incident, Jennifer testified "[i]t was basically the same thing. He would always do the same routine. He would walk me to his room. He would hold my hand. He would close the door. He would lay me on the side of the bed again, same blanket covering my eyes. TV was always on. [¶] . . . [¶] . . . And this time not only did he use his penis, but I felt his finger in the same area rubbing." Appellant's finger was wet.

Jennifer testified that "mostly" every week appellant lived in the home, he would touch her sexually more than three times in his bedroom. Maria Eva L. (Eva), Jennifer's mother and appellant's cousin, testified that during the period appellant was living in the home, Jennifer sometimes told Eva that Jennifer's vagina hurt. Eva saw a rash around

Jennifer's vagina but thought it was an issue of hygiene. Maria Edubiges L. (Edubiges), Jennifer's aunt, testified that whenever she visited, which was often, Jennifer said her private part was hurting. Edubiges too saw a rash on Jennifer's vagina. In about June 2006, appellant moved out. In 2011, Jennifer told her brother what had happened, he told Eva, and Eva called the police.

In March 2011, Los Angeles Police Detective Luz Montero arrested and interviewed appellant. Appellant initially denied he committed sexual acts with Jennifer. Montero took a sample of appellant's saliva and later, as a ruse, told appellant that appellant's DNA had been detected with Jennifer's DNA. After appellant asked if the results were positive and Montero said yes, appellant admitted his penis touched the top of Jennifer's vagina once. Montero testified she asked appellant why he did it, and "[appellant] responded by saying he had impulses, male impulses, urges. He was human. He was a man." Appellant indicated he realized the moment he did it that he should not have done it, and it was a mistake. Appellant told Montero that appellant recognized Jennifer was a little girl, appellant was remorseful, and he would never do it again. Appellant presented no defense evidence as to the present offense (or as to the below evidence of uncharged offenses).

2. *Evidence of Uncharged Offenses*.

In about June 2006, appellant moved into Edubiges's home in Sacramento. In about August 2006, appellant and several children, including 12-year-old Marlin A. (Marlin), were attending a party in the home. Edubiges saw appellant in appellant's room and children playing there. She also saw appellant alone with Marlin that night, and Marlin told adults that appellant had done something to him. Edubiges confronted appellant, and appellant said he had done it accidentally. After that happened, Edubiges found out appellant did something to Henry A., Edubiges's son.

During Montero's interview of appellant, appellant explained concerning Marlin that children had been watching television in appellant's bedroom. Appellant told Montero that appellant lay down in the middle of the children to watch television "[a]nd when [appellant] passed, [appellant] grazed [Marlin] like this." Appellant told Montero that Marlin falsely said appellant had been touching him.

In November 2006, when Henry A. (Henry) was 14 years old, he and appellant were playing soccer by themselves in the backyard. Henry testified appellant, using his open hand, rubbed Henry's penis over Henry's shorts. Henry thought it was accidental and continued playing, but appellant later did the same thing twice. After the third time, Henry became nervous and went to his room. Henry called Edubiges on the phone and told her what appellant had done. Edubiges came home and confronted appellant. Appellant claimed what had happened was an accident. Edubiges told appellant to leave the house and he did so.

ISSUES

Appellant claims (1) the trial court erred by admitting the uncharged sexual offenses evidence, (2) the prosecutor committed misconduct during closing argument, (3) the trial court erred by giving CALCRIM No. 1120, (4) cumulative prejudicial error occurred, and (5) the matter must be remanded because the sentencing minute order and abstract of judgment reflect the trial court imposed restitution and parole revocation fines, even though the trial court in fact imposed no such fines.

DISCUSSION

1. *The Trial Court Properly Admitted the Uncharged Sexual Offenses Evidence.*

a. *Pertinent Facts.*

On May 30, 2012, the prosecutor indicated the People had filed a pretrial motion seeking to introduce at trial evidence of appellant's offenses against Marlin and Henry.[1] The prosecutor orally represented the evidence was "the defendant within months after

[1] The written motion is not a part of the record on appeal.

molesting or finishing his molestations of the victim in our case moved up to Sacramento with another family and there he molested two other children." The prosecutor also indicated as follows. The proffered evidence was admissible as propensity evidence under Evidence Code section 1108, and was admissible on the issues of appellant's motive and intent as against an Evidence Code section 1101 objection. The proffered evidence would be brief and less inflammatory than the evidence of the present offense, and the prosecutor was "submit[ting] mostly" on the People's written motion. Appellant asked the court to exclude the proffered evidence under Evidence Code section 352 based on the alleged dissimilarities between the uncharged offenses and the present offense.[2]

The court, considering Evidence Code sections 1108 and 352, indicated as follows. The People's written motion provided a detailed factual summation of the uncharged offenses, and they were sexual. Section 352 analysis included consideration of the inflammatory nature of the uncharged offenses, the possibility of confusion of issues, remoteness in time, and consumption of time, and the court was required to consider all factors and their prejudicial effect. The 2006 uncharged offenses were fairly recent.

