Filed 9/20/19 P.v. Bolanos CA2/5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>LEONEL BOLANOS,<br><br>Defendant and Appellant. | B293719<br><br>(Los Angeles County Super. Ct. No. BA458863) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed.

Robert H. Derham, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Yun K. Lee and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

Following a jury trial, defendant and appellant Leonel Bolanos was convicted of 15 counts of sexually abusing a child and sentenced to 60 years to life, plus 46 years. On appeal, defendant contends the trial court erred by failing to instruct the jury on the specific intent element of sexual penetration in violation of Penal Code section 288.7, subdivision (b)[1], and by instructing the jury that the People did not need to prove motive. Defendant also asserts the trial court erred by admitting expert opinion testimony regarding Child Sexual Abuse Accommodation Syndrome (CSAAS). Finally, defendant argues certain assessments and fines were imposed without a hearing on his ability to pay, in violation of *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We affirm.

## II. BACKGROUND

### A. *Procedural History*

On February 22, 2018, the Los Angeles County District Attorney filed an information charging defendant with sexually abusing victim J.V. (the child). Counts 1 through 8 charged defendant with violating section 288.7, subdivision (b) (oral copulation or sexual penetration of a child 10 years old or younger); counts 9 through 14 charged him with violating section 288, subdivision (a) (lewd acts upon a child under the age of 14 years); count 13 charged him with violating section 288a,

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[1] Further statutory references are to the Penal Code unless otherwise indicated.

subdivision (c)(2)(B) (forcible oral copulation of a victim under the age of 14 years); and counts 14 and 15 charged him with violating section 288, subdivision (b)(1) (forcible lewd acts upon a child under the age of 14 years). On September 13, 2018, a jury found defendant guilty on all counts.

The trial court sentenced defendant to an aggregate sentence of 60 years to life, plus 46 years, comprised of the following terms: on counts 1 through 4, 15 years to life consecutively for each count; on counts 5 through 8, 15 years to life for each count, to be served concurrently with the sentence for counts 1 through 4; on count 9, the high term of eight years consecutive; on counts 10 through 12, one-third the midterm of six years (two years), consecutive for each count; on count 13, the high term of 12 years consecutive; and on counts 14 and 15, the high term of 10 years consecutive for each count.

The trial court imposed the following fines and assessments: a $30 criminal conviction assessment (Gov. Code, § 70373) per count, for a total of $450; a $40 court operations assessment (§ 1465.8, subd. (a)(1)) per count, for a total of $600; a $300 restitution fine (§ 1202.4, subd. (b)); a $300 parole revocation fine (§ 1202.45), which was stayed until parole was revoked; and a $300 sexual offender program fund fine (§ 290.3).

B. *Trial*

1. Prosecution's case

The child, who was born in 2005, was about three or four years old when defendant began dating M.C., the child's mother (mother). When the child was about four years old, defendant

moved in with mother and the child, and the three lived in an apartment on Kenmore Avenue (first apartment) in Los Angeles. When the child was about seven to nine years old, she, mother, and defendant moved into a second apartment, also on Kenmore Avenue (second apartment). In both apartments, the child slept in the same room as mother and defendant, with the child sleeping on one bed and mother and defendant sharing another bed nearby.

Mother worked four to five days a week during the time of the abuse. Defendant also worked full-time, except during two periods of six months and one year, respectively, when he was disabled due to a tumor on his foot.

Defendant began to sexually abuse the child when she was about seven or eight years old. He abused her three to four times per week. The abuse occurred when defendant and the child were at home alone. Defendant began by touching the child's breasts and vagina over her clothes on multiple occasions.

When the child was nine or ten years old, defendant began to touch her breasts under her clothing. He did so on more than one occasion. Defendant also began to touch the child's vagina under her clothing and did so more than once.

Beginning when the child was nine or ten years old, defendant would put his mouth on the child's breasts and suck on them. He did this more than once. Defendant would also put his mouth on the child's vagina. He did this on more than one occasion.

