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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEJANDRO CRUZ CARRILLO,

Defendant and Appellant.

C069357

(Super. Ct. No. 02F04947)

In this case we reverse the 525-years-to-life sentence of defendant Alejandro Cruz Carrillo, which the court incorrectly calculated pursuant to the habitual sexual offender statute. (Pen. Code,¹ § 667.71.) As the People themselves concede, they presented insufficient evidence that defendant's two Oregon prior convictions qualified as offenses listed in the habitual sexual offender statute that subjected defendant to his

¹ All further section references are to the Penal Code unless otherwise indicated.

prolonged sentence. We remand the matter for resentencing for the People to prove, if they can, that the prior Oregon convictions are qualifying convictions.

In so holding, we reject defendant's remaining appellate contentions relating to the evidence, his counsel's performance, and alleged prosecutorial misconduct.

FACTUAL AND PROCEDURAL BACKGROUND

In 2001, defendant repeatedly molested the three daughters (11-year-old Mi., eight-year-old Me., and seven-year-old D.) of his live-in girlfriend while his girlfriend was working the graveyard shift. The girls' mother "had a feeling something was wrong" and asked the girls, but they denied it.

In 2002, one of the daughters told her father's girlfriend about the molests, and the police removed the girls from their mother's home. The same day the girls were removed, defendant left. He was not found by police until 2009 in North Carolina.

Shortly after being removed, the girls were interviewed by a forensic interview specialist (the MDCI interviews). They were also examined by a pediatrician specializing in child abuse, Dr. Angela Rosas. The girls all exhibited signs of being sexually abused. At trial, Dr. Anthony Urquiza testified about child sexual abuse accommodation syndrome.

A jury found defendant guilty of all 21 charged counts of committing a lewd act on a child under 14 and found true a multiple victim allegation. The court found true that defendant had two prior Oregon convictions that qualified as offenses listed in the habitual sexual offender statute and accordingly

sentenced him to 525 years to life in prison (25 years to life for each of the 21 counts).

DISCUSSION

I

*The People Presented Insufficient Evidence That
Defendant's Prior Oregon Convictions Qualified
Under The Habitual Sexual Offender Statute*

Defendant contends the court improperly sentenced him as a habitual sexual offender because his two Oregon prior convictions did not qualify for purposes of the habitual sexual offender statute.

Section 667.71, subdivision (a), defines a "habitual sexual offender" as "a person who has been previously convicted of one or more of" certain specified offenses "and who is convicted in the present proceeding of one of those offenses." A person who meets this statutory definition "is punish[able] by imprisonment in the state prison for 25 years to life." (§ 667.71, subd. (b).) The certain specified offenses include "[a]n offense committed in another jurisdiction that includes all of the elements of an offense specified in this subdivision." (§ 667.71, subd. (c)(13).)

A

*There Was Insufficient Evidence The Oregon
Rape Prior Qualified Under The California
Habitual Sexual Offender Statute*

For an out-of-jurisdiction rape conviction to qualify under the habitual sexual offender statute, it must include all the

elements of "[r]ape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261." (§ 667.71, subd. (c)(1).) Paragraph 2 requires an act of sexual intercourse "accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (§ 261, subd. (a)(2).) Paragraph 6 requires an act of sexual intercourse "accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat." (§ 261, subd. (a)(2).)

The first Oregon prior alleged here was rape in the first degree. The plea for that prior was no contest to "rape in the first degree." The Oregon charging document stated that defendant in 1991 "did unlawfully and intentionally engage in sexual intercourse with . . . a female child under the age of twelve years" The Oregon Criminal Code defines rape in the first degree as "intercourse by forcible compulsion or with a female below the age of 12 years." (*State v. Harvey* (1987) 303 Or. 351, 353 [736 P.2d 191, 192].) This latter definition of rape required only sexual intercourse with another person under a certain age. (*State v. Spring* (2001) 172 Or.App. 508, 514 [21 P.3d 657, 659].) Thus, in Oregon, a defendant can be convicted of first degree rape if the victim is under age 12 regardless of whether the act of sexual intercourse was "accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful

bodily injury on the person or another" (§ 261, subd. (a)(2)) or "accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat" (*ibid.*).

As the People here concede, they did not present proof that defendant's rape of a 12-year-old girl in Oregon was accomplished by force, violence, duress, menace, fear, or retaliatory threat.

