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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

EFRAIN LEON-HERRERA,

Defendant and Appellant.

C068812

(Super. Ct. No. 10F04833)

Following a jury trial, defendant Efrain Leon-Herrera was convicted of attempting to commit an act of sexual intercourse or sodomy of a child 10 years of age or younger (Pen. Code, §§ 664/288.7, subd. (a) -- count one; undesignated statutory references to follow are to the Penal Code), sexual penetration of a child 10 years of age or younger (§ 288.7, subd. (b) -- count three), and two counts of lewd and lascivious acts on a child under the age of 14 by force or fear (§ 288, subd. (b)(1) -- counts two & four). The trial court sentenced defendant to consecutive state prison terms of 9 years and 15 years to life.

On appeal, defendant contends his convictions for counts one and two must be reversed under the corpus delicti rule, and counsel was ineffective for failing to object to testimony regarding the victim's statements to a police officer. We affirm.

BACKGROUND

The sexual assaults

Starting in August 2009 defendant's sister, Lupita Herrera (Herrera), took care of Maria H.'s five-year-old daughter M.E. when Maria H. went to work. Herrera took care of M.E. at the home Herrera shared with her parents, defendant, and two other brothers.

On July 21, 2010, Maria H. left M.E. at the Herrera home at around 4:30 p.m. Herrera took M.E. to the park with Herrera's brothers and defendant's young daughter and son. She returned home with M.E. at around 8:00 p.m., where they watched television for 60 to 90 minutes before Herrera put M.E. to bed.

Herrera took M.E. upstairs to sleep in Herrera's room. She stayed with M.E. for about half an hour until M.E. fell asleep. Herrera then shut the door and went downstairs to cook dinner for her brother Miguel.

About 10 to 30 minutes later, Herrera went upstairs to lie down with M.E., as was her practice. When she reached the top of the stairs, Herrera heard M.E. whimpering from the bedroom. Herrera saw the shadow of a figure in the doorway of the now open bedroom door. She pushed past the figure and went into the bedroom; when she turned on the light, she saw defendant in the doorway, holding a pair of jean shorts.¹

M.E. was kneeling on the bed and fully dressed. She grabbed Herrera and said defendant had hit her. When Herrera asked what had happened, defendant denied hitting M.E. Defendant said he came to the bedroom after hearing M.E. calling out his children's names and telling his daughter to stop hitting her. Herrera closed the bedroom door to get defendant out of the room so that the scared and sobbing M.E. would calm down.

¹ According to Herrera, defendant was wearing a pair of shorts and a black shirt, and holding another pair of shorts. She had seen defendant wear a second pair of shorts over his basketball shorts on prior occasions.

M.E. repeatedly told Herrera that defendant had hit her. She did not cry as much after Herrera closed the door on defendant. Asked where defendant had hit her, M.E. made a spanking motion toward her buttocks. M.E. asked Herrera if defendant knew where she lived and told Herrera not to let defendant follow her mom. At some point, Herrera asked M.E., “Are you sure you weren’t dreaming?”

Herrera went downstairs to tell her mother what had happened, bringing M.E. with her. M.E. had calmed down by the time Maria H. arrived 10 to 20 minutes later, but she started crying as soon as she saw her mother. Herrera told Maria H. that M.E. said defendant had hit her.

Herrera testified that Maria H. said M.E. might have been dreaming. According to Maria H., M.E. was crying when she picked her up; Herrera and her mother were watching television. Neither said anything about an attack on M.E. Maria H. then went home with her daughter.

Maria H. found blood on M.E.’s panties the following morning. Asked to explain, M.E. told her mother she had fallen at school. Maria H. then went to school with M.E. to get an explanation. She met with the site supervisor at M.E.’s preschool program, Emma Ercila, who said there was no record of M.E.’s falling. Ercila had M.E. point out where she fell, on the stairs at a play structure. She felt that M.E.’s explanation was not credible, and asked Maria H. to take M.E. to the restroom and examine her.

