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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MANUEL DE JESUS CUBIAS, Defendant and Appellant.	B336363 (Los Angeles County Super. Ct. No. BA495924)

APPEAL from an order of the Superior Court of Los Angeles County, Craig Richman, Judge. Affirmed.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Zee Rodriguez and Lauren Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Manuel De Jesus Cubias (defendant) was convicted of sexual penetration of a child 10 years old or younger (Pen. Code[1] § 288.7, subd. (b); count 1); lewd act upon a child under age 14 (§ 288, subd. (a); counts 2-6); and continuous sexual abuse (§288.5, subd. (a); count 7). Defendant contends his federal constitutional rights were violated because the trial court erred by giving CALCRIM Nos. 1190 and 330. Respectively, he avers these instructions "impermissibly lighten[ed] the prosecution's burden of proof by bolstering a victim's testimony" and "instructed the jury to treat out of court statements as testimony and also bolstered the testimony of a child witness." We affirm.

BACKGROUND

Procedural History

On November 7, 2022, defendant was charged by information with sexual penetration of a child 10 years old or younger (§ 288.7, subd. (b); count 1); lewd act upon a child under age 14 (§ 288, subd. (a); counts 2-6); and continuous sexual abuse (§ 288.5, subd. (a); count 7). With regard to counts 2 through 5, it was further alleged defendant committed an offense specified in section 667.61, subdivision (c) against more than one victim, each a child under the age of 14, as set forth in section 667.61, subdivisions (e)(4) and (j)(2). A jury convicted defendant as charged and found true both special allegations. The trial court sentenced defendant to 65 years to life in state prison, consecutive to a determinate term of 18 years.

Defendant timely appealed.

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[1] All further undesignated statutory references are to the Penal Code.

Statement of Facts

Familial Relationships

Defendant was married to Eva[2] and they have two children: Wilmer and Yanine. Mayra is Eva's sister and the mother of Celia. Celia is Yvette's mother.

Carmen has five children, including Elizabeth, Jesus, and Nayeli. The two families were connected through two romantic relationships: Elizabeth dated Wilmer, and Jesus dated and eventually married Yanine.

Defendant and Eva initially lived in an apartment in Los Angeles, then moved to a house or duplex in East Hollywood. Mayra lived in the second residence on the East Hollywood property, and during various periods, Celia and Yvette also lived there.

Nayeli D. (Counts 3-5)

Nayeli met defendant when she was younger than 10 years old through her siblings' relationships with defendant's children, Yanine and Wilmer. She frequently visited defendant's home with her siblings, Elizabeth and Jesus. Nayeli testified regarding three separate instances where defendant "touch[ed her] in [her] privates." These occurred when she was 5, 10, and under 14 years old.

When Nayeli was 17, she told Celia about the abuse. Before approaching Celia, Nayeli asked Yvette, Celia's daughter, how she felt around defendant; Yvette said, "he would always bug her." Nayeli disclosed her abuse to Celia because she "suspected" defendant may be "touching [Celia's] daughter (Yvette)."

Yvette N. (Counts 1-2)

Trial Testimony

Yvette, Celia's daughter, was 12 years old when she testified at trial. Defendant is her great-uncle, whom she called "Papa Mister." She frequently visited defendant's house with

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[2] Because of the various familial relationships, we refer to the witnesses and others by their first names. No disrespect is intended.

family members, including her mother, aunts, and grandmother. When at the house without her mother, Yanine or Wilmer supervised her. Yvette's grandmother, Mayra, lived in a second house on the same property, and Yvette lived there for a period. At Celia's request, defendant was never responsible for caring for Yvette.

On one occasion, Yvette was alone with defendant for approximately ten minutes while Eva and Mayra walked the dogs to the liquor store. Defendant was sitting on a bed situated in the living room. After Eva and Mayra left, defendant told Yvette to get on the bed, sat her at the edge, put his hands inside her pants and underwear, and used his fingers to touch her privates. Defendant said nothing during the touching, and it lasted only until Eva and Mayra returned. When Yvette heard the dogs' collars, defendant stopped touching her and pushed her away. When the women entered, she was standing near the bed rather than sitting on it.

Defendant acted as though nothing had happened. Yvette said nothing "[b]ecause [she] was scared that no one would believe [her] and [she] didn't want to break the family apart and make everybody mad." She could not recall her exact age but knew she was no older than kindergarten age.

Forensic Interview

On November 10, 2020, when Yvette was nine years old, she participated in a forensic interview. She understood she was there to talk about "Papa Meester" who "touched [her] wrongly in [her] private part."

Yvette explained that when she was five years old and in kindergarten, her grandmother and Eva left the house to go to "the liquor store" and took the dogs with them. After they left, she was in the kitchen and defendant was sitting on the corner of the bed with his legs open, such that "the corner [of the bed] was open." He called her over. When she got there, "he lifted [her] up from the bed," and she sat "in the middle of his legs" with him behind her. "First, [she] was sitting on the bed" and "then he started touching [her], and that's when [she] started slipping.