B

*There Was Insufficient Evidence The Oregon
Sodomy Prior Qualified Under The California
Habitual Sexual Offender Statute*

For an out-of-jurisdiction sodomy prior conviction to qualify under the habitual sexual offender statute, it must include all the elements of "[s]odomy, in violation of subdivision (c) or (d) of Section 286." (§ 667.71, subd. (c)(7).) Any sodomy conviction in California (including under subdivisions (c) and (d)) requires "sexual penetration, however slight." (§ 286, subd. (a).)

The second Oregon prior alleged here was sodomy in the first degree. The plea for that prior was no contest to "sodomy in the first degree." The Oregon charging document stated that defendant in 1991 "did unlawfully and intentionally engage in deviate sexual intercourse . . . with . . . a child under the age of twelve years" The Oregon Criminal Code defines deviate sexual intercourse as "sexual conduct between persons

consisting of contact between the sex organs of one person and the mouth or anus of another." (Or. Rev. Stat., § 163.305, subd. (1).) In Oregon, "sexual penetration is not an element of the offense of sodomy in the first degree." (*State v. Luttrell* (1988) 93 Or.App. 772, 774 [764 P.2d 554, 554].)

As the People here concede, they did not present proof that defendant's sodomy conviction of a 12-year-old girl in Oregon involved sexual penetration.

C

Remedy

The People argue that we must remand the case for retrial of the habitual sexual offender allegation, noting there might be admissible evidence from the prior Oregon proceedings that can establish the missing elements. We agree. (See *People v. Jenkins* (2006) 140 Cal.App.4th 805, 813-816 [the trial court's strike and serious felony findings that the appellate court reversed for insufficient evidence may be retried if the prosecutor obtains additional admissible evidence regarding the out-of-state priors to establish the missing elements].)

Defendant argues resentencing may not be based on the three strikes law, as the applicability of that law was never pled or proven in the trial court. We need not address this issue because the People have not tried to invoke the three strikes law to salvage defendant's sentence.

II

*Dr. Urquiza Did Not Improperly Vouch For
The Victims Here, So Defense Counsel Was
Not Ineffective For Failing To Object*

Defendant contends Dr. Urquiza improperly vouched for the credibility of the three girls here, and trial counsel was ineffective for not objecting. He claims this is so because the doctor testified on redirect examination that in his opinion, false accusations of molest by children occur "very infrequently or rarely." We reject defendant's contention.

Vouching involves expressing a personal belief in the integrity of a witness. (See, e.g., *People v. Medina* (1995) 11 Cal.4th 694, 757.) The doctor made clear he was not vouching for the victims. Dr. Urquiza's testimony was very general and addressed child sexual abuse accommodation syndrome. The People did not ask Dr. Urquiza any questions about the facts of defendant's case or even mention the victims. On cross-examination, defense counsel elicited from the doctor that he "kn[e]w very little about the facts of this case." The doctor continued, "[i]t is not my place to provide an opinion about whether a particular child was abused or not or a particular person is guilty or innocent or not. That's not my place." Defense counsel later asked if child sexual abuse accommodation syndrome "doesn't . . . purport . . . to improve the presence of sexual abuse in any one case . . . ?" The doctor responded, "That's not the purpose of accommodation syndrome. It is not to be used to make a determination as to whether a particular

person was abused or not or a particular child -- I'm sorry. Whether a particular child was abused or not or a particular defendant was guilty or innocent."

The only reason the testimony about the doctor's belief in the rarity of false molest accusations came into being was because defense counsel asked about studies on false memories. It was after this prolonged discussion that the People followed up on redirect, asking the doctor about studies quantifying the percentage of false allegations of sexual abuse. It was the doctor's opinion, based on "the studies" that false allegations occurred "very infrequently or rarely" and that 95 percent of the time, the children were telling the truth.

As a review of this testimony demonstrates, at no time did Dr. Urquiza express a personal belief that the victims here were telling the truth. Rather, he repeatedly made clear he was not testifying to do so and indeed could not do so. Because the doctor's testimony was proper, defense counsel was not ineffective for failing to object. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693] [first prong of an ineffective assistance claim is deficient performance].)

III

The Court Did Not Abuse Its Discretion In Allowing Dr. Urquiza To Testify

About Child Sexual Abuse Accommodation Syndrome

Defendant contends the court abused its discretion in violation of his federal right to due process by allowing

Dr. Urquiza to testify about child sexual abuse accommodation syndrome. He claims the testimony about the syndrome was unreliable and misleading, an argument defendant bases on published scientific research refuting the basic assumptions underlying the syndrome. Defendant acknowledges California Supreme Court precedent rejecting this argument, citing, among other cases, *People v. Brown* (2004) 33 Cal.4th 892. We are bound by Supreme Court precedent (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) and therefore reject his argument.