The court ruled the proffered evidence was propensity evidence under Evidence Code section 1108, and the court would not exclude the evidence under Evidence Code section 352. The court also ruled the proffered evidence was relevant to the issues of intent, and absence of mistake or accident, as against an Evidence Code section 1101 objection.

---

[2] Appellant also posed a Sixth Amendment objection (his only other objection) that the uncharged offenses occurred in 2006; therefore, it was probably impossible to find witnesses who could corroborate or contradict Marlin and Henry, appellant could not properly cross-examine them, and he was denied effective assistance of counsel.

b. *Analysis.*

Appellant claims the trial court erred by admitting the uncharged offenses evidence.[3] Appellant argues the proffered evidence should have been excluded under Evidence Code section 352. The claim is unavailing. According to the trial court, the People made a detailed offer of proof in their written pretrial motion. However, the written motion is not part of the record on appeal; therefore, we have no record of the detailed proffer the court relied upon when making the Evidence Code section 352 determination appellant wants us to review.[4] Appellant thus waived any issues regarding whether the proffered evidence should have been excluded under Evidence Code section 352, either as propensity evidence under Evidence Code section 1108, or as evidence of intent, or absence of mistake or accident, as against an Evidence Code section 1101 objection. (Cf. *People v. Robertson* (2012) 208 Cal.App.4th 965, 991 (*Robertson*); *People v. Carter* (2010) 182 Cal.App.4th 522, 531, fn. 6; *People v. Akins* (2005) 128 Cal.App.4th 1376, 1385.) However, in our discussion below, we address appellant's arguments on their merits.

---

[3] Appellant argues at the outset Evidence Code section 1108 violates federal due process and similar provisions of the state Constitution because the section violates a corollary of the principle the People must prove their case beyond a reasonable doubt. However, he asserts he raises the issues simply to preserve them for federal review, concedes our Supreme Court's decision in *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*) rejected his federal constitutional arguments, and concedes *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, compels us to follow *Falsetta*. Appellant did not raise his issues in the trial court (see fn. 2, *ante*). Assuming he did not waive them, we accept his concessions and conclude Evidence Code section 1108 does not violate his federal due process right or similar rights under the state Constitution.

[4] For example, appellant, for the first time in his reply brief, asserts ". . . Marlin A. merely told someone that appellant did something – what appellant did was unknown." However, this assertion appears to be based on Marlin's trial testimony which, of course, was not before the trial court when it made the challenged pretrial evidentiary ruling. Because we do not have the People's written motion, we do not know what, if anything, the People said Marlin would testify appellant did to him.

Appellant maintains the uncharged offenses evidence, proffered under Evidence Code section 1108, should have been excluded under Evidence Code section 352 because the evidence *lacked* probative value. Appellant is really raising a relevance issue he did not raise below. " 'Under Evidence Code section 352, a trial court may exclude *otherwise relevant* evidence when *its probative value is substantially outweighed* by concerns of undue prejudice, confusion, or consumption of time.' " (*People v. Edwards* (2013) 57 Cal.4th 658, 713; italics added.)

Assuming appellant did not waive the relevance issue, we note in *Falsetta, supra,* 21 Cal.4th 903, our Supreme Court observed, concerning Evidence Code section 1108 evidence, "evidence of a defendant's other sex offenses constitutes *relevant* circumstantial evidence that he committed the charged sex offenses." (*Id.* at p. 920, italics added.) The amended information filed with the court alleged appellant committed continuous sexual abuse of Jennifer. The prosecutor orally represented that after appellant finished molesting Jennifer, he molested two other children. The trial court did not abuse its discretion by admitting the proffered evidence as probative. (See *People v. Waidla* (2000) 22 Cal.4th 690, 717, 723-725 (*Waidla*).)

Appellant maintains the uncharged offenses evidence proffered under Evidence Code section 1108 should have been excluded under Evidence Code section 352 because the uncharged offenses were too dissimilar from the present offense. However, "[t]he similarity between the charged crimes and the prior sexual misconduct is still a consideration but it plays a smaller role in the question of admissibility under Evidence Code section 1108 than it does under Evidence Code section 1101 because similarity is but one of many factors for the trial court to consider. [Citation.]" (*Robertson, supra,* 208 Cal.App.4th at p. 991; see *People v. Mullens* (2004) 119 Cal.App.4th 648, 659 (*Mullens*); *People v. Soto* (1998) 64 Cal.App.4th 966, 984.)