And it started to hurt, but he said nothing" except "shh, shh." Every time she would start to "slip off the bed, he would . . . lift [her] back up." He put his hand inside her pants and her underwear. He touched her "for almost about, like, an hour" and "then it started hurting." Afterward, it hurt when she urinated.

Yvette did not say anything during the touching; she thought her "mind was blank, because if it wasn't—[she was] pretty sure [she] would start [to] cry[]." She "just knew that something was hurting." When she heard the "little bell on [the dog's] collar," defendant stopped and "acted normal after that." "[W]hen they left, he did that to me" but afterward, when Eva and Mayra got home, "he just act[ed] normal." This was the only time defendant touched Yvette in this manner, though "he would always…carry [her] up on his lap."

Celia M (Counts 6-7)

Celia, 28 years old, is the mother of Yvette. Defendant is her uncle, and she called him "Papa Mister." She lived in the duplex on the same property as defendant while she was in elementary and middle school. Defendant was like a father to her. Her own father left when she was 11 years old. When she was in middle school her feelings for defendant "became confused." She began to realize that "what was going on with—the abuse wasn't okay and normal." Even though she realized this, she did not say anything because she "love[d her] family[,] and [she] didn't want to hurt them."

Defendant "would put his fingers in [her] vagina" starting at "about six" years old. He did this often. The last time she remembers defendant touching her was when she was approximately 15 years old. How often defendant touched her would depend on how much access he had to her. Sometimes it would happen three times a week and sometimes there would be a few weeks between the incidents. When he touched her, he would either say nothing or say "shh."

Eventually her daughter, Yvette, told her about what defendant did to Yvette. She called the police the next day. Because she was worried what would happen to Yvette, she had

instructed her mother, Mayra, that Yvette should not be left alone with defendant. Celia and Yvette had moved back into the duplex with Mayra when Yvette was about four or five years old.

Investigation

On September 21, 2020, Los Angeles County Sheriff's Deputy Veronica Ramirez responded to a call for service at Celia's home in Lancaster. She interviewed Yvette and Celia separately as she was the only female officer present and wanted to get their individual perspectives. Because the allegations took place outside of Lancaster, Ramirez referred the case to the Los Angeles Police Department (LAPD).

LAPD Detective Lisa Frias worked at Stuart House, a child advocacy center housing a multi-disciplinary team for child sex abuse investigations that includes district attorneys, law enforcement, forensic interviewers, social workers, medical experts, and advocates. After receiving the report regarding Yvette from the Sheriff's Department, Detective Frias contacted Celia. On November 10, 2020, 9-year-old Yvette participated in a forensic interview conducted at a child advocacy center called Inner Circle because it was closer to their Lancaster home. Yvette's interview was recorded and played for the jury.

DISCUSSION

I. CALCRIM No. 1190 Did Not Impermissibly Lighten the People's Burden of Proof by Bolstering Victim Testimony

Defendant contends the trial court "impermissibly lighten[ed] the prosecution's burden of proof by bolstering [the] victim's testimony" which "prejudicially violated [his] Fourteenth Amendment right to due process." We disagree.

The trial court instructed jurors with CALCRIM No. 301, which provides: "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." The court also instructed the jury with CALCRIM No. 1190,

which provides: "Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone."

Though defense counsel did not object during trial, defendant argues this issue is preserved for appeal because the combined effect of giving CALCRIM Nos. 301 and 1190 "was a misstatement of the prosecution's burden of proof" and "signaled to the jury that the victim's testimony did not need to be treated with the same caution as other evidence." Defendant further argues that CALCRIM No. 1190 diminished the prosecution's burden of proof by instructing jurors the victims' testimony did not need to be "scrutinized as closely" as other evidence. Therefore, he contends the claim may be considered on the merits because "the error affected [his] substantial rights. (§ 1259.)" We agree. However, "[a]scertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) Thus, we examine the issue on the merits.

As defendant recognizes, our high court rejected these arguments in *People v. Gammage* (1992) 2 Cal.4th 693 (*Gammage*). In *Gammage*, the California Supreme Court considered nearly identical instructions and rejected the very arguments now offered by defendant. Specifically, the Supreme Court rejected the argument that the challenged instructions dilute the reasonable doubt standard. (*Id.* at p. 701.) The *Gammage* court also rejected the argument that the combination of instructions "create a preferential credibility standard for the complaining witness, or somehow suggest that that witness is entitled to a special deference." (*Ibid.*) The high court explained: "The one instruction merely suggests careful review when a fact depends on the testimony of one witness. The other tells the jury there is no legal corroboration requirement. Neither eviscerates or modifies the other." (*Ibid.*) Our high court expressly held that

"it is proper" for the trial court to give the two instructions together in cases involving sex offenses. (*Id.* at p. 702.)

Moreover, notwithstanding defendant's argument that *Gammage* is wrongly decided, we are required to follow our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Defendant demonstrates no instructional error.

II. The Trial Court Did Not Violate Defendant's Due Process Rights by Giving a Modified Version of CALCRIM No. 330

Defendant asserts the "trial court violated [his] federal constitutional right to due process by giving a modified CALCRIM No. 330 which instructed the jury to treat out of court statements as testimony and also bolstered the testimony of a child witness." Specifically, defendant contends, "section 1127f only applies to *testimony* of a child under 10. Though Yvette was under the age of 10 for the forensic interview, it was not testimony. While she did in fact testify, she was 12 years old at the time. Therefore, the statute had no application and did not justify giving the modified CALCRIM No. 330."