Maria H. took M.E. to the restroom and discovered blood on her underpants again. Maria H. and Ercila then took M.E. into the office and asked her what had happened. M.E. at first shrugged her shoulders, but after continued questioning, she began crying and said defendant had touched her with his fingers, pointing toward her vagina at the same time. She said that she had been asleep when it happened. Demonstrating what defendant did to her, M.E. extended her fingers and said, “he went like that.”

M.E. testified that defendant hurt her while she was sleeping in Herrera’s room. When she awoke, defendant was touching her under her clothes with his finger. He

touched her inside the part where she goes “pee” and it hurt. He also pushed her there. Defendant was still doing it to her and she was crying when Herrera entered the room. Herrera stayed with M.E. and then went downstairs with her.

M.E. told Herrera defendant had hit her. Herrera thought M.E. had been dreaming. M.E. admitted lying when she said she got hurt at school. She was afraid of defendant and afraid to tell her mother the truth.

The investigation

After M.E. told her mother and Ercila about the sexual assault, Ercila drove them to the hospital, where M.E. was given a medical examination. Pointing to her genitals, M.E. told the examiner defendant hit her “here.” The examiner found genital lacerations and trauma to the hymen. The results were consistent with M.E.’s story; the examiner concluded that sexual abuse was “highly suspected.” The injuries were not consistent with M.E.’s falling down.

M.E.’s injuries were gone when she was given a second examination by Dr. Angela Rosas, a pediatrician and expert in sexual assault examinations. Three nurse practitioners reviewed the photographs of the first and second examinations, and concluded the findings were “nonspecific.” Dr. Rosas conducted another review of the photographs with two of the three nurse practitioners from the original review. Using computer magnification not employed in the initial review, they found genital injury consistent with sexual penetration. According to Dr. Rosas, “This is the classic finding of a child sexual abuse case.”

Sacramento Police Officer Lisa Nou Khang-Her interviewed M.E. at the hospital. Describing the sexual assault, M.E. said that defendant told her not to tell anyone. Defendant put one hand over her mouth, and another hand beneath her shorts and under her underwear. “ ‘He squeezed down really hard’ ” and “ ‘He put his finger inside of me in the middle,’ ” but “ ‘He didn’t put anything in my poo poo area.’ ” M.E. was shy and calm during the interview and did not cry.

M.E. also gave a SAFE (special assault forensic evaluation) interview. She first told the interviewer that she hurt herself by falling. After prompting by the interviewer, M.E. said defendant used two hands and touched her on the inside of her vaginal area. She told defendant to stop touching her stomach, but he said nothing.

The arrest and interrogation

Defendant was not at his family's house when officers came to arrest him on July 24, 2010. The following day, defendant called the police and told them he was home. Defendant was taken into custody, told he was under arrest for the "sexual assault of a little girl," and given *Miranda* warnings.² During a recorded interrogation inside the patrol car, defendant said he heard M.E. crying while he was walking upstairs to use the bathroom. Defendant woke her up and took her to the bathroom. Herrera came upstairs when he took M.E. back to bed. M.E. said defendant hit her, but defendant told Herrera nothing happened.

The officer told defendant it was time to "face the issues." Defendant said he was high on crystal methamphetamine during the incident; he had removed M.E.'s clothes, pressed "my whatever on her," and was about to have sexual intercourse with her before coming to his senses. Defendant insisted that it would not have happened had he not been under the influence of methamphetamine. M.E. cried, and he implored her not to say anything. He helped M.E. put her clothes back on.

Prior misconduct evidence

E.L. is the mother of defendant's two children. Having recently broken up with defendant, E.L. was arguing with him and getting ready to leave his house on July 24, 2008. Defendant, who had used crystal methamphetamine that day, pulled a knife on her and told her she had to stay. He then forced E.L. to have sex with him over her

² *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

protestations. Defendant then forced her to shower with him and perform oral sex on him. E.L. reported the incident to the police but did not seek prosecution.