The child also recounted incidents when defendant inserted his finger into her vagina, which caused her pain. The first time he did so was when the child was younger than 10 years old. The child initially testified that defendant did this more than once,

but not often. Then, the child (and jurors) viewed a video of the child's earlier interview at Stuart House, a child advocacy center. In the video, the child stated that defendant first put his mouth on, and inserted his finger into, her vagina when she was six years old and living in the first apartment. She further stated that defendant would put his fingers in her vagina and move them in and out, and did so approximately once a week. After reviewing the video, the child recalled that defendant inserted his finger into her vagina about once a week.

When the child was about seven or eight years old, she told mother about defendant's sexual abuse. Mother asked defendant about the allegations and he "denied everything." Mother did not believe the child. The child was afraid that defendant would do something to her or mother and therefore told mother that she had lied about the abuse.

Defendant last abused the child on July 3, 2017, when the child was 11 years old. The child was in the kitchen reading a book when defendant grabbed her wrist and pulled her toward the bedroom. The child told defendant she did not want to go with him, and grabbed onto a chair in the kitchen. Defendant gripped the child's wrist harder. She let go of the chair and grabbed onto a drawer in the hallway. Defendant again tightened his hold on the child's wrist and she let go of the drawer. Defendant threw the child onto the bed he shared with mother, pulled up her shirt, and touched her breasts with his hand. He also sucked on her nipples. He then pulled down the child's pants and touched her vagina. After about 10 minutes, defendant told her to get dressed. She put on her clothes and went to the kitchen.

On July 4, 2017, the child, who was crying in the living room, told mother that she was unhappy because defendant had been sexually abusing her when mother was not home. Mother confronted defendant, who again denied abusing the child. Mother directed the child to call the police, who arrived 20 minutes later. After being interviewed by the police, the child went to the hospital to be examined. The child was then interviewed at Stuart House the next day.

Nurse Abigail Rea of the UCLA Rape Treatment Center examined the child on July 4, 2017. She swabbed the child's neck, breasts, upper inner thighs, mouth, anal area, and external genital area for DNA. The child had no visual injuries, which was consistent with the history she provided to Rea.

Jennifer McLean-Madera was a nurse practitioner at the UCLA Rape Treatment Center. On July 4, 2017, she performed a sexual assault suspect exam on defendant.

Los Angeles Police Department criminalist Bradley Tom analyzed the samples taken from the child. The swabs from the child's right breast and inner right thigh had a mixture of DNA from two contributors. The child was one of the contributors, and the second contributor's profile was consistent with defendant's DNA profile. The DNA swab of the child's external genitals matched defendant's DNA profile.

2. Defendant's case

Defendant did not testify and called no witnesses.

3. Arguments

Counts 1 through 8 charged defendant with violating section 288.7, subdivision (b), oral copulation or sexual penetration of a child 10 years of age or younger. The prosecutor informed the jury in both opening and closing arguments that counts 1 through 4 charged defendant with oral copulation, while counts 5 through 8 charged defendant with sexual penetration.

The prosecutor then discussed the evidence that supported counts 9 through 12, lewd acts upon a child less than 14 years old. The prosecutor described the evidence that defendant had touched the child's breasts and vagina, both over and under her clothing, and had placed his mouth on her breasts. The prosecutor explained that for these counts, the People were required to prove that defendant's touching was "done with the intent to arousing, appealing to, gratifying the lust, passions or sexual desires of the defendant or the child." The prosecutor explained the required touching was a different type of touching than what "a parent does maybe when they're bathing a child, or something that a doctor does when examining a child. Okay. Children are touched every day. Okay. So the touching isn't what's criminal, but a touching with that intent, with a sexual intent is criminal." The prosecutor further explained that counts 13 through 15 related to the events of July 3, 2017, when defendant used force on the child.

During her closing argument, defense counsel argued that the People had failed to meet their burden of proving the charges beyond a reasonable doubt. Counsel further reminded the jury about the presumption of innocence: "What it means is that [defendant] is presumed to not have orally copulated [the child].

