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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.

TOMMY GONZALES, JR.,

Defendant and Appellant.

G045267

(Super. Ct. No. 10CF0813)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Richard M. King, Judge. Affirmed as modified.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant
and Appellant.

No appearance for Plaintiff and Respondent.

* * *

1. Introduction

Tommy Gonzales, Jr., filed a notice of appeal after a jury found him guilty of four counts of sexual penetration of a child 10 years of age or younger by a person 18 years of age or older (Pen. Code, § 288.7, subd. (b) [counts 1-4]); one count of oral copulation of a child 10 years of age or younger by a person 18 years of age or older (*id.*, § 288.7, subd. (b) [count 5]); and one count of commission of a lewd act upon a child under the age of 14 (*id.*, § 288, subd. (a) [count 6]). All six counts involved the same victim, Jane Doe.

The trial court sentenced Gonzales to a total indeterminate term of 30 years to life in prison, consisting of 15 years to life for count 1 and a consecutive term of 15 years to life on count 5. The trial court imposed a concurrent sentence of 15 years to life on counts 2, 3, and 4, and a concurrent determinate sentence of six years on count 6.

We appointed counsel to represent Gonzales. Appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), setting forth the facts of the case and requesting that we review the entire record. Pursuant to *Anders v. California* (1967) 386 U.S. 738 (*Anders*), appointed counsel suggested we consider three issues, which we address in section 3. Gonzales was given 30 days to file written arguments in his own behalf. He did not do so.

We have examined the entire record and counsel's *Wende/Anders* brief. We looked for issues others than those raised by counsel, but after considering the entire record, we have found no reasonably arguable issue. (*Wende, supra*, 25 Cal.3d 436.) We remand for the limited purpose of modifying the judgment to award Gonzales 63 days of presentence conduct credit on his indeterminate sentence, and, as modified, affirm the judgment.

2. Facts

We view the evidence in the light most favorable to the verdict and resolve all conflicts in its favor. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303.)

Jane Doe was born in January 2006. When the charged offenses were committed, she lived with her mother (Mother) and Gonzales, who is Mother's cousin, in Santa Ana. In April 2010, one of Jane Doe's preschool teachers informed Mother that Jane Doe had been lifting up her dress and touching herself. Mother was concerned because this behavior was "completely out of character" for Jane Doe.

Mother told Jane Doe her "lady bug" (vagina) was special and nobody, particularly boys, should touch it. Jane Doe told Mother that Gonzales "touches my lady bug." Mother contacted her uncle, Gonzales's father, and reported the allegations to him. As a result, Gonzales's parents had Gonzales removed immediately from Mother's home. Mother subsequently contacted the Orange County Social Services Agency and the police.

On April 2, 2010, Santa Ana Police Detective Eva Lopez and police officer Sweet interviewed Gonzales. A videotape recording of the interview was played for the jury. At the outset of the interview, officer Sweet confirmed that Gonzales spoke English, and Detective Lopez read him his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. Gonzales initially denied having any sexual contact with Jane Doe. He ultimately admitted that over the previous two years, he had placed his finger inside Jane Doe's vagina four or five times, had kissed and licked her vagina once, and had her masturbate him once.

On April 14, 2010, Detective Lopez took Jane Doe to a Child Abuse Services Team (CAST) facility where she was interviewed by social worker Adriana

Ball. A videotape recording of the CAST interview was played in its entirety for the jury. During the interview, Jane Doe said that Gonzales had put his finger inside her vagina numerous times, licked or kissed her belly and breasts, and had her touch his erect penis.

At trial, Jane Doe testified that Gonzales had touched her “lady bug,” where she goes “[p]ee.” A medical examination of Jane Doe was not conducted.

3. Analysis of Suggested Issues in Counsel’s *Wende/Anders* Brief

Appointed counsel suggests three potential issues: (1) “Did the trial court prejudicially err in admitting the evidence of Jane Doe’s CAST interview pursuant to Evidence Code section 1360?”; (2) “Did the trial court prejudicially err in limiting the defendant’s cross-examination of Detective Lopez on the issues of potential bias/coercive interviewing techniques employed during appellant’s interview?”; and (3) “Should this Court order the trial court to prepare an amended abstract of judgment properly reflecting that appellant is entitled to an award of 63 days of conduct credit upon his indeterminate sentence of 30 years to life, as opposed to the current May 26, 2011 amended abstract of judgment which reflects that appellant was only awarded the 63 days of conduct credit upon his concurrent determinate sentence of six years?”

