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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. JUAN JOSE GARCIA, Defendant and Appellant.	B234348 (Los Angeles County Super. Ct. No. VA055858)

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

Richard D. Miggins, 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 Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Juan Jose Garcia appeals from the judgment entered following his conviction by jury on count 1 – lewd act upon a child (Pen. Code, § 288, subd. (a)). The court sentenced appellant to prison for six years. We affirm the judgment.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established that on August 15, 1999, 12-year-old Cynthia V. (Cynthia) lived in Artesia with her parents, relatives, and appellant. On that morning, she was cleaning a restroom. Appellant invited her into his bedroom. She entered and he shut the door. Cynthia testified appellant smelled like beer and looked like he was drunk. Appellant grabbed her arms and tried to kiss her while she resisted. Appellant was loudly playing music. Cynthia's brother looked into the bedroom through an opening and her uncle banged on the bedroom door. Cynthia jumped out a window.

Cynthia's aunt saw Cynthia jump out the window and asked her what had happened. Cynthia denied anything had happened. She was afraid of her father because she was not supposed to be in appellant's bedroom. Cynthia's uncle told appellant to leave. Maria, Cynthia's mother, arrived home. Appellant left. Cynthia denied to Maria that anything had happened. However, Maria called the police. Perhaps an hour after the incident, Cynthia spoke to a sheriff's deputy at the house.

Cynthia testified at trial that she did not want to testify and did not want her boyfriend or co-workers to learn about what had happened. Cynthia was embarrassed about appearing in court and felt responsible for what had happened. She did not remember telling police that appellant pushed her onto the bed, removed his shorts and underwear, put his penis on her vagina as she struggled, and rubbed his penis on her vagina. She testified she probably had lied to police because Maria had been saying appellant raped Cynthia, and Cynthia's aunt had told Maria to call the police.

Los Angeles County Sheriff's Lieutenant Arthur Scott testified that on August 20, 1999, he interviewed Cynthia by herself at the house and she told him the following. Cynthia was cleaning a restroom when appellant invited her into his bedroom. She refused

to enter. About an hour later, he again asked her to enter his bedroom. Thinking he was going to ask a question, she entered. Appellant asked Cynthia to close the bedroom door but she refused. Appellant closed the bedroom door, sat on the bed, and asked her to approach him. Appellant took her by her hand and pulled her to him. Cynthia began screaming but his music was playing loudly and no one could hear her.

Appellant pushed Cynthia onto his bed and then removed his pants. He tried to remove her skirt but Cynthia turned away and she pulled her skirt back up. Appellant pulled her skirt above her vaginal area and removed her underwear. While she resisted, appellant lied on top of her and his erect penis was on top of her vagina.

In August 1999, appellant had been employed at a construction company. He quit his job without giving notice to his employer and apparently moved from California.

In December 2010, appellant was arrested for an alcohol-related incident. The present case was assigned to Los Angeles County Sheriff's Deputy Marlene Vega who, the day after appellant's above arrest, interviewed him concerning the present case. The interview was recorded on a CD. During the interview, appellant initially told Vega that he did not do anything to Cynthia and nothing happened. Vega said she knew appellant had tried to have sex with Cynthia even though he did not have sex with her. Appellant then told Vega the following. Appellant grabbed Cynthia by her hand, closed the door, pulled down her pants, and brushed his penis over her vagina. He also kissed Cynthia's lips. He was "kind of drunk." After someone knocked on the door, he told Cynthia to exit through a window.

Vega asked appellant why he did not insert his penis into Cynthia's vagina. Appellant replied as follows. Appellant had been unable to put his penis into Cynthia's vagina. Cynthia had agreed to have sex, but once someone knocked on the door, she was afraid and there had not been enough time.

The CD and a transcript thereof were admitted into evidence. (References herein to the transcript are to copies thereof.) Appellant presented no defense evidence.

ISSUES

Appellant claims (1) the trial court erroneously permitted the playing of the CD to the jury and (2) he was denied effective assistance of counsel by his trial counsel's failure to request an instruction indicating that voluntary intoxication could negate the requisite criminal intent.

