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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.

ANTONIO RODRIGUEZ,

Defendant and Appellant.

G046114

(Super. Ct. No. 10NF2639)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W. Michael Hayes, Judge. Affirmed.

Richard Schwartzberg, 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, Barry Carlton and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Antonio Rodriguez of substantial and continuous sexual abuse of a child under the age of 14 years (Pen. Code, § 288.5, subd. (a); count 1) and lewd or lascivious acts with a child (Pen. Code, § 288, subd. (c)(1); counts 2 & 3). The trial court sentenced him to a total prison term of 16 years.

Defendant claims two errors require a reversal of the judgment: (1) the court's decision to admit the testimony of one witness over his objection on clergy-penitent privilege grounds; and (2) the court's failure to sua sponte instruct the jury on unanimity with respect to counts 2 and 3. We find no error in admitting the challenged testimony and, while we agree the court should have given a unanimity instruction, we conclude the error was harmless beyond a reasonable doubt and affirm the judgment.

FACTS

In August 2010, then 15-year-old I. told church camp counselor Shannon Buckner that defendant, her stepfather, had molested her, the last time having been approximately two months before she went to camp. Buckner notified a youth minister of the Orange County Church of Christ, which is the church I. and her family attended. The youth minister notified a senior minister of the church, and other members of church leadership soon became aware of her allegations.

Within days, defendant moved out of the family home. Anaheim police officers interviewed I. and her mother, G. After talking to I. and G., Anaheim Police Detective German Alvarez asked mother and daughter to cold call defendant, which he described as a recorded telephone call between a victim and suspect that is arranged by the police. During a conversation with G., defendant said he regretted it, but also said "I didn't do anything." He refused to talk to I. about her accusations.

At trial, I., who was then 16 years old, testified she had been repeatedly molested by defendant from the time she was nine, 10 or 11 until shortly before she attended church camp at age 15. The first instance occurred when she was in the fourth grade and involved touching her private parts outside her clothing. On other occasions,

she and defendant were alone in the bedroom she shared with her sisters. He would remove her clothing, touch her breasts and vagina, and kiss her mouth and lips. She saw a counselor the year she was in the fourth grade, but she did not say anything about what defendant was doing because it “felt like I had to protect him.”

I. testified defendant molested her innumerable times over the next four years, explaining he did “basically the same thing all the time[,]” although sometimes at night and sometimes during the day. During the day, he would wait until her sisters were distracted or watching television to pull her aside. At night, he would sneak out of the bedroom he shared with G. and go to I.’s bed, always being careful not to awaken her sisters. On one occasion, he told I., “‘Oh, let’s have a baby,’ . . . ‘Oh, no, never mind. You’re too young. Let’s wait until you’re around the age of 16.’” When she turned 13, he started to put his fingers into her vagina and slide his body up and down hers.

Jesse Mier, the leader of a home bible study defendant and I.’s mother attended, testified he twice met defendant in an Anaheim Carl’s Jr. restaurant after becoming aware of I.’s allegations. Mier asked defendant what had happened. Mier testified “he agreed or accepted that he had actually molested [I.], and perhaps at one point led me to believe that he might have undressed her.” Defendant also told Mier “one time I went to her room and one time she went to my room.” However, he denied touching I.

Defendant did not testify on his own behalf, but he did call two Anaheim police officers, one of them being Alvarez, to impeach I.’s testimony with her previous statements to police.

The parties stipulated that a search of the family home and computer failed to yield any links to pornographic Web sites or any other relevant information. They also stipulated that shortly before trial I. watched a video recording of her first interview with Alvarez. After she saw the recording, I. told the investigator, “‘Defendant began sexually molesting [her] before she was nine years old. [I.] remembered meeting with a school

psychologist when she was nine years old and in the fourth grade. [She] recalled making great efforts to conceal from the psychologist that defendant . . . had been molesting her because [she] considered defendant . . . as her father and did not want to break up the family. [¶] [She] said that when she was 12 years old, she recalled defendant . . . being on top of her and sexually assaulting her. [She] told defendant . . . to get off of her and kicked and pushed [him]. However, due to [his] weight and resistance, she was unable to get him off of her. [¶] When [she] was 14 years old, she recalled defendant . . . putting his fingers inside her vagina . . . on seven additional incidents. [¶] [She] said that when she was 14 or 15 years old, defendant . . . attempted to put his mouth on her vagina. [She] kicked [him] and prevented him from putting his mouth on her vagina.”