The defense

Defendant lived at his parents' house in July 2010, sleeping in the downstairs bedroom. On July 21, 2010, he got home from work between 5:00 and 5:30 p.m. He saw M.E. at home and then later at the park with his brothers and sister and his children.

Defendant hung out with his brothers on the front lawn after they returned home from the park. Between 9:00 and 9:30 p.m. he went to his bedroom to get clothes for going out that night. Not finding the clothes he was looking for, he went upstairs to look in his brothers' room. Defendant first went to the bathroom. After he came out and went to his brothers' bedroom, defendant heard M.E. crying and saying, "Alisa, stop hitting me."

Defendant went into Herrera's bedroom and awakened M.E. M.E. said she needed to go to the bathroom, and defendant took her there, waiting in the hallway until she returned to the bedroom. M.E. then whimpered as defendant stood in the threshold of the bedroom.

Herrera, coming from downstairs, walked past defendant and turned on the light in her bedroom. M.E. buried her head in Herrera's chest and began sobbing. She repeatedly accused defendant of hitting her. When asked by Herrera, defendant denied the charge. After Herrera closed the bedroom door, defendant got his clothes and left to play video games with a friend. He went to work the next day and did not return home until July 25, 2010.

On July 24, 2010, defendant spoke to his brother Miguel on the telephone. Miguel said police were looking for defendant and had put a gun to their brother Andres's head during a search of their house.

Defendant's confession was a lie. He first told the correct version of the facts to the officer but changed his story to the false confession because the officer did not

believe him. Defendant confessed because he was afraid that if the officer did not get the story he wanted, he would go back to search the house and take it out on defendant's family. He had used methamphetamine on the day before the interview and was still "wired" and "a little paranoid" from the drugs when he talked to the police. At the time of his arrest, defendant was on searchable probation for a felony conviction of possession of methamphetamine for sale.

DISCUSSION

I

Defendant contends his convictions of the charges in counts one and two must be reversed because there was insufficient evidence of the corpus delicti of the offenses apart from defendant's confession. We disagree.

In a criminal trial, the prosecution must prove the corpus delicti of the crime -- that is, the fact of injury, loss, or harm and the existence of a criminal agency as its cause -- without relying exclusively upon the defendant's extrajudicial statements, confessions, or admissions. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169.) This requirement of independent proof precludes conviction based solely on a defendant's out-of-court statements. (*Id.* at p. 1178.) It "requires *corroboration* of the defendant's extrajudicial utterances insofar as they indicate a crime was committed, and forces the People to supply, as part of their *burden of proof* in every criminal prosecution, some evidence of the corpus delicti aside from, or in addition to, such statements." (*Ibid.*) The corpus delicti of a crime may be proven by circumstantial evidence and need not amount to proof beyond a reasonable doubt. (*Id.* at p. 1171.) Once the corpus delicti has been established, the defendant's statements may be considered for their full value and used to strengthen the prosecution's case. (*Ibid.*)

Defendant was charged in count one with attempting to commit sexual intercourse with M.E. (§§ 664, 288.7, subd. (a)) and in count two with a lewd and lascivious act, placing his penis on M.E.'s vagina (§ 288, subd. (b)(1)). These counts address a different

act than that in counts three and four (§§ 288.7, subd. (b), 288, subd. (b)(1)), which involves defendant's digital penetration of M.E. Defendant argues that while there is evidence apart from his own statements that he digitally penetrated M.E., there is insufficient evidence of the alleged assault in counts one and two other than his confession, and the convictions must therefore be reversed under the corpus delicti rule. In support of his contention, defendant claims all the other evidence points to a single act of sexual abuse, and no evidence points to two acts of sexual abuse.

