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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FILIBERTO MORALES MATUS, Defendant and Appellant.	G045099 (Super. Ct. No. 07CF3379) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer, Judge. Affirmed.

R. Clayton Seaman, Jr., 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, James D. Dutton and Alana Cohen Butler, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Filiberto Morales Matus appeals from a judgment after a jury found him guilty of multiple counts of committing a lewd act upon a child under 14 years old and one count of continuous sexual abuse of a child under 14 years old. The jury also found defendant had engaged in substantial sexual conduct, including sexual intercourse, oral copulation, and sodomy, in committing several of those offenses. Defendant solely contends in this appeal that the trial court erred by failing to instruct the jury, sua sponte, with CALCRIM No. 302 entitled "Evaluating Conflicting Evidence."

We affirm. Although the trial court erred by failing to instruct the jury with CALCRIM No. 302, the error was not prejudicial in light of the totality of the instructions given to the jury.

FACTS

In 2006, then 18-year-old defendant began living with his maternal aunt and uncle and three cousins, including then 11-year-old Y.V. At trial, Y.V. described defendant's sexual conduct with her, which started in November or December 2006 and ended in September 2007 when her mother discovered Y.V. and defendant kissing in the living room of the family home.

Y.V. testified that in November or December 2006, defendant suddenly kissed her on the lips for about a minute in the living room. In December, Y.V. was in the backyard when defendant kissed her on the lips and "just kept on kissing" her. Defendant pulled down his pants and then pulled down Y.V.'s pants. They heard a noise and pulled their pants up; Y.V. left. Later that day, Y.V. returned to the backyard where defendant kissed her and again pulled down his pants and her pants. He turned her around and sodomized her. Y.V. told defendant to stop because it hurt, but he told her everything was going to be okay and the pain would go away. Y.V. tried to move away,

but defendant "was kind of holding [her] from [her] waist." She told him that she wanted to go. Defendant turned her around and put his penis in her vagina.

Y.V. and defendant did not talk for a couple of weeks after that incident even though they lived in the same house and frequently saw each other. In January or February 2007, defendant pretended to fall on the couch and then rubbed Y.V.'s thigh and kissed her. She thereafter started talking to him again.

In January or February 2007, defendant followed Y.V. into the bathroom and shut the door. He kissed her and sodomized her. Y.V. told defendant that he was hurting her and that she did not want him to "do this"; defendant told her everything was going to be okay. He turned her around and put his penis in her vagina. He also lifted her shirt and bra, and touched her chest. Y.V. testified that "these kind of events occurred" about five or six times.

On another occasion, defendant told Y.V. to put his penis in her mouth. She said no. Defendant had his penis outside of his clothing and she touched it with her hand. A few days later, defendant again asked Y.V. to put his penis in her mouth. This time, Y.V. complied, and defendant ejaculated. At trial, Y.V. was asked whether there were other occasions when she put his penis in her mouth, and Y.V. said yes, "that whole spring break." She testified that during her summer break from school, she put defendant's penis in her mouth on a daily basis.

On September 21, 2007, defendant sodomized Y.V. and engaged in sexual intercourse with her. Defendant also put his penis in Y.V.'s mouth. Y.V. and defendant were later kissing on the couch in the living room when Y.V.'s mother walked in and saw them. Y.V.'s mother slapped defendant, kicked him out of the house, and made a report at Y.V.'s school.

A Santa Ana police detective interviewed defendant at his workplace and testified at trial regarding that interview. Defendant initially denied having any "relations" with Y.V. He thereafter told the detective Y.V. was always the initiator of

sexual conduct with defendant. Defendant stated that one night Y.V. kissed him when he had a headache, but he asked her to move away from him. Defendant stated he kissed Y.V. in the backyard but did not have sex with her. Defendant also stated that on one occasion, he was outside when Y.V. called him over to her bedroom window, where she unzipped his pants, pulled out his penis, and started playing with it. Defendant told the detective that he once attempted to sodomize Y.V. in the bathroom but did not penetrate her. He denied engaging in oral copulation with Y.V., although he said Y.V. attempted to put his penis in her mouth and kissed his penis the night her mother discovered them. He also stated he attempted both anal sex and oral copulation with Y.V. earlier that same day.

