Filed 1/24/13 P. v. Diaz CA2/3

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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. NOE H. DIAZ, Defendant and Appellant.	B237929 (Los Angeles County Super. Ct. No. BA381482)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig Richman, Judge. Affirmed.

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

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Noe H. Diaz appeals his convictions for oral copulation with a child under the age of 10 and commission of a lewd act upon a child. The trial court sentenced Diaz to a term of 15 years to life in prison. Diaz contends the evidence was insufficient to sustain the verdicts. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *People's evidence.*

In September 2010, Diaz and the victim's mother, C.H., had been romantically involved for three years. For six months, C.H., her seven-year-old daughter Y.H., and her son lived with appellant and his brother in a one-bedroom apartment in Los Angeles. Diaz, C.H., and the children slept in the living room, with the children on a bunk bed and Diaz and C.H. on a sofa bed. Diaz's brother slept in the bedroom.

On September 26, 2010, C.H. gave her children a bath and put them to bed in the bunk bed; Y.H. was wearing a blouse, underwear, and pants. C.H. went to bed at 10:00 p.m. Diaz was out at the time. Diaz returned to the apartment and went to bed between 11:00 and 11:30 p.m., wearing his street clothes, and laid down next to C.H., who was still awake. Diaz and C.H. did not have intercourse that night, or on the preceding day.

C.H. awoke sometime after that because she felt movement on the side of the bed. Y.H. was in the sofa bed, and Diaz, wearing only boxer shorts, was lying in between C.H. and Y.H.[1] He was holding Y.H.'s legs open and performing oral copulation on her. She was still wearing her blouse but no pants or underwear. Y.H. was "between asleep and awake" and "wasn't totally awake." C.H. slapped Diaz and asked what he was doing. They argued and he told her, " 'If you want to, [C.H.], kill me.' " Both children woke up.

C.H. told the children to change their clothes and began packing their belongings. Diaz and C.H. argued about some photographs that Diaz wanted; C.H. tore them up.

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[1] C.H. did not know whether Y.H. got in the sofa bed on her own, as she sometimes did, or whether Diaz moved her there.

C.H. telephoned a taxicab and she and the children went to stay at a friend's residence where C.H. worked as a housekeeper. The friend telephoned police at 12:40 a.m. Police arrested Diaz at 3:00 a.m.

C.H. and Diaz had not argued on the day of the offense, and everything was "normal" between them.

Y.H. was examined at a rape treatment center at 6:00 a.m. She did not tell the nurse Diaz had molested her. The nurse swabbed her external genitalia, but not her vagina. C.H. told the nurse Y.H. had not bathed or otherwise used the toilet before the examination. However, before genital swabs were taken, Y.H. provided a urine sample. A scan of Y.H.'s body with a Woods lamp[2] did not detect bodily fluids. Y.H.'s demeanor was "playful" and the examination was normal, which was not unusual given the nature of the alleged molestation.

A nurse practitioner examined Diaz at approximately 4:30 a.m. and took penile and scrotal swabs. A scan with a Woods lamp did not reveal any bodily fluids on Diaz. Diaz told the nurse that he had had something to eat or drink before the examination.

At the time of trial, Y.H. was eight years old. She did not remember the molestation and did not know what had happened to cause her mother to move out of Diaz's apartment. Diaz had never touched her inappropriately prior to that night. When she woke up that night, her mother and Diaz were arguing and she was not wearing clothes, although she usually wore pajamas and underwear to bed. She did not recall going to the hospital for an examination. She did recall her mother ripping photographs the last night they lived with Diaz. She did not recall any other arguments between her mother and Diaz prior to the night they moved.

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[2] A Woods lamp is a device that illuminates blood and bodily fluid smears.