Appellant's Evidence Code section 352 objection was based only on the alleged dissimilarities between the uncharged offenses and the present offense. However, the trial court considered that and other pertinent factors. The trial court did not abuse its

discretion or violate appellant's constitutional rights (assuming he has not waived the latter issue) by not excluding under Evidence Code section 352 the uncharged offenses evidence introduced under Evidence Code section 1108. (Cf. *Waidla, supra,* 22 Cal.4th at pp. 717, 723-725.)

Appellant, maintains the uncharged offenses evidence was inadmissible on the issues of intent, and absence of mistake or accident, as against an Evidence Code section 1101 objection. However, "when the other crime evidence is admitted solely for its relevance to the defendant's intent, a *distinctive* similarity between the two crimes is often unnecessary for the other crime to be relevant. Rather, if the other crime sheds great light on the defendant's intent at the time he committed that offense it may lead to a logical inference of his intent at the time he committed the charged offense if the circumstances of the two crimes are substantially similar even though not distinctive." (*People v. Nible* (1988) 200 Cal.App.3d 838, 848-849.)

In the present case, the evidence of appellant's sexual offenses against the two children while he lived with them and their family was evidence of his state of mind, i.e., a willingness to commit sexual offenses against a child while appellant was living with the child and child's family. This shed great light on appellant's intent, and absence of mistake or accident, during his multiple touchings of Jennifer, a child, when he lived with her and her family. The trial court did not abuse its discretion or violate appellant's constitutional rights (assuming he has not waived the latter issue) by admitting the uncharged offenses evidence as against Evidence Code section 1101 and 352 objections.

Finally, there was overwhelming evidence of appellant's guilt even absent the uncharged offenses evidence. The alleged evidentiary error was not prejudicial under any conceivable standard. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); *Mullens, supra,* 119 Cal.App.4th at p. 659; *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705] (*Chapman*).)

2. *No Prosecutorial Misconduct Occurred*.

Jennifer testified that after the first sexual incident, she was not afraid of appellant when the two were around her family, but when the two were alone she felt hopeless. During closing argument, the prosecutor commented, inter alia, as follows. Appellant knew he was guilty but was hoping the jury would ignore the evidence, find reasonable doubt where there was none, and acquit him. If, after everything the jury had heard during trial, the jury could say it believed appellant molested Jennifer, then the jury had no reasonable doubt because the jury had been convinced by the evidence. The prosecutor also commented, "While it was happening it didn't occur to any of the adults even as she routinely developed red marks on her vagina."

The prosecutor then stated, "*Can you imagine how lonely she must have felt to be surrounded by so many, yet protected by no one.* But as jurors you now have the opportunity after everything you've heard to stand up for her. [¶] At the beginning of this trial this defendant was presumed innocent because you had heard no evidence. And he's had his fair trial. He's had a jury of his peers. He's got a judge, lawyer, prosecutor. He's had his day in court. *So that presumption of innocence is gone*. Now it's time for him to face the consequences of his actions. It's time for him to hear the words guilty." (Italics added.)

Appellant claims the prosecutor committed misconduct by making the above italicized comments. However, appellant failed to object on the ground of prosecutorial misconduct and failed to request a jury admonition with respect to the prosecutor's comments, which would have cured any harm. Appellant waived the issue of prosecutorial misconduct as to the comments. (Cf. *People v. Gionis* (1995) 9 Cal.4th 1196, 1215; *People v. Mincey* (1992) 2 Cal.4th 408, 471.)

As to the merits, a prosecutor commits misconduct by inviting the jury to view the case through the victim's eyes, because it appeals to the jury's sympathy for the victim. (Cf. *People v. Leonard* (2007) 40 Cal.4th 1370, 1406.) Assuming the first previously italicized comment inviting the jury to imagine Jennifer's feelings of loneliness was

misconduct, we nonetheless note the following. The thrust of the prosecutor's comment was not an invitation to the jury to imagine Jennifer's feelings. Instead, the thrust of the comment, viewed with the rest of the prosecutor's comments, was that (whether or not the jury could imagine Jennifer's feelings) Jennifer felt lonely, no one protected her although she was surrounded by many adults, and the jury, who had heard the evidence, could protect her by convicting appellant.

The challenged comment was brief, mild, and unrepeated, and occurred in the context of other comments by the prosecutor directing the jury's attention to the evidence. There was overwhelming evidence of appellant's guilt. The court, using CALCRIM No. 200, told the jury not to let sympathy influence its decision. No prejudicial prosecutor misconduct occurred by reason of the prosecutor's first previously italicized comment. (Cf. *People v. Kipp* (2001) 26 Cal.4th 1100, 1130; *Watson, supra,* 46 Cal.2d at p. 836; *Chapman, supra,* 386 U.S. at p. 24.)

