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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEJANDRO MAURICIO AMEZCUA,

Defendant and Appellant.

A140609

(Alameda County
Super. Ct. No. C171303)

Defendant Alejandro Mauricio Amezcua appealed after a jury convicted him of five counts of lewd acts upon a child and three counts of simple assault in connection with the sexual abuse of an extended family member. Amezcua argues his rights to due process were violated because the trial court instructed the jury that witnesses' pretrial statements were true. We disagree and affirm.

I.
FACTUAL AND
PROCEDURAL BACKGROUND

Amezcua sexually abused the victim between 2002 and 2004, starting when she was five years old. The abuse took place on several occasions when Amezcua's sister-in-law babysat the victim and her older brother at the Union City apartment complex where both the sister-in-law and Amezcua lived. The instances of sexual abuse often involved Amezcua kissing and touching the victim's chest, breast, and stomach. On several occasions, Amezcua forced the victim to touch his penis. Amezcua also vaginally and anally penetrated the victim and orally copulated her.

In the years immediately following the sexual abuse, the victim told various people about it. When she was eight, the victim told her close friend that Amezcua had abused her but told the friend not to tell anyone for fear something bad would happen. Several years later, the victim told her brother about the abuse but again insisted that no one be told. At trial, both the victim's friend and brother testified about what the victim had told them.

In the fall of 2011, the victim went to a doctor for a physical examination. During the exam, the victim told a nurse that she had been sexually abused as a child and provided a cursory description of her experience. In October 2011, the victim's parents and the police were notified. The lead detective assigned to the case orchestrated and recorded a pretext phone call between the victim and Amezcua in an attempt to "get the suspect to talk about the incident." Amezcua denied the sexual abuse but told the victim not to tell anyone because it would "get everyone in trouble." A transcript of the telephone conversation was read at trial.

At Amezcua's request, the trial court instructed the jury with CALCRIM No. 318 as follows: "You have heard evidence that a witness made a statement before the trial. If you decide that the witness made a prior statement, you may use that prior statement in two ways: [¶] One. To evaluate whether the witness's testimony in court is believable; and [¶] Two. As evidence that the information in the prior statement is true."

A jury convicted Amezcua of three counts of misdemeanor assault and five felony counts of committing a lewd and lascivious act upon a child. (Pen. Code, §§ 240, 288, subd. (a).¹) The trial court sentenced him to 14 years in prison for the five felony counts, with concurrent prison terms for the three assault convictions. Amezcua timely appealed.

¹ All statutory references are to the Penal Code.

II. DISCUSSION

Amezcuca argues that the trial court committed reversible error by instructing the jury with CALCRIM No. 318. He contends that the instruction allows for the unconstitutional presumption that the victim's pretrial statements to medical personnel, her brother, her friend, and the police, as well as in the recorded phone call, were "true simply because she made them." He claims that CALCRIM No. 318's fundamental error lies in its failure to instruct jurors that pretrial statements may be true *or* false, and that failure to so instruct eases the prosecution's burden of proof and constitutes reversible error.² We disagree.

In *Hudson, supra*, 175 Cal.App.4th at pages 1028-1029, the defendant similarly argued that CALCRIM No. 318 violated his constitutional rights by lowering the prosecution's burden of proof and by denying jurors the ability to consider out-of-court statements as false. As the *Hudson* court explained: "By stating that the jury 'may' use the out-of-court statements, [CALCRIM No. 318] does not require the jury to credit the earlier statements even while allowing it to do so. [Citation.] Thus, we reject defendant's argument that CALCRIM No. 318 lessens the prosecution's standard of proof by compelling the jury to accept the out-of-court statements as true." (*Hudson*, at p. 1028.) *People v. Tuggles* (2009) 179 Cal.App.4th 339, 365-366, similarly held that CALCRIM No. 318 properly serves to instruct the jury that it *could* consider inconsistencies between out-of-court statements and in-court testimony in order to decide whether a witness's statements are trustworthy. (See also *People v. Golde* (2008) 163 Cal.App.4th 101, 119-120 [CALCRIM No. 318 does not allow jurors to ignore

² We review Amezcuca's challenge to the instruction even though he did not object below and, in fact, requested the instruction. (§ 1259 [appellate court may review instruction given despite lack of objection where "the substantial rights of the defendant were affected thereby"]; *People v. Hudson* (2009) 175 Cal.App.4th 1025, 1028 (*Hudson*) [relying on § 1259, court reviewed constitutional challenge to CALCRIM No. 318 despite lack of objection below].)

evidence]; *People v. Felix* (2008) 160 Cal.App.4th 849, 859 [instructing jurors with CALCRIM Nos. 318 and 220 did not implicate the defendant’s substantial rights].)

Amezcuca argues that both *Hudson* and *People v. Tuggles* wrongfully “mischaracterize” CALCRIM No. 318. He claims the instruction allows jurors to “use the witness’s pretrial statement as evidence that the pretrial statement is ‘true’ and in order to evaluate the witness’s trial testimony.” This argument is meritless. The instruction clearly states that it is up to the jury to determine whether it believes the witness made the pretrial statements in the original instance. Then, if the jury decides such statements were made, jurors *may* use those statements to evaluate the believability of in-court testimony and *may* choose to determine that such pretrial statements were true. In that instance, the jury may “consider discrepancies between out-of-court statements and in-court testimony to decide that a witness’s statements on the stand were not trustworthy.” (*People v. Tuggles, supra*, 179 Cal.App.4th at p. 365.)

Moreover, as was the case in *Hudson, supra*, 175 Cal.App.4th at page 1029, the jury here also was instructed with CALCRIM Nos. 220 and 226. Instruction No. 220 instructs jurors to “impartially compare and consider all the evidence that was received throughout the entire trial,” and No. 226 informs jurors that they may believe “all, part, or none of any witness’s testimony.” The combined use of the instructions properly informed the jury of its duty to weigh and consider the trustworthiness of all testimony presented, and did not “lessen the prosecution’s burden of proof by elevating out-of-court statements to unquestionable reliability.” (*Hudson, supra*, at p. 1029.) We reject Amezcuca’s somewhat confusing argument that the use of the instructions together somehow creates “a special rule governing witness’s pretrial statements,” thereby overriding the other instructions. “ ‘[C]orrectness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.’ ” (*People v. Anderson* (2007) 152 Cal.App.4th 919, 928-929.) On review, “juries are presumed to [have] follow[ed] a trial court’s . . . instruction[s].” (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 598-599.) We have no reason to doubt that was the case here.

The trial court did not err by instructing the jury with CALCRIM No. 318, and use of the instruction did not violate Amezcua's constitutional rights.

III.
DISPOSITION

The judgment is affirmed.

Humes, P.J.

We concur:

Margulies, J.

Banke, J.