BACKGROUND

Defendant was charged in a second amended information with seven counts of committing a lewd act on a child under the age of 14 years in violation of Penal Code section 288, subdivision (a) (counts 1, 3, 4, 6, 7, 9, and 10); two counts of committing a forcible lewd act on a child under 14 years of age in violation of section 288, subdivision (b)(1) (counts 2 and 5); and one count of continuous sexual abuse of a child under 14 years of age in violation of Penal Code section 288.5, subdivision (a) (count 8). The second amended information further alleged that as to counts 2, 5, 6, 7, 8, and 9, defendant had engaged in substantial sexual conduct within the meaning of Penal Code section 1203.066, subdivision (a)(8), including sexual intercourse, oral copulation, and sodomy, with a child under 14 years of age.

The jury found defendant guilty on counts 1, 6, 7, 8, 9, and 10, and on the lesser included offense of committing a lewd act on a child as to counts 2 and 5. The jury also found the substantial sexual conduct enhancement allegation true as to counts 2, 5, 6, 7, 8, and 9. Defendant was found not guilty on count 4. The jury was unable to reach a

verdict on count 3. The trial court granted defendant's motion to declare a mistrial as to count 3, and ultimately granted the prosecution's motion to dismiss count 3.

The trial court sentenced defendant to a total prison term of 26 years. Defendant appealed.

DISCUSSION

Defendant's sole contention on appeal is that the trial court erred by failing to instruct the jury, sua sponte, with CALCRIM No. 302 entitled "Evaluating Conflicting Evidence." Defendant contends Y.V.'s testimony conflicted with, inter alia, the statements defendant made to the detective during his interview, and the court's duty to instruct with CALCRIM No. 302 was thereby triggered. We agree the trial court erred by failing to instruct the jury with CALCRIM No. 302 in this case. We conclude, however, the error was not prejudicial.

CALCRIM No. 302 provides: "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point."

In *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884-885, the California Supreme Court held the trial court had a sua sponte duty to instruct the jury with CALCRIM No. 302's predecessor, CALJIC No. 2.22, as modified by the court.[1] Thus,

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[1] The version of CALJIC No. 2.22 before the Supreme Court in *People v. Rincon-Pineda*, *supra*, 14 Cal.3d at page 884, footnote 8, was entitled "'Weighing Conflicting Testimony'" and stated: "'You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the testimony of a lesser number or other evidence, which appeals to your mind

the trial court's failure, here, to instruct the jury, sua sponte, with CALCRIM No. 302, constituted error.

In *People v. Snead* (1993) 20 Cal.App.4th 1088, 1097, the appellate court concluded the trial court's error in failing to instruct the jury with CALJIC No. 2.22 was harmless, stating that in "considering all the instructions that were given, 85 pages worth, there was no 'reasonable likelihood' [citation] of juror misunderstanding caused by the omission. (See, e.g., CALJIC Nos. 2.00, 2.20, 2.21.1, 2.21.2, 2.27, 2.80.)" (Accord, *People v. Virgil* (2011) 51 Cal.4th 1210, 1262.)

Here, the trial court instructed the jury with the CALCRIM instructions that are the equivalents of the CALJIC instructions given in *People v. Snead*. The court instructed the jury with CALCRIM Nos. 220 ("Reasonable Doubt"), 222 ("Evidence"), 223 ("Direct and Circumstantial Evidence: Defined"), 224 ("Circumstantial Evidence: Sufficiency of Evidence"), 226 ("Witnesses"), and 301 ("Single Witness's Testimony"). Significantly, CALCRIM No. 226 stated in relevant part: "Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently."

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with more convincing force. [Testimony which you believe given by one witness is sufficient for the proof of any fact.] This does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.'" The Supreme Court further decided that the sentence of CALJIC No. 2.22, given in that case, which stated, "'Testimony which you believe given by one witness is sufficient for the proof of any fact'" should be removed from CALJIC No. 2.22 and given in a separate instruction. (*People v. Rincon-Pineda*, *supra*, at pp. 884-885.)

Furthermore, the prosecutor did not argue in his closing argument that more witnesses supported conviction than the number of witnesses who opposed it. The harmless nature of the trial court's failure to instruct the jury with CALCRIM No. 302 is further demonstrated by the jury's verdicts, which included a finding of not guilty as to count 4, and a finding of guilty as to the lesser included offenses of counts 2 and 5; the jury was unable to reach a verdict on count 3. Thus, the jury evaluated the conflicting evidence and reached its own conclusions.

We therefore conclude defendant was not prejudiced by the trial court's error in failing to instruct the jury sua sponte with CALCRIM No. 302.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.