DISCUSSION

1. Clergy-penitent Privilege

“As a general matter, the claimant of the [clergy-penitent] privilege has the burden to prove, by a preponderance of the evidence, the facts necessary to sustain the claim. [Citation.] He is aided by a presumption that a [clergy-penitent] communication was made in confidence. (Evid. Code, § 917[, subd. (a)].) The opponent has the burden to prove otherwise [citation] by a preponderance of the evidence [citation].” (*People v. Mickey* (1991) 54 Cal.3d 612, 655; see also *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417, 441-442 (*Archbishop*).) On review, this court defers to the trial court’s factual findings if supported by substantial evidence. (*Archbishop, supra*, 131 Cal.App.4th at p. 442.) Whether the privilege exists is a matter of law and reviewed de novo. (*Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1515 (*Doe 2*).)

The parties here moved pretrial to determine the admissibility of statements defendant made to various leaders within his church. The prosecution called two witnesses during the Evidence Code section 402 hearing, Scott Sweeney and Mier. Sweeney identified himself as a minister at the Orange County Church of Christ where he

oversaw a “married ministry of about 150 [people],” the “Latin ministry of about 50 people,” and “a campus ministry of about a hundred people.” I.’s family was involved in the Latin ministry.

In early August, after Buckner relayed I.’s accusations to Sweeney, he, Luis Priego, another minister in the church, and Mier went to the defendant's family home to talk to defendant and ensure he moved out of the family home without incident. Sweeney relied on Mier to translate because defendant spoke limited English. Sweeney described Mier as one of many volunteer “small-group leader[s],” whose primary responsibility is to host weekly bible studies in their homes. Sweeney testified any problems within Mier’s groups would be relayed to Sweeney or Priego.

Mier testified he and his wife were leaders, or “shepherds,” in the church. When asked to explain the position of shepherd, Mier stated, “we usually get in touch with [members of the bible study group]. If we don’t see them coming to church often enough, we get concerned and go and check. Also, we’re concerned about their marriage, how their marriage and lifestyle are doing. How is – mainly their relationship with God” He recalled the meeting with Sweeney and Priego, and also testified he met defendant a couple of additional times at a Carl’s Jr. restaurant in Anaheim.

At the conclusion of the Evidence Code section 402 hearing, the court excluded any testimony about what defendant said during his meeting with Sweeney, Priego, and Mier. However, with respect to his restaurant conversations with Mier, the court stated, “Mr. Mier is not a clergy member within the meaning of the privileged sections. That’s not his function as a lay leader to provide this type of discipline counseling, using the language in the section, and . . . any statements made to Mr. Mier at the Carl’s Jr. will come in.”

Defendant claims Mier’s church-related functions meet the statutory definition of a “member of the clergy,” and the admission of his testimony at trial violated the clergy-penitent privilege. We disagree.

“The present day clergy-penitent privilege has its origin in the early Christian Church sacramental confession which existed before the Reformation in England. It has evolved over the years into the contemporary ‘minister’s’ privilege adopted in some form in virtually every state of this country. [Citation.] Justification for the privilege is grounded on societal interests in encouraging penitential communication and the development of religious institutions by securing the privacy of the penitential communication. [Citation.] Counterbalanced against such weighty legitimate interests is the fundamental principle that “‘the public . . . has a right to every man’s evidence’” requiring strict construction of testimonial exclusionary rules and privileges tending to derogate the search for truth. [Citations.]” (*People v. Edwards* (1988) 203 Cal.App.3d 1358, 1362.)