The prosecutor's second previously italicized comment occurred in the context of his arguments the evidence proved appellant's guilt beyond a reasonable doubt; therefore, the comment did not constitute prosecutorial misconduct. (Cf. *People v. Booker* (2011) 51 Cal.4th 141, 185-186; *People v. Panah* (2005) 35 Cal.4th 395, 463.) Moreover, the challenged comment was brief and unrepeated and there was overwhelming evidence of appellant's guilt. The court, using CALCRIM No. 200, told the jury that if the attorneys' comments on the law conflicted with the court's instructions, the jury was to follow the latter, and, using CALCRIM No. 220, instructed on the presumption of innocence and the People's burden to prove appellant's guilt beyond a reasonable doubt. No prejudicial prosecutor misconduct occurred by reason of the prosecutor's second previously italicized comment. (Cf. *Watson, supra,* 46 Cal.2d at p. 836; *Chapman, supra,* 386 U.S. at p. 24.) Nor has appellant demonstrated the failure of appellant's trial counsel to preserve the issues for appellate review constituted ineffective assistance of counsel. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)

3. *The Trial Court Did Not Err by Giving CALCRIM No. 1120.*

Appellant claims the trial court erred by giving CALCRIM No. 1120. We disagree. He argues in essence (1) Penal Code 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 the defendant violated Penal Code 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 Penal Code section 288, 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 Penal Code 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 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*, at p. 449.)

Martinez stated, "In *In re Smith* (1972) 7 Cal.3d 362 . . . (*Smith*), we relied on this language [in Penal Code section 288] 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 when a defendant commits *any* touching of an underage minor with the requisite sexual intent (1) the defendant has violated Penal Code 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 Penal Code 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 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 Penal Code section 288.5, subdivision (a) based on three or more acts of "lewd or lascivious conduct, as defined in Section 288, . . ." within the meaning of section 288.5, subdivision (a). (*Cuellar*, at pp. 1069-1070.) In that case too the defendant challenged the clause in CALCRIM No. 1120 "[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 "[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 Penal Code 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" (Pen. Code, § 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 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 because that instruction's clause "[t]he touching need not be done in a lewd or sexual manner" conflicts with the requirement of Penal Code 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 "lewd or lascivious conduct, as defined in Section 288" (Pen. Code, § 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 Penal Code section 288, subdivision (a), to determine in *Sigala* whether the clause in CALCRIM No. 1120 "[t]he touching need not be done in a lewd or sexual manner" conflicted with the phrase "lewd or lascivious conduct" in Penal Code section 288.5, subdivision (a). That phrase had its origins in Penal Code 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 even if the challenged instructional clause was erroneous, it does not follow we must reverse the judgment. Based on Jennifer's testimony, appellant's acts were not innocent touchings without sexual intent but were touchings with sexual intent, and his conduct was unquestionably of a sexual nature. There was overwhelming evidence of appellant's guilt. Moreover, when appellant spoke with police, he never said he touched his penis against Jennifer's vagina on multiple occasions for over a year but with innocent intent each time. The prosecutor did not argue to the jury appellant would have been guilty even if his touchings of Jennifer had been innocent; instead, the prosecutor argued appellant touched Jennifer with the requisite sexual intent. The alleged instructional error was harmless under any conceivable standard. (Cf. *Watson*, *supra*, 46 Cal.2d at p. 836; *Chapman*, *supra*, 386 U.S. at p. 24.)[5]

4. *The Judgment Must Be Modified to Reflect Appropriate Fines.*

The record reflects on June 27, 2012, the trial court purported to impose a former Penal Code section 1202.4, subdivision (b) restitution fine and a former Penal Code section 1202.45 parole revocation fine but failed to impose an amount for either fine. The June 27, 2012 minute order and the abstract of judgment each reflect the trial court imposed a $240 fine pursuant to each section.

---

[5] In light of our previous analysis of appellant's claims, we reject his claim the trial court committed cumulative prejudicial error.

Appellant claims the matter must be remanded because, although the trial court failed to impose a fine under either of the above sections, said minute order and abstract of judgment erroneously reflect the court imposed a $240 fine under each section. Appellant does not dispute the trial court was required to impose at least a minimum fine under each section. Respondent correctly concedes the minimum fine under each of the above sections based on the law applicable at the time of appellant's offense was $200, and respondent requests we simply modify the judgment to reflect a $200 fine under each section. We accept respondent's concession and we will modify the judgment and direct the trial court to correct its minute order. (Cf. *People v. Humiston* (1993) 20 Cal.App.4th 460, 466; *People v. Solorzano* (1978) 84 Cal.App.3d 413, 415, 417.)

DISPOSITION

The judgment is modified by imposing a $200 former Penal Code section 1202.4, subdivision (b) restitution fine and a $200 former Penal Code section 1202.45 parole revocation fine and, as modified, the judgment is affirmed. The trial court is directed to correct its June 27, 2012 minute order accordingly, and to forward to the Department of Corrections an amended abstract of judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.