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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.

JERRY DAVID AGUILAR,

Defendant and Appellant.

G045285

(Super. Ct. No. 07NF2903)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

We appointed counsel to represent Jerry David Aguilar on appeal. Counsel filed a brief which set forth the facts of the case. Counsel did not argue against his client but advised the court no issues were found to argue on Aguilar's behalf. Aguilar was given 30 days to file written argument on his own behalf, and he filed a supplemental brief within that time.

Pursuant to *Anders v. California* (1967) 386 U.S. 738, to assist the court in its independent review, counsel suggested two issues both concerning count 2: (1) whether there was sufficient evidence of force, fear, or duress to support the aggravated sexual assault charge; and (2) whether the trial court erred by failing to instruct the jury on the lesser included offense of lewd act with a minor. In his supplemental brief, Aguilar generally discusses the respective discovery duties borne by the prosecution and defense. Unfortunately, he fails to allege any specific error relative to these rights and responsibilities.

We have reviewed the information provided by counsel and Aguilar's supplemental brief, and we have independently examined the record. We found no arguable issues. (*People v. Wende* (1979) 25 Cal.3d 436.) The judgment is affirmed

FACTS

Over a seven year period, Aguilar inappropriately touched his step-daughter N.A. N.A. was five years old when the abuse began. When N.A. was approximately eight years old, Aguilar covered her mouth as he penetrated her. Aguilar stopped abusing N.A. when she was 11 years old and experienced her first menstrual period. Aguilar told N.A. not to tell anyone about these acts or he would hit her mother and then her mother would become angry with her and hit her.

When N.A. was 16 years old, she got into an argument with her mother about her relationship with her ex-boyfriend. N.A.'s relationship with the ex-boyfriend had been sexual, and her mother was upset about N.A. losing her virginity. During the

course of the argument N.A. blurted out that she was not a virgin because Aguilar had raped her. N.A.'s mother then reported the accusation to a social worker.

The police had N.A. place a recorded call to Aguilar. N.A. told Aguilar she was confused about sex and worried she would be thinking about Aguilar when she had sex with boys her own age. Aguilar said he could not talk and asked that she call him back later. Aguilar told her to make sure nobody listens to their conversation. N.A. placed a second call to Aguilar during which he said he was sorry for what he had done to her. He explained that N.A.'s mother treated him poorly, and he began taking drugs. Because of the drugs, he was not thinking clearly. When N.A. accused Aguilar of raping her, he denied raping her. He said they never had "sex . . . in the way to have sex." Aguilar said he felt she was trying to get him to say something and asked to meet in person. She refused, claiming to be too scared and embarrassed. He denied the reason he stopped his involvement with her was because she had her period and he was afraid he would get her pregnant. He said he did not care if he went to jail or even died because his life was ruined.

N.A. later explained she did not tell anyone about the abuse because she did not want anything bad to happen to Aguilar. N.A. further said she did not tell anyone because the abuse had become routine.

At trial, Aguilar generally denied the sexual abuse but admitted he touched N.A. inappropriately on three occasions while taking a bath with her. He insisted his apology to N.A. on the telephone only related to the three inappropriate touchings he admitted. One of Aguilar's family members testified she found a one-page letter from N.A. addressed to Aguilar in Aguilar's car. In the letter, N.A. apologized to Aguilar. N.A. testified the apology was not for reporting the sexual abuse but for arguing with him over her mother.

Aguilar offered evidence of a conversation N.A. had with another family member when she was approximately 18 years old. During the conversation, N.A. told

others she made up allegations about Aguilar, but she did not specify which allegations were false.

A jury convicted Aguilar of one count of aggravated sexual assault of a child in violation of Penal Code section 269, subdivision (a)(1) (count 2), and four counts of lewd act on a child under 14 years of age in violation of Penal Code section 288, subdivision (a) (counts 3-6), and found true allegations he had substantial sexual conduct as to counts 3, 4, 5, and 6. The trial court sentenced Aguilar to prison for an indeterminate term of 15 years to life on one count of aggravated sexual assault of a child (count 2) and imposed a consecutive six-year term on one count of lewd act on a child under 14 of age (count 3). The court also imposed concurrent terms of six years on the remaining three counts of lewd act on a child under 14 years old (counts 4, 5, & 6).

DISCUSSION

We first address the issues cited by counsel and then will address Aguilar's supplemental brief.