IV

*The Prosecutor Did Not Engage In
Misconduct, So Defense Counsel Was Not
Ineffective For Failing To Object*

Defendant contends the prosecutor committed misconduct when he argued for misuse of the child sexual abuse accommodation syndrome evidence and argued that acquittal required wholesale rejection of the People's evidence. There was no misconduct.

A

*The Prosecutor Did Not Argue For Misuse Of
The Child Sexual Abuse Accommodation Syndrome*

Defendant contends the following four portions of the prosecutor's argument urged misuse of the child sexual abuse accommodation syndrome.

One: "[The victims'] reaction coincide[s] with the Child Sexual Abuse Accommodation Syndrome: How they reacted to it, how they kept it a secret, how they didn't tell anybody[,] the unconvincing disclosures. Everything is consistent with all the studies that have been done on victims of child molestation. He's so unlucky that their reactions are completely consistent with that."

Two: "And also [Dr. Urquiza] pointed out that false allegations are rare." "Dr. Urquiza . . . explained to you how kids who were molested would react and the fact that basically if you look at what happened in this case, their reactions were similar to their syndrome. You have to say he didn't know what he was talking about."

Three: "[D.]'s MDIC. The defense says, well, '[D.] didn't take it seriously. Look she was laughing on there. She didn't care.' [¶] Once again, consistent with accommodation syndrome. What did Dr. Urquiza say? When this happens to kids, they shut it out . . . they don't react the way a person expects"

Four: "[D]r. Urquiza told you that we have done studies on false allegations and they happen zero to six percent of the time. That means 94 percent of the time when a kid tells you that somebody touched me, they are telling the truth."

We find no prosecutorial misconduct in these arguments, so defense counsel was not ineffective for failing to object. The prosecutor's point in invoking Dr. Urquiza's testimony was to demonstrate that the victims' behavior was consistent with child sexual abuse accommodation syndrome and explained, for example,

why D. would be laughing even though she was claiming she was molested. The quotation of the statistics about the frequency of false allegations was not improper because the prosecutor talked about the statistics in general and did not state there was therefore a 94 percent chance these victims were telling the truth. The prosecutor was repeating much of Dr. Urquiza's testimony, and this he was entitled to do. Contrary to defendant's argument, the prosecutor was not claiming the child sexual abuse accommodation syndrome proved the victims were telling the truth.

B

The Prosecutor Did Not Misstate And Shift The Burden Of Proof

Defendant contends the following two portions of the prosecutor's argument misstated and shifted the burden of proof.

One: "In order to find this man [not] guilty, you have to say all three of those girls came in here and lied ten years after the incident took place."

Two: "So what is this case about? [¶] It is about every witness [who] testified, not just [the three victims.] In order to find him not guilty, you also have to believe that [the mother] when she came in here and she said, I had a gut feeling something was happening to my children, you have to say, 'I didn't believe her. . . .' [¶] Dr. Rosas. You have to say, I don't believe her . . . in 2002, she found two instances of suspicious sexual activity. [¶] Dr. Urquiza . . . [y]ou have to say he didn't know what he was talking about. [¶] Sergeant Peterson . . . [who] took those girls away . . . [a]nd . . .

made it clear to this man why we were there and what the allegations were. You have to say Sergeant Peterson, he doesn't know what he's talking about. [¶] Detective Roberson who described to you how those interviews are done . . . [y]ou have to say he's completely making this up."

These portions of the argument did not misstate and shift the burden of proof. The critical testimony in this courtroom drama was that of the victims. The other witnesses played supporting roles and the jury was not compelled "to say [Dr. Urquiza] . . . didn't know what he was talking about" to find defendant not guilty. However, the prosecutor was performing in his role as an advocate; he was not instructing the jury. Argument may be vigorous and even overblown, within limits. (*People v. Fierro* (1991) 1 Cal.4th 173, 212 [argument by a prosecutor is "traditionally vigorous and therefore accorded wide latitude"].) The jury heard the testimony and was free to reach its own conclusions from the evidence. The prosecutor simply suggested he had offered the jury a tightly packaged case whose parts fit together well. There was no misconduct.

DISPOSITION

Defendant's sentence is vacated. The findings under the habitual sexual offender statute are reversed and the cause is remanded for retrial of the habitual sexual offender allegations if defendant can present sufficient evidence of the prior

conviction allegations. In all other respects, the judgment is affirmed.

_____ ROBIE _____, J.

We concur:

_____ RAYE _____, P. J.

_____ HULL _____, J.