Potential Issue 1:

Evidence Code section 1360, subdivision (a) states: “In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply: [¶] (1) The statement is not otherwise admissible by statute or court rule. [¶] (2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability. [¶] (3) The child either: [¶] (A) Testifies at the proceedings. [¶] (B) Is unavailable as a witness, in which

case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child.”

The requirements of Evidence Code section 1360, subdivision (a) were satisfied in this case. The trial court found, outside the jury’s presence, that Jane Doe’s statements made during the CAST interview “have trustworthiness” and “are reliable.” Jane Doe testified at trial, and the trial court expressly permitted defense counsel to cross-examine her on her statements made during the CAST interview. We have found nothing in the appellate record to suggest the trial court’s determination under section 1360 was erroneous.

Potential Issue 2:

During cross-examination of Detective Lopez, Gonzales’s trial counsel asked why, in the police interview, she used certain tactics with Gonzales after he had said he never touched Jane Doe. Detective Lopez answered that she did not believe Gonzales was being honest and she was using tactics to “try[] to get the truth from him.” At that point, the trial court met with counsel outside of the jury’s presence. The court acknowledged evidence of bias and motive generally is admissible but expressed concern that testimony regarding tactics used by Detective Lopez was irrelevant because the entire interview of Gonzales had been recorded. The court stated that because the entire interview had been recorded, “there is a danger that we’re going to have this officer tell her opinions, either directly or inferentially, of her opinion about the credibility of either [Jane Doe] or [Gonzales].” Pursuant to Evidence Code section 352, the trial court limited cross-examination of Detective Lopez on the issue of bias and coercive interview techniques.

A trial court’s decision to admit or exclude evidence under Evidence Code section 352 is reviewed for abuse of discretion. (*People v. Gurule* (2002) 28 Cal.4th 557, 654.) The trial court has broad discretion to assess “whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or

consumption of time.” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) We conclude the trial court did not abuse its discretion in limiting the scope of Detective Lopez’s cross-examination. If the trial court did err, we find no prejudice in light of the strong evidence of guilt. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Potential Issue 3:

An amended abstract of judgment, entered on June 3, 2011, reflects 420 actual days of credit for time served and zero days of presentence conduct credit on Gonzales’s indeterminate sentence. The amended abstract of judgment also reflects 420 actual days of credit for time served and 63 days of presentence conduct credit (483 days total) on Gonzales’s determinate six-year sentence. Appointed counsel suggests Gonzales is entitled to 63 days of conduct credit on his indeterminate sentence.

Gonzales unsuccessfully requested relief in the trial court. The original abstract of judgment reflected 38 days of presentence custody credit on the determinate sentence and zero days of presentence custody credit on the indeterminate sentence. After the original abstract of judgment was filed, Gonzales’s trial counsel contacted the trial court and requested recalculation of custody credit. The trial court then awarded the presentence conduct credit reflected in the amended abstract of judgment.

In a letter dated October 26, 2011, appointed counsel requested the trial court award 63 days of presentence conduct credits on the indeterminate sentence. In a minute order entered on November 7, 2011, the trial court stated: “The Court has received a letter, dated 10/26/11, from the Defendant’s appellate counsel indicating that the Court was in error in not awarding 63 days of conduct credit on the indeterminate sentence of 30 years to life. [¶] The Court previously awarded these credits on 5/26/11 at the request of trial counsel.” The minute order indicates the trial court believed it had awarded Gonzales 63 days of conduct credits on the indeterminate term when, in fact, the court had awarded those credits on the determinate term. Gonzales’s appellate counsel

sent the court a letter requesting correction of its award of presentence conduct credits. No response from the trial court appears in the appellate record.

Presentence conduct credit may be earned on an indeterminate sentence. (*People v. Duff* (2010) 50 Cal.4th 787, 793.) We will remand the matter to the trial court with directions to modify the judgment to award Gonzales 63 days of presentence conduct credit on the indeterminate sentence.

4. Disposition

The matter is remanded with directions to the trial court to modify the judgment to award Gonzales 63 days of presentence conduct credit, in addition to 420 days of actual time served, on his indeterminate sentence. The trial court is directed to prepare an amended abstract of judgment and forward a certified copy of it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.