The People counter by arguing, "[t]rial courts may adapt standard jury instructions to fit the circumstances of the case" and that juries are "presumed to follow the instructions as given." We agree.

A. *Relevant Facts*

During jury instruction conference including the court and the parties, defense counsel objected to the giving of CALCRIM No. 330 because Yvette was 12 years old during her trial testimony, not under the age of 10 and, despite understanding the forensic interview took place while Yvette was under the age of 10, defense counsel argued it was inappropriate to give the instruction because it specifically refers to "testimony." Overruling defense counsel's objection, the court found, because

the forensic interview was admissible[3] and Yvette was nine years old at the time she gave the statement, "the instruction [wa]s appropriate."

As a result, the court gave the modified CALCRIM No. 330 as follows: "You have heard a *statement* from a child who was age 10 or younger at the time of the *statement*. As with any other witness, you must decide whether the child gave truthful and accurate testimony. [¶] In evaluating the child's testimony, you should consider all the factors surrounding that testimony, including the child's age and level of cognitive development. [¶] When you evaluate the child's cognitive development, consider the child's ability to perceive, understand, remember and communicate. [¶] While a child and an adult witness may behave differently, that difference does not mean that one is any more or less believable than the other. You should not discount or distrust the testimony of a witness just because he or she is a child."

B. *Standard of Review and Applicable Law*

We apply the de novo standard to independently review whether a jury instruction accurately states the law. (*People v. Cole* (2004) 33 Cal.4th 1158, 1206; *People v. Posey* (2004) 32 Cal.4th 193, 218.)

"[T]he California Supreme Court characterized the Legislature's enactment of Penal Code section 1127f,[4] which

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[3] No party objected to the admission of the video and the court noted it was admissible under Evidence Code section 1360.

[4] Section 1127f provides: "In any criminal trial or proceeding in which a child 10 years of age or younger testifies as a witness, upon the request of a party, the court shall instruct the jury, as follows: [¶] In evaluating the testimony of a child you should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development. Although, because of age and level of cognitive development, a child may perform

mandates the instruction that [CALCRIM No. 330] now incorporates, as adopting the modern view of criminal jurisprudence that rejects traditional notions of child witnesses as susceptible to leading questions, incapable of recalling prior events accurately, and neither reliable nor truthful." (*People v. McCoy* (2005) 133 Cal.App.4th 974, 978–979.)

CALCRIM No. 330 "neither "'lessen[s] the government's burden of proof'" nor "'instructs the jury to unduly inflate the testimony of a child witness.'"" (*People v. McCoy, supra,* 133 Cal.App.4th at p. 979.) "'The instruction tells the jury not to make its credibility determinations solely on the basis of the child's "age and level of cognitive development," but at the same time invites the jury to take these and all other factors surrounding the child's testimony into account. The instruction provides sound and rational guidance to the jury in assessing the credibility of a class of witnesses as to whom "'traditional assumptions'" may previously have biased the fact-finding process. Obviously a criminal defendant is entitled to fairness, but just as obviously he or she cannot complain of an instruction the necessary effect of which is to increase the likelihood of a fair result.'" (*Ibid.*)

C. *Analysis*

We conclude the court's instruction with the modified CALCRIM No. 330 did not constitute an instructional error. "In charging the jury the court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. . . ." (§ 1127; accord, Cal. Const., art. VI, § 10 [same].) A court may give a cautionary instruction "'relating to certain kinds of evidence and witnesses . . . where

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differently as a witness from an adult, that does not mean that a child is any more or less credible a witness than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child."

necessary to protect . . . against mistake or unwise action by the jury.'" (*People v. Sutton* (1964) 231 Cal.App.2d 511, 515.) In the instant case, the jury watched a video recording of Yvette's forensic interview, which occurred when she was 9 years old. Given the circumstances, the court appropriately gave the cautionary instruction. That the court modified the instruction which is usually given to "assist[] the jury in evaluating a child witness's performance on the witness stand" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 814–815), is of no moment, and did not render the instruction erroneous. "Trial courts . . . are not bound by the suggested language of the standard [jury] instruction and are free to adapt it to fit the circumstances of the case. . . ." (*Cedars–Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 12.)

Because we have found the trial court did not err, there is no prejudice to defendant under any standard. However, even assuming error, defendant was not prejudiced beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Here, the evidence against defendant was strong and the jury deliberated for less than two hours before finding defendant guilty of all counts. The jury heard Yvette's forensic interview from when she was 9 years old, as well as her live testimony, when she was 12 years old. She was subject to cross-examination and, during closing argument, defense counsel pointed out the inconsistencies between her forensic interview and her trial testimony. The jury was capable of understanding the instruction referred to Yvette's "statement" which took place when she was under 10 years old.

DISPOSITION

The judgment is affirmed.

CHAVEZ, J.

We concur:

LUI, P. J.

RICHARDSON, J.