DISCUSSION

1. *The Trial Court Did Not Err by Permitting the Playing of the CD.*

a. *Pertinent Facts.*

Vega conducted the interview of appellant in Spanish. On May 9, 2011, appellant filed a motion in limine regarding the interview. The transcript was attached to the motion. The transcript reflects a state certified court interpreter did the transcription in Spanish and the translation in English. The transcription and translation are side by side in the transcript.

The transcript reflects laughter occurred after appellant provided his name to Vega. The transcript also reflects laughter occurred when appellant explained to Vega that appellant (1) had rubbed his penis against Cynthia's vagina, and the Spanish word appellant used during that explanation meant "to rub, like this," (2) had not put his penis inside Cynthia because he had been unable to do so, and (3) had tried to put his penis inside her but "couldn't get in."

On May 11, 2011, the jury was sworn.[1] On that date, and outside the presence of the jury, the prosecutor indicated he intended to call Vega as a witness and to play the CD to the jury. Appellant objected, arguing that the translation by jurors who understood Spanish and the translation in the transcript might differ.

[1] Cynthia's mother testified with the assistance of an interpreter, and an interpreter apparently translated testimony for appellant.

Appellant suggested that the jury rely on the transcript. The court asked if appellant was saying it was okay for the jury to have the transcript. Appellant's counsel said, "Well, I can't stop it. I know that they're going to have it because that's what the People have and I know the court would allow it in."

The prosecutor argued that at points during interview, appellant was joking and laughing about his inability to insert his penis into Cynthia, it was necessary to play the CD so the jury could hear his tone and demeanor during the interview, and his tone and the detail of his statements proved his statements were voluntary and not fabricated.

The court overruled appellant's objection to the playing of the CD and stated transcripts would be distributed to the jury. The court later stated, "Just reading the transcripts, some of that what he's talking that flavor comes through. So, I think they should hear that." (*Sic*.)

During Vega's later testimony, a transcript was distributed to each juror, then the CD was played. After the CD was played, the transcripts were collected. The prosecutor later commented, concerning Vega's demeanor during the recorded interview, that Vega was "kind of . . . joking" with appellant, and the prosecutor asked if Vega had been trained regarding interviewing suspects. Vega indicated she had received training and that the joking or establishing rapport with appellant was designed to make him feel comfortable.

On May 12, 2011, the CD (People's exhibit No. 4A) and a transcript (People's exhibit No. 4B) were admitted into evidence without further objection. People's exhibit No. 4B is the same as the transcript attached to appellant's motion in limine, except only the latter transcript contains a page reflecting a state certified court interpreter did the transcription and translation.[2]

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[2] During the final charge to the jury, the court, with the parties' consent, gave CALJIC No. 1.03, regarding the prohibition against independent investigation by jurors. That instruction stated, inter alia, "You must decide all questions of fact in this case from the evidence received in this trial and not from any other source. When a witness has testified through a Certified Court Interpreter, you must accept the English interpretation of that testimony even if you would have translated the foreign language differently."

b. *Analysis.*

Appellant claims the trial court abused its discretion and denied his rights to due process and a fair trial by permitting the playing of the CD, because the Spanish-speaking jurors provided their own translation of the CD and disregarded the transcript with the result they based their verdict on "different evidence" (AOB/15) than the non-Spanish-speaking jurors. We disagree.

First, " '[e]vidence' means testimony, writings, material objects, or other things *presented to the senses* that are offered to prove the existence or nonexistence of a fact." (Evid. Code, § 140, italics added.) The only thing the playing of the CD presented to the senses of the jury was a conversation in Spanish. Any translation of that conversation by a juror was not "[e]vidence" within the meaning of Evidence Code section 140. All jurors heard the same "[e]vidence," i.e., the Spanish conversation, when the CD was played.

The playing of the CD, i.e., the Spanish conversation, provided evidence of (1) what appellant said in Spanish, and (2) what occurred while appellant was speaking. As for what occurred while appellant was speaking, the court, during its final charge to the jury, gave CALJIC No. 2.70 on the definition of confessions and admissions. That instruction (the validity of which is undisputed) told the jury that they were the exclusive judges of whether a confession or admission by appellant was credible, i.e., whether it was "true in whole or in part."

