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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR ENRIQUE ESPINOSA,

Defendant and Appellant.

E052361

(Super.Ct.No. SWF029405)

OPINION

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik, Judge.

Affirmed.

Thien Huong Tran, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Collette C. Cavalier and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Oscar Enrique Espinosa guilty of one count of engaging in sexual intercourse or sodomy with a child 10 years old or younger (Pen.

Code, § 288.7, count 1)¹ and two counts of committing a lewd and lascivious act with a child under the age of 14 years (§ 288, subd. (a), counts 2 & 3). At sentencing, defendant argued that the sentences on counts 2 and 3 should be stayed under section 654, but the trial court found that at least three distinct acts had occurred. The court sentenced defendant to a determinate term of 10 years, plus 25 years to life.

On appeal, defendant argues that the court erred in instructing the jury with CALJIC No. 2.20.1, since the instruction violated his federal and state constitutional rights to due process, a jury trial, presentation of a defense, and confrontation. We affirm.

FACTUAL BACKGROUND

Castro worked at a nutrition store. Her daughter, Jane Doe, was always with her there. Doe was six years old at the time of trial. Defendant began to frequent the store, and he started buying Doe snacks and candy. Castro became concerned with Doe's relationship with defendant when she saw defendant hugging and kissing Doe.

On September 30, 2009, Castro saw defendant take Doe toward the back of the store. Castro went to look for them and called Doe's name. She saw defendant and Doe in the alley behind the store. It appeared that they had been sitting in folding chairs, facing each other. Castro heard defendant tell Doe, "Get up, get dressed, because they already saw us." Doe's pants and stockings were apparently pulled down, just below her hip. When Castro saw them, Doe stood up and started pulling her pants up. Defendant's

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

shirt was open, and he stood to pull up his pants. Castro confronted defendant, and he said he was not doing anything. Castro told Doe to call the police.

Doe was taken to a hospital and examined by a forensic nurse. When examining Doe's genital area, the nurse noted a hypervascular redness between the vaginal lips. The redness was consistent with a semi-hard object pressing in that area. The nurse testified that the redness could be caused by penile rubbing of the genitals. She also said the redness could have been caused by "some other mechanisms."

During a police interview, defendant said he bought Doe ice cream, toys, and shoes. He also said she was attracted to him and called him her boyfriend. Defendant admitted that he had kissed Doe in the past, at her insistence. Defendant claimed he went to urinate in the alley when Castro saw him on September 30, 2009. He said Doe insisted on going to the alley with him. Later in the interview, defendant admitted that Doe was sitting on his lap and that he was holding her, kissing her, and hugging her.

At trial, Doe testified that defendant was kissing her outside of the store, with her clothes "down." She said defendant took her clothes down. Doe also said defendant was touching the part of her body where she "[s]ometimes pee-pee and sometimes poo-poo" with his "thing." She said he put it inside her private part. Doe further testified that defendant touched her body prior to that day. He kissed her and touched her body "on the front." He also asked her to touch his body parts. Doe said she did not like defendant and did not want to be his girlfriend.

ANALYSIS

The Court Properly Instructed the Jury with CALJIC No. 2.20.1

Defendant claims that the court prejudicially erred in instructing the jury with CALJIC No. 2.20.1 and, thus, his convictions must be reversed. He specifically argues that CALJIC No. 2.20.1 unfairly bolstered Doe's credibility, and thereby usurped the jury's role of assessing witness credibility, in violation of his rights to a jury trial and due process. Defendant further contends that his ability to impeach Doe's credibility was impaired, in violation of his rights to present a defense and to confront his accuser. These contentions are meritless.

In accordance with section 1127f, the court instructed the jury with CALJIC No. 2.20.1 as follows: "In evaluating the testimony of a child ten years of age or younger, 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. [¶] A child, because of age and level of cognitive development, may perform differently than an adult as a witness, but that does not mean that a child is any more or less believable than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child. [¶] 'Cognitive' means the child's ability to perceive, to understand, to remember and to communicate any matter about which the child has knowledge."