Sufficiency of Evidence-Count 2

We review a claim of sufficiency of the evidence under the deferential substantial evidence standard of review. “When an appellant challenges the sufficiency of the evidence to support a conviction, the appellate court reviews the entire record to see ““whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.”” [Citation.] We view the facts in the light most favorable to the judgment, drawing all reasonable inferences in its support. [Citations.] We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. [Citations.] The test on appeal is not whether we believe the evidence established the defendant's guilt beyond a reasonable doubt, but whether ““any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”” [Citations.]” (*People v. Cochran* (2002) 103 Cal.App.4th 8, 12-13 (*Cochran*).

The offense of aggravated sexual assault on a child under the age of 14 years requires proof that “force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person” was used. (Pen. Code, § 286, subd. (c)(2)(A); see also Pen. Code, § 269, subd. (a)(3).) “Force, in this context, means physical force that is “substantially different from or substantially greater than that necessary to accomplish the lewd act itself.” [Citation.]” (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1004.) More specifically, “the force requirement will be deemed satisfied when the defendant uses any force that is ‘different from and in excess of the type of force which is used in accomplishing similar lewd acts with a victim’s consent.’ [Citation.]” (*Id.* at p. 1005.) The determination as to whether violence, duress, menace, or fear was used must be made in light of the age of the victim, her relationship to the defendant, and whether the victim was continuously exploited. (*Cochran, supra*, 103 Cal.App.4th at p. 14.)

Here, N.A. was young when the sexual assaults began, and the perpetrator was her step-father and an authority figure in the household. The conduct continued over a period of years, and N.A. indicated she did not tell anyone about it because the abuse had become routine. N.A. further related that Aguilar told her not to tell anyone about these acts or he would hit her mother and then her mother would become angry with her and hit her. Additionally, there was evidence Aguilar forcibly covered N.A.’s mouth as he penetrated her. Accordingly, there was sufficient evidence of force, fear, or duress to support the aggravated sexual assault charge in count 2.

Jury Instruction-Lesser Included Offense

Counsel suggests the trial court may have erred by failing to instruct the jury on lewd act on a minor as a lesser included offense to the charge in count 2. We note when the court was discussing jury instructions with counsel, Aguilar indicated he was not requesting any lesser included offenses.

Two tests are used to determine whether an offense is a lesser included offense: the statutory elements test and the accusatory pleading test. (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) The statutory elements test is satisfied when ““all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense.” [Citation.]” (*Ibid.*) The accusatory pleading test is met ““if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed.” [Citation.]’ [Citations.]” (*Id.* at pp. 288-289.)

Penal Code section 288 prohibits lewd and lascivious acts with a child under 14 years of age. Penal Code section 288, subdivision (a), is a lesser or necessarily included offense of forcible lewd conduct prohibited by subdivision (b). (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1321-1322; *People v. Ward* (1986) 188 Cal.App.3d 459, 472.) The only difference between the crimes of forcible and nonforcible lewd conduct is that forcible lewd conduct requires a finding of the use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury. (Pen. Code, § 288, subs. (a), (b)(1).)

Even though a Penal Code section 288, subdivision (a), offense is a lesser included offense of a Penal Code section 288, subdivision (b), offense, the trial court is not necessarily required to instruct on the lesser offense. “A criminal defendant is entitled to an instruction on a lesser included offense only if [citation] ‘there is evidence which, if accepted by the trier of fact, would absolve [the] defendant from guilt of the greater offense’ [citation] *but not the lesser*. [Citations.]” (*People v. Memro* (1995) 11 Cal.4th 786, 871.)

Although Aguilar admitted he touched N.A. inappropriately in the bath, Aguilar denied he engaged in the sexual conduct described by N.A. Accordingly, the issue was not whether the sexual conduct was forcible or nonforcible, but whether it occurred at all. There was no evidence the sexual conduct occurred, but was nonforcible.

Instead, the evidence of the forceful nature of the sexual conduct was overwhelming. Accordingly, there is no likelihood an instruction on simple assault would have resulted in a more favorable result. We discern no error.

Supplemental Brief

In his supplemental brief, Aguilar generally discusses the respective discovery duties borne by the prosecution and defense. Unfortunately, he fails to allege any specific error relative to these rights and responsibilities. We have reviewed the supplemental brief and conclude it does not identify any potentially viable appellate issues. When an appellant fails to allege specific error and fails to include any related arguments in his briefing, any claim is waived. (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 686.)

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.