At its origin, “[t]he priest-penitent privilege recognize[d] the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation . . . in return.’ [Citation.]” (*Archbishop, supra*, 131 Cal.App.4th at p. 443.) Under modern application, however, there is no requirement the communication have as its purpose the confession of such an act or thought to receive religious consolation and guidance, rather the focus is on any communication with members of the clergy. (*Doe 2, supra*, 132 Cal.App.4th at p. 1518; *Archbishop, supra*, 131 Cal.App.4th at p. 443.) “Therefore, ‘[a]s long as the discipline or practice of a church authorizes a member of the clergy to hear particular communications and imposes a duty of secrecy on the clergy member for such communications, a communication is privileged from disclosure even though it is not a confession.’ [Citations.]” (*Doe 2, supra*, 132 Cal.App.4th at pp. 1518-1519.)

In California, the clergy-penitent privilege is codified in Evidence Code sections 1031 through 1034. A “‘member of the clergy’” is “a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization.” (*Id.* § 1030.) Although Evidence Code section 1030 defines “‘member of

the clergy” in broad terms, the clergy-penitent privilege is narrowly construed in the interest of presenting otherwise relevant, admissible evidence. (*People v. Sinohui* (2002) 28 Cal.4th 205, 212; accord, *Trammel v. United States* (1980) 445 U.S. 40, 50.)

In this case, the challenged conversations with Mier were not privileged for several reasons. First, contrary to defendant’s assertion, the evidence does not “unequivocally demonstrate” Mier was a member of the clergy as defined in Evidence Code section 1030. To the contrary, Sweeney explained Mier’s role as a volunteer leader of a home bible study. While such a position could conceivably result in the acquiring of confidential information, it is clear Sweeney expected Mier to relay the most serious issues to him or another church pastor. Mier was certainly not expected to take on full pastoral responsibilities, and it does not appear he was authorized to make any recommendations to defendant, spiritual or otherwise. Thus, substantial evidence supports the trial court finding that Mier’s function within the church structure is demonstrably different from that of Sweeney or Priego and outside the statutory definition of a clergy member.

Second, although the trial court did not mention this element of the statutory scheme in its ruling, it appears that whatever defendant said to Mier in the Anaheim Carl’s Jr. does not meet the statutory definition of a “penitential communication.” (Evid. Code, § 1032.) It seems unlikely any such discussion in a Carl’s Jr. is “a communication made in confidence” that occurred in the absence of any “third person.” (*Ibid*; *People v. Edwards* (1988) 203 Cal.App.3d 1358, 1362-1363.)

Moreover, there is no evidence Mier was schooled in the “discipline or practice” of receiving confidential communications within the church structure. In fact, Sweeney indicated Mier was not authorized to deal with the more serious issues of his fellow congregants, and there is no evidence Mier was trained or expected to handle an emotionally and legally complicated issue like child abuse.

And, finally, the record is bereft of evidence Mier was bound to keep the “communications secret” under the dictates of his church. (Evid. Code, § 1032; see also *People v. Johnson* (1969) 270 Cal.App.2d 204, 208.) While Meir testified he considered defendant’s statements to be “sort of like a confession,” and he was initially reluctant to discuss them with Alvarez, his perceptions do not constitute a factual basis for application of the privilege. (See *Doe2, supra*, 132 Cal.App.4th at p. 1518.)

For these reasons, we agree with the trial court’s decision to admit Mier’s testimony regarding his discussions with defendant at the Carl’s Jr. Defendant’s reliance upon *People v. Thompson* (1982) 133 Cal.App.3d 419 and the out-of-state authorities and arguments to the contrary therein are simply not persuasive.

2. *Unanimity Instruction*

Defendant next asserts the trial court had a sua sponte duty to give CALCRIM No. 3500, the general unanimity instruction, with respect to counts 2 and 3. “It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.” (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.)

If indicated by the facts and charges, a unanimity instruction falls under the category of a general principle of law. Criminal defendants have a constitutional right to a unanimous jury verdict. (*People v. Jones* (1990) 51 Cal.3d 294, 321 (*Jones*) citing Cal. Const., art. I, § 16.) “From this constitutional principle, courts have derived the requirement that if one criminal act is charged, but the evidence tends to show the commission of more than one such act, ‘either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act.’ [Citations.]” (*People v. Napoles* (2002) 104 Cal.App.4th 108, 114.)