He's presumed not to have penetrated [the child]. He's presumed not to have committed any lewd and lascivious acts on [the child]." Counsel did not make any arguments regarding the People's failure to prove that defendant acted with the specific intent required to find him guilty of lewd conduct with a child under the age of 14.

## III. DISCUSSION

### A. *Jury Instruction Omitted Necessity of Finding Specific Intent For Sexual Penetration Charges*

Defendant contends the trial court erred by failing to instruct the jury that sexual penetration of a child 10 years of age or younger, in violation of section 288.7, subdivision (b), required a finding of specific intent. "'Sexual penetration' is the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening *for the purpose of sexual arousal, gratification, or abuse* by any foreign object, substance, instrument, or device, or by any unknown object." (§ 289, subd. (k)(1), italics added.) Based on the statutory language, the trial court was required to instruct the jury that when defendant sexually penetrated the child, he did so "'with the intent to gain sexual arousal or gratification or to inflict abuse on the victim.'" (*People v. ZarateCastillo* (2016) 244 Cal.App.4th 1161, 1167; *People v. Ngo* (2014) 225 Cal.App.4th 126, 157.) The Attorney General concedes that the trial court erred in failing to instruct the jury on specific intent but argues

that the error was harmless under the *Chapman* standard of review. (*Chapman v. California* (1967) 386 U.S. 18.)

The trial court's error only affected counts 5 through 8 because the prosecutor elected to proceed on these counts on a theory that defendant sexually penetrated the child. (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292 ["Where the jury receives evidence of more than one factual basis for a conviction, the prosecution must select one act to prove the offense, or the court must instruct the jury that it must unanimously agree on one particular act as the offense"]; accord *People v. Leonard* (2014) 228 Cal.App.4th 465, 491.) On counts 1 through 4, the prosecutor elected to proceed on a theory that defendant orally copulated the child, which does not require a finding of specific intent. (*People v. Mendoza* (2015) 240 Cal.App.4th 72, 80 [oral copulation under § 288.7, subd. (b) is general intent crime].)

In determining whether the error in omitting an element of a charged offense was harmless, a reviewing court is to "'conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless.' [Citation.] On the other hand, instructional error is harmless 'where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence.' [Citations.] Our task, then, is to determine 'whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.'" (*People v. Mil* (2012) 53 Cal.4th 400, 417, quoting

*Neder v. United States* (1999) 527 U.S. 1, 17, 19; accord, *People v. Aranda* (2012) 55 Cal.4th 342, 367.)

Here, the error was harmless. The trial court correctly instructed the jury on counts 9 through 12, engaging in lewd conduct with a child under 14 years old, and on counts 13 through 15, using force when engaging in lewd conduct with a child under 14 years old, that the People were required to prove that defendant acted "with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of himself or the child."

The jury found defendant guilty of counts 9 through 15 and thus concluded that when defendant touched the child's breasts and vagina over and under her clothes, he acted with the "intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of himself or the child." Although this is a different intent than the one required for a finding of sexual penetration, there is no evidence in the record that a jury could have rationally concluded that when defendant sexually penetrated the child, he did so with any intent other than to "gain sexual arousal or gratification or to inflict abuse on the victim." Given the facts of this case, which include defendant's sucking of the child's breasts and repeated oral copulation and digital penetration of the child, in secret, over a period of years, we cannot imagine a circumstance in which a rational jury could have concluded that defendant acted without specific intent when he sexually penetrated the child. (*People v. Ngo*, *supra*, 225 Cal.App.4th at p. 163 ["There are very few circumstances in which a person would intentionally penetrate another person *without* such a purpose. Perhaps, for example, a father could penetrate his daughter when physically examining her for

medical reasons. Or a defendant could be mentally unable to form the specific intent for some reason, e.g., mental illness. Whatever the possibility of such scenarios, nothing in the record would support them here"].) Indeed, defendant's position at trial was that the People failed to meet their burden to prove that any of the unlawful touching occurred, not that defendant lacked the requisite specific intent at the time he touched the child. Thus, the evidence supporting a finding of specific intent was uncontested. We therefore conclude that the trial court's error in failing to instruct the jury on the specific intent necessary to commit sexual penetration of a child, in violation of section 288.7, subdivision (b), was harmless beyond a reasonable doubt.