Our Supreme Court rejected a similar contention in *People v. Jones* (1998) 17 Cal.4th 279 (*Jones*). The victim in *Jones* was found on a dirt median by a road, dying from a gunshot wound to the head. (*Id.* at p. 302.) "Medical experts found bruises on her thighs, knees, legs, and perineal area. She also exhibited injuries on her hands. Results from the sexual assault kit revealed the presence of semen inside her vagina, on her external genitalia, and in her rectal area. No trace of semen was found in [the victim's] mouth; an expert testified, however, that negative test results were not inconsistent with oral copulation because the mouth's natural rinsing processes eliminate semen. [The victim] was not wearing underpants, a brassiere, or shoes. Evidence showed she customarily wore such clothing." (*Ibid.*) At issue was whether there was sufficient evidence to establish the corpus delicti of oral copulation (§ 288a, subd. (a)), " 'the act of copulating the mouth of one person with the sexual organ or anus of another person.' " (*Jones*, at p. 302.)

The Supreme Court found the "circumstantial evidence of multiple forcible sexual acts sufficiently establishes the requisite prima facie showing of both (i) an injury, loss or harm, and (ii) the involvement of a criminal agency." (*Jones, supra*, 17 Cal.4th at p. 302.) The defendant claimed there was insufficient evidence of oral copulation since no semen was found in the victim's mouth. (*Ibid.*) The Supreme Court determined "that the lack of evidence of the *specific* loss or harm to this victim is fatal to the establishment of the corpus delicti." (*Ibid.*) Rejecting the claim, the Supreme Court ruled: "we have

never interpreted the corpus delicti rule so strictly that independent evidence of every physical act constituting an element of an offense is necessary. Instead, there need only be independent evidence establishing a slight or prima facie showing of some injury, loss or harm, and that a criminal agency was involved.” (*Id.* at p. 303.)

M.E.’s testimony, her extrajudicial statements, and the medical evidence establish both injury and criminal agency -- defendant sexually assaulted her. The evidence also establishes that defendant removed his pants; defendant was known to wear two pairs of shorts, and was seen in the bedroom wearing one pair of shorts and holding another. When combined with M.E.’s description of the attacks and the medical evidence, this is consistent with the following scenario -- defendant took off his pants and put his penis against M.E. with the intent to commit intercourse (counts one and two), and then penetrated her with his finger (counts three and four). Applying *Jones*, we find the prosecution met its burden of establishing the corpus delicti of counts one and two.

II

Defendant contends trial counsel was ineffective in failing to raise hearsay objections to Officer Khang-Her’s testimony relating her interview with M.E.

“To establish ineffective assistance of counsel, a defendant must show that (1) counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the defendant. [Citation.] ‘A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citation.]” (*People v. Scott* (1997) 15 Cal.4th 1188, 1211-1212.) “ ‘If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.’ ” (*People v. Holt* (1997) 15 Cal.4th 619, 703.)

Assuming M.E.'s statements to Officer Khang-Her were inadmissible, defendant's contention is nonetheless without merit because he does not carry his burden of establishing prejudice.

Defendant does not take issue with M.E.'s statements to her mother, to Ercila, to the forensic medical examiner, or during the SAFE examination, or with her statement to another officer that defendant " 'touched me down there.' " His claim is limited to a part of Officer Khang-Her's testimony, where she relates that M.E. told her defendant put his right hand over her mouth and his other hand underneath her shorts and underwear, " 'squeezed down really hard,' " placed his finger in the " 'middle' " of her vagina, did not penetrate her anal cavity, and that she was afraid defendant was going to hurt her.

This relative handful of statements does no more than provide a few additional details to the already compelling proof of defendant's sexual assaults. M.E. testified that defendant sexually assaulted her; the renditions of the assault she gave to her mother, Ercila, and the SAFE interviewer were essentially consistent with her trial testimony. Defendant confessed to an attempted rape of M.E., and an expert in sexual assault examinations described the results of the sexual assault examination as "the classic finding of a child sexual abuse case."

In light of the overwhelming proof of defendant's guilt on all charges, it is not reasonably probable that a successful objection to the statements in question would result in a different outcome. We accordingly reject defendant's contention.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

NICHOLSON, J.

BUTZ, J.