As with any rule, there are exceptions. The Attorney General relies on one such exception to the rule, the so-called continuous course of conduct exception. (See *People v. Diedrich* (1982) 31 Cal.3d 263, 281.) ““This exception arises in two contexts. The first is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. [Citation.] The second is when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time. [Citation.]”” (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1309.) Penal Code section 288.5 as charged in count 1 is one such statute.

Count 2 charged defendant with the commission of “a lewd and lascivious act” on I. between March 7, 2009 and March 6, 2010. Count 3 charged he committed “a lewd and lascivious act” on I. between March 7, 2010 and August 1, 2010. As the prosecutor explained during closing argument, “with continuous sexual abuse [count 1], we’re looking at the conduct that occurred to [I.] under 14, from 2005 to about 2009. So we’re talking about the evidence of which she provided when she was nine, when she was 10, when she was 11, 12, and 13. So count 1 is exclusively for everything that happened under 14.” With respect to counts 2 and 3, the prosecutor stated, “Count 2 and 3 are the exact same charges, it’s just two different ages. We have 14 and 15.”

While the prosecutor’s argument suggests she relied on a continuing course of conduct theory, counts 2 and 3 each charged defendant with the commission of a single act during a particular time period, and not a relatively short time period, but during an entire year. Defendant is correct in stating, “the evidence at trial was rife with acts, which if credited, could have constituted the two charged offenses.” I.’s testimony lacked specificity and she did not correlate specific acts with any time period beyond her age or grade level. This situation presents a quandary, one neither defendant, nor the Attorney General has resolved by citation to a published case directly on point, i.e., one involving Penal Code section 288 charges and generic testimony.

The Attorney General relies on *Napoles, supra*, 104 Cal.App.4th 108, but the defendants in *Napoles* were charged with one count of felony child abuse (Pen. Code, § 273a, subd. (a)) occurring January 30, 2000 through May 11, 2000 (*Napoles, supra*, 104 Cal.App.4th at pp. 117-118), and expert testimony established “the baby had been intentionally assaulted very violently, through a variety of different mechanisms, resulting in at least a dozen broken bones” and “significant soft tissue injuries.” (*Id.* at p. 113.) The *Napoles* court relied on two factors to reject the defendants’ assertion the court erred by not giving a unanimity instruction: “First, when the accusatory pleading alleges one violation of Penal Code section 273a, subdivision (a) . . . for misconduct occurring between two specified dates, [t]he issue before the jury [is] whether the accused was guilty of the course of conduct, not whether he had committed a particular act on a particular day.’ [Citation.] Second, [w]here . . . the evidence establishes a pattern of physical trauma inflicted upon a child within a relatively short period of time, *a single course of conduct is involved* and no justification exists for departing from the well-established rule . . . that jury unanimity is not required as to the underlying conduct constituting the violation of section 273a.’ [Citation.]” (*Id.* at p. 116.) However, the court found no error “[b]ased on the language of the charging document and the evidence presented” (*Id.* at p. 117)

Here, counts 2 and 3 each alleged both the commission of “a lewd and lascivious act” and that the act occurred within a designated year. Under *Jones* and the particular circumstances presented here, the trial court should have given a unanimity instruction.¹

However, the failure to give the unanimity instruction is harmless error because the jury’s verdict implies that it did not believe the only defense offered.

¹ It seems CALCRIM No. 3501, the modified unanimity instruction, would have been the correct instruction under these facts. (See *Jones, supra*, 51 Cal.3d at pp. 321-322.)

(*People v. Deletto* (1983) 147 Cal.App.3d 458, 464-474.) Defendant offered only a general denial to the charges, and only I. testified about the acts in question. There was nothing in this record from which the jury could have rationally discriminated between the incidents described and conclude defendant committed one act but not the others. “[I]n order for the unanimity instruction to make a difference, there must be evidence from which jurors could *both accept and reject* the occurrence of at least the same number of acts as there are charged crimes. [Citation.] There was not. Failure to deliver a unanimity instruction was harmless beyond a reasonable doubt.” (*People v. Brown* (1996) 42 Cal.App.4th 1493, 1502.)

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.