B. *Instruction on Motive*

Defendant next contends that the trial court erred in instructing the jury with CALCRIM No. 370, as follows: "The People are not required to prove that the defendant had a motive to commit the crime charged. In reaching your verdict you may, however, consider whether the defendant had a motive. [¶] Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show that the defendant is not guilty." According to defendant, this instruction improperly removed the specific intent element from the jury for counts 9 through 12, lewd acts upon a child under the age of 14 years in violation of section 288, subdivision (a), and counts 14 through 15, lewd acts upon a child under the age of 14 years by force or fear in violation of section 288, subdivision (b)(1).

Even if we assume the instruction on motive removed an element of the offense for counts 9 through 12, 14, and 15, we conclude that any such error was harmless. As discussed above, the evidence in support of finding that defendant acted to arouse or gratify his or the child's lust, passions, or sexual desires was overwhelming and uncontested. Thus, any error in instructing the jury with CALCRIM No. 370 was harmless beyond a reasonable doubt. (*People v. Mil, supra,* 53 Cal.4th at p. 417.)

C. *CSAAS Expert Testimony*

Defendant next contends the trial court erred by allowing a witness to testify about CSAAS. Prior to trial, defendant objected to the proffered testimony of Dr. Susan Hardie, an expert on CSAAS, on grounds that such testimony would be unduly prejudicial under Evidence Code section 352. The trial court overruled the objection.

Prior to Hardie's testimony, the trial court instructed the jury that "Testimony of Dr. Hardie is offered on the subject of [CSAAS]. The testimony you're about to receive about [CSAAS] is not evidence that the defendant in this case committed any of the crimes that are charged against him. [¶] You may, however, consider this evidence and you may consider it only in deciding whether or not [the child's] conduct was not inconsistent with the conduct of someone who has been molested in evaluating the believability of her testimony."

At trial, Hardie testified that CSAAS was a term first used by Dr. Roland Summit, to disabuse clinicians of the myth that a child who has been sexually abused would automatically disclose that abuse. Hardie further testified that a sexually abused child

may exhibit five behavioral characteristics: secrecy, helplessness, accommodation, delayed disclosure, and recantation. As to the latter two characteristics, Hardie explained why a child may delay disclosing sexual abuse by weeks, month, or years. Regarding recantation, Hardie testified that not all sexually abused children recant a report of abuse, but recantation is a method of denying or minimizing a painful memory, and a child may retract a report of abuse based on the reactions of other people, such as a non-offending parent.

Following the close of evidence, the trial court again instructed the jury on how it could consider Hardie's tesitmony: "You have heard . . . testimony from Dr. Susan Hardie regarding [CSAAS]. [¶] Dr. Hardie's testimony about [CSAAS] is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not [the child's] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony." (See CALCRIM No. 1193.)

Defendant contends that CSAAS expert testimony should not be admissible in California, citing cases from other jurisdictions. We reject this argument as other jurisdictions are not persuasive when California courts have spoken on the matter. (*Ammerman v. Callender* (2016) 245 Cal.App.4th 1058, 1086.) As defendant concedes, CSAAS expert testimony is admissible under California authority. (See, e.g., *People v. Julian* (2019) 34 Cal.App.5th 878, 885; *People v. Gonzales* (2017) 16 Cal.App.5th 494, 503; *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744.)

Defendant next argues that the admission of Hardie's testimony violated his right to a fair trial and due process under

the federal and state Constitutions. "Because [the defendant] failed to object on these grounds at trial, the claim is not preserved." (*People v. Ramos* (1997) 15 Cal.4th 1133, 1170; accord, *People v. Burgener* (2003) 29 Cal.4th 833, 872; *People v. Anderson* (2001) 25 Cal.4th 543, 592, fn. 17.)