(i) *DNA evidence.*

Analysis of genital swabs taken from Y.H. did not reveal the presence of any male DNA. According to the People's DNA expert, Diaz's penile sample contained DNA consistent with a mixture of his and Y.H.'s DNA. Y.H.'s DNA profile would have been present in only one in 110 trillion members of the United States Hispanic population. It was highly unlikely the DNA was C.H.'s. It was also highly unlikely that DNA could be transferred from one person to another through a third person, or via a towel or sheet ("secondary transfer"). A variety of circumstances could cause the degradation or removal of DNA, rendering it unrecoverable, including urination, wiping the area, showering or washing, and heat or humidity. DNA is not as prevalent on the surface of the skin as it is in bodily fluids.

b. *Defense evidence.*

A defense DNA expert testified as follows. She would expect to find saliva and the perpetrator's DNA on a child's vagina and genital area if oral copulation had occurred. Diaz's DNA was not found on Y.H. Nothing in the medical reports indicated that Y.H.'s genital area had been screened for the presence of saliva. Urination would not likely wash away all DNA present on the genital area, but wiping could. If a subject is wearing underwear, the DNA can be wiped off onto the clothing. DNA can also be removed by simply washing with water, or by wiping off the area with a tissue or towel. The prosecution expert's calculations were incorrect and one out of every 44 million Hispanic persons, not one out of every 110 trillion, could have contributed to the mixed DNA sample found on Diaz. Based on the testing done, it was not certain whether a third person, or additional persons, contributed to the DNA mixture. The possibility C.H. was the source of the foreign DNA found in Diaz's sample could not be excluded, because C.H.'s DNA had not been tested. DNA is present in sweat. "[S]econdary transfer" of DNA is in fact a common occurrence. DNA can be transferred from person to person via inanimate objects, such as towels or blankets; however, this theory is not universally accepted in the scientific community. The amount of Y.H.'s DNA found on Diaz's penile swab was relatively small. The expert conceded it was possible Y.H.'s DNA

ended up on Diaz's penis because Diaz touched Y.H.'s vaginal area and then touched his penis.

The high temperature in downtown Los Angeles on September 26, 2010, was 102.9 degrees. At 11:47 p.m., the temperature was 80.1 degrees.

2. *Procedure.*

Trial was by jury. Diaz was convicted of oral copulation with a child under 10 (Pen. Code, § 288.7, subd. (b))[3] and commission of a lewd act upon a child (§ 288, subd. (a)). The trial court denied Diaz's motions for a new trial, to unseal juror information, and to modify the verdict. It sentenced him to a term of 15 years to life in prison and imposed a restitution fine, a suspended parole restitution fine, a court security assessment, and a criminal conviction assessment. Diaz appeals.

DISCUSSION

The evidence was sufficient to sustain the verdicts.

Diaz contends the evidence was insufficient to support his convictions because it was "too contradictory to be credible, too incredible to be cogent." He urges that Y.H. did not recall the molestation, and the DNA evidence did not support the charges and was inconsistent with C.H.'s account. We disagree.

When determining whether the evidence was sufficient to sustain a criminal conviction, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66; *People v. Carrington* (2009) 47 Cal.4th 145, 186-187.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient

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

substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Here, the evidence was clearly sufficient. The victim's mother testified that she observed appellant orally copulating her seven-year-old daughter. The testimony of a single witness, unless physically impossible or inherently improbable, is sufficient to establish a fact and support a conviction. (Evid. Code, § 411; *People v. Young* (2005) 34 Cal.4th 1149, 1181; *People v. Hampton* (1999) 73 Cal.App.4th 710, 722.) Thus, C.H.'s testimony was, by itself, sufficient to support the verdicts. In addition, DNA analysis disclosed the presence of Y.H.'s DNA on Diaz's penis, an unusual circumstance which corroborated C.H.'s account.

