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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

EDVER RAUL AMAYA,

Defendant and Appellant.

B245612

(Los Angeles County
Super. Ct. No. BA378994)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie A. Swain, Judge. Affirmed as modified.

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

No appearance for Plaintiff and Respondent.

Defendant Edver Raul Amaya appeals from the judgment entered following his conviction by jury of one count of continuous sexual abuse (count 1), two counts of committing a lewd act upon a child under the age of 14 (counts 2 & 3), and two counts of committing a lewd act upon a child who was 14 or 15 years of age and at least 10 years younger than defendant (counts 4 & 5). As to counts 1, 2, and 3, the jury also found that defendant committed the acts against more than one victim.¹ (Pen. Code, §§ 288.5, subd. (a), 288, subd. (a), 288, subd. (c)(1), 667.61, subds. (b) & (e).)

STATEMENT OF FACTS²

I. The Prosecution Case

N., who was 20 at the time of trial in 2011, was born in November 1990. Defendant is her father. When N. was younger, she lived almost exclusively with her grandmother and grandfather. She did not recall ever living with defendant. Beginning when N. was in elementary school, she would visit defendant at his apartment on his days off. Her brother, K., and stepsister, Y., would often accompany her.

When N. was 10 years old and in the 5th grade, defendant would bathe her and Y., who was three years younger than N. While defendant dried N., he would touch her breasts. During her 6th grade year, while she and defendant were naked, he would “dry hump” her until he “was finished.” N. explained that they would lie on the bed and defendant would rub his penis near her vagina until he climaxed. Afterwards, N. would go into the bathroom and cry. She tried to pretend nothing happened between her and defendant. She estimated there were nine or 10 such incidents during that year.

When N. was in the 7th grade, defendant accused her of not being a virgin. He ordered her to take her clothes off and she complied. Defendant forced her to orally

¹ At sentencing, the prosecution moved to dismiss the allegation as to count 1 after it determined that the enhancement provision was not in effect at the time of the offenses alleged in that count.

² We set forth an abbreviated version of the facts due to the nature of the appeal.

copulate his penis and then put his penis in her vagina against her will. Defendant continued to have sexual intercourse with N. more than 20 times each year from the time she was in 7th grade until the 11th grade. While she was in the 11th grade, defendant became involved with a girlfriend and he stopped having sex with N.

In 2010, N. told a friend about the incidents with defendant after learning that the friend had gone through the same thing with her stepfather. Eventually, N. told her brother, who informed their mother. Her mother called the police. N. spoke to Y. and learned that defendant had touched her as well.

N. acknowledged that she accused a teacher of touching her inappropriately. According to N., the teacher was in custody. She denied ever saying that an uncle had sexually abused her.

Y., who was 18 at the time of trial, was born in August 1993. She did not want to be in court because she felt that what had happened belonged in the past. Defendant is her father. She and her mother, Angela, used to live with defendant, but they moved out when she was five or six years old. Y. would visit defendant every Tuesday and on the weekends.

During the summer after Y.'s 5th grade year, defendant showed her a film of a man and woman having intercourse. He came behind Y. and tried to hug her, but she shrugged him off. On another occasion, while she was lying next to defendant in bed, she felt his erect penis against her back. There were other times when defendant tried to put his tongue in Y.'s mouth, grab her breasts, or touch her vagina; however, she would fight him off. Once, defendant grabbed her hand and tried to put it down his pants. She touched his pubic hair and was able to pull her hand out. There were one or two other incidents when defendant got behind Y. while she was lying on the couch and she felt his erect penis.

II. The Defense Case

Ana H. is defendant's girlfriend. She lived with him for four years, starting in 2007. There were occasions when N. and Y. would stay overnight and sleep in the living room. Ana H. believed defendant and N. had a good relationship.

Y. said she stopped sleeping at defendant's house in 2005. She began sleeping there once again in 2007, approximately two years after he had last touched her inappropriately.

Angela is Y.'s mother. She lived with defendant for almost nine years. N. and her siblings would visit defendant; however, at times their mother would prevent defendant from taking them. The mother was often hostile to Angela. She believed N. was responsible for changing Y.'s attitude toward defendant, accusing N. of "poisoning Y.'s mind."

N. told Angela that defendant started touching her when she was five years old. This would have been during a time when Angela was still living with defendant. She was surprised by this because N. rarely came to their home during that time. N. later said the abuse started after Angela moved out of defendant's home. N. told her that she was unlucky because two other men, her uncle and a teacher, had raped her in the past. N. asked Angela if she was interested in reporting to the police that defendant touched Y. inappropriately.

After N. left, Angela spoke to Y. Y. said nothing had happened between her and defendant. N. called Y. several times and asked her whether she was going to go to the police and press charges against defendant. Y. never did. The police came to Y.'s school and asked her questions.

Z.A. is defendant's sister. N.'s mother called her after N. reported defendant to the police. The mother told Z.A. that she wanted defendant to lose his employment, his apartment, and his right to live in this country. According to Z.A., N. has a reputation among the family of being dishonest.

J.A., defendant's younger sister, stated that N. told her she would never allow her father to be happy. N. wanted him to be with her mother.

Defendant said that after he began living with Angela, his ex-wife, N.'s mother, would come by his apartment, curse at him, and tell him that she was the one who should be living with him. She would do this in the children's presence. The ex-wife also threatened not to let the children visit if he did not help her get a green card. She told defendant she would never leave him in peace, claiming her cousins would come to ruin his car and kill him.

On his days off from work, defendant would arrange to visit with his children. Often, N., her brother, and Y. would be at his home together. Occasionally, they would spend the night.

He believed N. was upset with him because she believed he treated her and sister differently. She was jealous about defendant's preferential treatment of Y. and once wrote him a letter stating that she hated him. On another occasion when he told N. that he could not go to the hospital to visit her mother, she called him a "[s]loppy son of a bitch." She also made unspecified allegations against an uncle. He thought N. made up the charges of sexual abuse against him because she hated him so much.

Defendant denied bathing his children, drying them after they had a bath, or seeing them naked. He said he did not engage in any sexual acts with N.³

DISCUSSION

After reviewing the record on appeal, defendant's appointed appellate counsel filed a brief raising no issues and asking this court to conduct an independent review pursuant to *People v. Wende* (1979) 25 Cal.3d 436. On April 19, 2013, this court advised defendant of the nature of the brief that had been filed and informed him that he had 30 days to submit any issues which he wished us to consider. To date we have received no response.

³ In rebuttal, the prosecution called defendant's ex-wife, who denied she had any harsh feelings toward him, threatened him for not helping her with an immigration problem, or told N.A. to make the allegations against him.

We have independently reviewed the record and have discovered an error in the abstract of judgment. In count 5, defendant was convicted of violating Penal Code section 288, subdivision (c)(1); however, the abstract lists a conviction of Penal Code section 261.5, subdivision (d). This court has the inherent authority to correct errors in the abstract of judgment that do not accurately reflect the oral pronouncement of judgment of the sentencing court. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) We will order that the abstract of judgment be corrected to reflect that defendant was convicted in count 5 of violating Penal Code section 288, subdivision (c)(1).

We are satisfied that no other arguable issues exist and that defendant has, by virtue of counsel's compliance with the *Wende* procedure and our independent review of the record, received effective appellate review of the judgment entered against him. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-279; *People v. Kelly* (2006) 40 Cal.4th 106, 123-124.)

DISPOSITION

The abstract of judgment is amended to reflect that defendant was convicted in count 5 of violating Penal Code section 288, subdivision (c)(1). The clerk of the superior court is directed to send a copy of the corrected abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.