As defendant recognizes, this court and others have previously rejected similar attacks on CALJIC No. 2.20.1. (See *People v. Harlan* (1990) 222 Cal.App.3d 439, 455-457 [Fourth Dist., Div. Two] (*Harlan*); *People v. Jones* (1992) 10 Cal.App.4th 1566,

1572-1574 [Fourth Dist., Div. Two] (*Jones*); *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1392-1394, superseded by statute on other grounds, as stated in *People v. Levesque* (1995) 35 Cal.App.4th 530, 536-537.) In *Harlan*, this court concluded that CALJIC No. 2.20.1, specifically the second sentence, “merely advises the jury that due to the age and level of cognitive development, a child may act differently on the witness stand than an adult.” (*Harlan*, at p. 455.) We further held that the instruction does not impermissibly usurp the province of the jury to determine credibility, but instead “simply requires jurors not to find child witnesses unreliable *solely* because of their age.” (*Id.* at p. 456, italics in original.)

Defendant has given us no reason to reconsider our previous decisions. CALJIC No. 2.20.1 does not violate a defendant’s right to due process or a jury trial. It does not instruct the jury that the testimony of a child witness is more credible than that of other witnesses. To the contrary, it instructs the jury that a child is not any “more or less believable” than an adult. (CALJIC No. 2.20.1.) As explained by this court in *Jones*, CALJIC No. 2.20.1 “does not remove the issue of credibility from the jury; in fact, it presupposes that the jury must make a determination of credibility, but only after considering all the factors related to a child’s testimony, including his demeanor, i.e., how he or she testifies on the stand, which encompasses the manner of speaking.” (*Jones, supra*, 10 Cal.App.4th at p. 1574.)

Defendant specifically takes issue with the third sentence in CALJIC No. 2.20.1, which states: “You should not discount or distrust the testimony of a child solely because he or she is a child.” He claims that the language of this sentence “explicitly directs

jurors to provide *de facto* preferential treatment to such testimony simply because the witness is under the age of ten.” (Italics in original.) He further contends that the third sentence “has the effect of quelling juror evaluation of inconsistencies and other flaws in a child witness’s account,” and thereby “unduly bolsters the testimony of children.” We disagree. The third sentence explains the thrust of the instruction—that a child’s testimony should not be discounted simply because he or she is a child. We addressed the third sentence in *Harlan, supra*, 222 Cal.App.3d 439: “[T]he third sentence in CALJIC No. 2.20.1 relates to the child’s *testimony*. It states such testimony should not be discounted or distrusted solely because she or he is a child. This sentence does not give any greater credibility to the testimony of a child than an adult. It simply advises the jury that it should not give *less* credibility to a child just because the witness is a child. This is consistent with section 1127f, which is present state policy.” (*Id.* at pp. 455-456, italics in original.) No reasonable juror is likely to give CALJIC No. 2.20.1, read as a whole, the interpretation defendant suggests.

Furthermore, we note that when reviewing the propriety of an instruction, it is necessary to view the entire charge of the court, or the instructions as a whole. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) Here, the trial court instructed the jury with CALJIC No. 2.20, which explicitly states jurors “are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.” CALJIC No. 2.20 also lists the factors relevant to assessing credibility of all witnesses, including the abilities to remember and communicate. There is nothing in CALJIC No. 2.20 to suggest these factors were not relevant to assessing a child witness’s testimony. Likewise, there

is nothing in CALJIC No. 2.20.1 that tells the jury to ignore the factors listed in CALJIC No. 2.20. The essence and purpose of CALJIC No. 2.20.1 is to inform the jury that a child's testimony should not be rejected merely because the witness is a child. It does not tell the jury to give preferential treatment to a child's testimony, as defendant claims.

We conclude the trial court did not err in instructing the jury with CALJIC No. 2.20.1.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.