Even if we were to consider the merits of defendant's argument, we would reject it. The "introduction of CSAAS testimony does not by itself deny [a defendant] due process." (*People v. Patino, supra,* 26 Cal.App.4th at p. 1747.) Although "CSAAS expert testimony is not admissible to prove the complaining witness has in fact been sexually abused[] (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300 . . .)[,] [i]t is admissible to rehabilitate such witness's credibility when the defendant suggests that the child's conduct after the incident is inconsistent with her testimony claiming molestation. (*Ibid*.) Such testimony is needed to disabuse jurors of commonly held misconceptions of child sexual abuse and the abused child's seemingly self-impeaching behavior. (*Id.* at p. 1301.)" (*People v. Gonzales, supra,* 16 Cal.App.5th at p. 503; accord, *People v. Julian, supra,* 34 Cal.App.5th at p. 885.)

In this case, the child's credibility was crucial to the prosecutor's case against defendant. The child had previously recanted her reporting of sexual abuse to mother. Mother testified that she did not initially believe the child's statements. During cross-examination, mother stated that she never saw defendant touch or kiss the child in an inappropriate manner. Moreover, during closing argument, defense counsel argued that "[the child] tried to tell her mother something about [defendant] that very first time. [Mother] knows [the child] far better than any of you. And if she did not believe [the child], then you must

question [the child's] credibility." Under these circumstances, we conclude the trial court did not err in admitting Hardie's testimony.

D. *Fines, Fees, and Assessments*

Finally, defendant contends the trial court erred by imposing the fees, fines, and assessments described above without first determining whether he had an ability to pay. "In *Dueñas*, *supra*, 30 Cal.App.4th 1157, . . . [Division 7 of the Second Appellate District] held it violated due process under both the United States and California Constitutions to impose a court operations assessment as required by . . . section 1465.8[, subdivision (a)(1),] or the court facilities assessment mandated by Government Code section 70373, neither of which is intended to be punitive in nature, without first determining the convicted defendant's ability to pay." (*People v. Castellano* (2019) 33 Cal.App.5th 485, 488-489.) Regarding the minimum restitution fine under section 1202.4, subdivision (b), the *Dueñas* court further held that "although the trial court is required to impose a restitution fine, the court must stay execution of the fine until it is determined defendant has the ability to pay the fine." (*Id.* at p. 489.)

The trial court imposed a restitution fine of $300, a court facility assessment of $40 per count, and a court construction assessment of $30 per count, for a total of $1,050, without holding a hearing to determine whether defendant had the ability to pay such fines and assessments. Prior to *Dueñas*, these fines and

assessments were mandatory.[2] *(People v. Rodriguez* (2012) 207 Cal.App.4th 1540, 1543, fn. 2.)

The record demonstrates that defendant is able to work. Although he was home on disability for two periods (totaling approximately 18 months), defendant was otherwise employed full-time during the approximately seven years that he resided with the victim. Further, defendant has been sentenced to a lengthy prison term and thus should be able to earn sufficient prison wages to satisfy his fees. (See *People v. Jones* (2019) 36 Cal.App.5th 1028, 1035 ["[w]ages in California prisons currently range from $12 to $56 a month"].) Based on these particular facts, any error in failing to hold an ability to pay hearing was harmless beyond a reasonable doubt. (*Ibid.*; *People v. Johnson* (2019) 35 Cal.App.5th 134, 139-140.)

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[2] Defendant has forfeited his challenge to the trial court's imposition of the sexual offender program fund fine. Even before *Dueñas,* defendant was able to, but did not, challenge the imposition of that fine based on an inability to pay, pursuant to section 290.3, subdivision (a). He has thus forfeited that challenge on appeal. (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033, fn. 12; *People v. Acosta* (2018) 28 Cal.App.5th 701, 705.)

## IV. DISPOSITION

The judgment is affirmed.

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KIM, J.

We concur:

RUBIN, P. J.

BAKER, J.