Contrary to Diaz's arguments, C.H.'s testimony was neither demonstrably false, nor physically impossible. Although Diaz insinuates that C.H.'s testimony was fabricated to retaliate against him after the couple argued, there was no evidence supporting this theory. There was no evidence the couple had been fighting prior to the molestation, or were estranged. There was no showing C.H. had any motive to falsely implicate Diaz. Nor did the fact Y.H. had no memory of the event render the evidence insufficient. Y.H., who was seven years old at the time, was not fully awake when Diaz molested her. It is therefore not particularly surprising that she did not recall the event. As to the purported weaknesses in the DNA evidence, Diaz's DNA was not obtained until hours after the molestation occurred, and he ate or drank something in the interim. Therefore the absence of Y.H.'s DNA in his oral sample was not dispositive. Nor was the absence of Diaz's saliva or DNA in Y.H.'s genital samples conclusive. Both experts agreed that DNA could be removed in a variety of ways, including wiping. Given that after the molestation Y.H. donned underclothing, travelled to a residence and then to the rape treatment center, provided a urine sample, and was not swabbed until 6:00 a.m.—approximately six hours after the molestation—the jury could reasonably have inferred any DNA deposited by Diaz was removed during the intervening time.

Diaz's arguments that the evidence was insufficient amount to a request that this court reweigh the evidence, which is not a proper appellate function. (*People v. Friend* (2009) 47 Cal.4th 1, 41; *People v. Cortes* (1999) 71 Cal.App.4th 62, 81.) The purported weaknesses in the People's case, and the contradictions between the defense and prosecution DNA experts' testimony, did not make C.H.'s testimony impossible to believe or obviously false, but "merely presented the jury with a credibility determination that is not reviewable on appeal." (*People v. Mejia* (2007) 155 Cal.App.4th 86, 99.) We resolve neither credibility issues nor evidentiary conflicts. (*People v. Maury* (2003) 30 Cal.4th 342, 403; *Mejia*, at p. 98.) Because substantial evidence supported the verdicts, the fact the evidence might conceivably have been reconciled with a contrary finding does not warrant a reversal. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331.)

Diaz laments that allegations of sexual offenses are no longer viewed as " 'easily . . . made and . . . harder to be defended by the party accused, though never so innocent.' " (*People v. Huston* (1941) 45 Cal.App.2d 596, 597.) He relies on, inter alia, *People v. Headlee* (1941) 18 Cal.2d 266, *People v. Niino* (1920) 183 Cal. 126, and *United States v. Chancey* (11th Cir. 1983) 715 F.2d 543, in support of his contention that the evidence against him was inherently incredible and improbable. The facts in the cited cases, however, are readily distinguishable from the evidence presented in the case at bar. Moreover, *People v. Ennis* (2010) 190 Cal.App.4th 721, rejected arguments similar to Diaz's, made in a similar case. In *Ennis*, a defendant was convicted of molesting his two daughters. On appeal he acknowledged that testimony presented at trial was sufficient to establish the crimes, but argued that the evidence "was inherently improbable—by which he mean[t] full of contradictions, inconsistencies and implausibilities—and thus no rational jury could have relied upon it as a basis to convict." (*Id.* at p. 725.) *Ennis* rejected these arguments, explaining: "The 'inherently improbable' standard for rejecting testimony on appeal is not merely an enhanced version of implausibility, as Ennis seems to be asserting. '*Highly* implausible' is still an argument reserved for the trier of fact. Inherently improbable, by contrast, means that the challenged evidence is 'unbelievable

per se' . . . such that 'the things testified to would not seem possible.' [Citation.]" (*Ibid.*) "While an appellate court can overturn a judgment when it concludes the evidence supporting it was 'inherently improbable,' such a finding is so rare as to be almost nonexistent. ' "To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions." [Citations.] . . .' " (*Id.* at pp. 728-729.) "The inherently improbable standard addresses the basic content of the testimony itself—i.e., could that have happened?—rather than the apparent credibility of the person testifying." (*Id.* at p. 729.) "Consequently, '[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]' [Citation.]" (*Ibid.*)

As in *Ennis,* it is readily apparent that C.H.'s account of the molestation was neither physically impossible nor facially improbable. The evidence was sufficient.

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.