As indicated, the playing of the CD revealed laughter at various points, including in contexts in which appellant discussed rubbing his penis against Cynthia's vagina and being unable to insert his penis in her vagina. The prosecutor argued appellant joked and laughed about his inability to insert his penis into Cynthia, it was necessary to play the CD so the jury could hear his tone and demeanor while making his statements, and his tone and the detail of his statements indicated, inter alia, they were not fabricated. The court suggested it agreed with the prosecutor when the court stated, "[j]ust reading the transcripts, some of that what he's talking that flavor comes through." (*Sic*.)

An appellate court applies an abuse of discretion standard of review to any trial court ruling on the admissibility of evidence, including a ruling concerning relevance.

(*People v. Waidla* (2000) 22 Cal.4th 690, 717.) To the extent the playing of the CD provided evidence of what occurred while appellant spoke in Spanish, that evidence was relevant to appellant's tone and demeanor as conveyed by the conversation, facts that, in turn, were relevant to whether appellant's statements were credible. This is true whether or not any juror translated the words that appellant said.

The playing of the CD also provided evidence of what appellant said in Spanish, which implicates appellant's claim that jurors improperly translated what he said. However, first, the burden is on appellant to demonstrate error from the record; error will not be presumed. (*In re Kathy P*. (1979) 25 Cal.3d 91, 102; *People v. Garcia* (1987) 195 Cal.App.3d 191, 198.) Appellant has failed to demonstrate there were any jurors who understood Spanish. Second, appellant has failed to demonstrate that any juror(s) who understood Spanish translated the conversation into English. The record permits the inference the jury was reading the transcripts when the CD was playing.

Third, the record fails to demonstrate that any juror(s) communicated any such translation to another juror(s). Any such translation was simply an uncommunicated mental process of a juror who understood Spanish. Evidence Code section 1150, subdivision (a) provides that "[u]pon an inquiry as to the validity of a verdict, . . . [n]o evidence is admissible . . . concerning the mental processes by which [the verdict] was determined." On this record, even if a juror translated the conversation into English, section 1150 bars consideration of that fact.

Fourth, even if we could consider a juror's uncommunicated translation, appellant has failed to demonstrate that any such translation was erroneous or differed from the transcript. Fifth, the record fails to demonstrate any juror disregarded the transcript, or adopted any translation by the juror over the translation in the transcript.

The record demonstrates a state certified court interpreter made the transcript. Appellant does not suggest the transcript was erroneous. Appellant suggested to the trial court that the jury rely on the transcript. Appellant did not object to the admission of the transcript into evidence and there is no dispute the court properly admitted it. The trial

court did not abuse its discretion or violate appellant's right to due process or right to a fair trial by permitting the playing of the CD.[3]

2. *Appellant Was Not Denied Effective Assistance of Counsel by His Trial Counsel's Failure to Request a Voluntary Intoxication Instruction.*

The court instructed on the elements of the present offense using CALJIC No. 10.41. That instruction stated an element of the present offense was "the touching was done with the specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person or the child." Appellant did not request that the court give, and the court did not give, an instruction indicating voluntary intoxication could negate said specific intent.

Appellant claims his trial counsel's failure to request such an instruction constituted ineffective assistance of counsel. We reject the claim. The record sheds no light on why appellant's trial counsel failed to request such an instruction, counsel was not asked for an explanation, and we cannot say there simply could not have been a satisfactory explanation.

Indeed, on this record, appellant's trial counsel reasonably could have concluded the trial court properly would have denied any such request. Even if there was substantial evidence that appellant had become voluntarily intoxicated, his trial counsel reasonably could have concluded that appellant's detailed account to Vega of what appellant did with Cynthia in his bedroom reflected such a clear memory of events that there was no substantial evidence appellant became intoxicated to the point he failed to formulate the requisite criminal intent. (Cf. *People v. Marshall* (1996) 13 Cal.4th 799, 848; *People v. Ivans* (1992) 2 Cal.App.4th 1654, 1661-1662.) No ineffective assistance of counsel occurred. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)

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[3] In light of our analysis, we need not consider the impact, if any, of the fact the court gave CALJIC No. 1.03 (see fn. 2, *ante*) which, in relevant part, pertained to witness testimony and did not explicitly refer to unsworn pretrial statements such as those contained in the transcript. We note Cynthia's mother, and apparently appellant, used an interpreter during trial. (See fn. 1, *ante*.)

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.