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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.

DIMAS RENE CULAJAY,

Defendant and Appellant.

G047560

(Super. Ct. No. 09NF2063)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed.

Rodger Paul Curnow, 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, William M. Wood, Meagan J. Beale and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found defendant Dimas Rene Culajay guilty of four counts of lewd act on a child under 14 years of age (Pen. Code, § 288, subd. (a)), involving three different victims, and found the offenses involved multiple victims (Pen. Code, § 667.61, subd. (b), former subd. (e)(5); Stats. 1998, ch. 936, § 9).¹ The court sentenced defendant to two consecutive terms of 15 years to life. Defendant contends the trial court violated his right to confrontation and to present a defense, erred in instructing the jury, and abused its discretion in imposing a consecutive sentence. We affirm.

I

FACTS

This case involves three related girls. M.D. and L.C. are sisters and Maria D.'s (Maria) nieces. A.C. is the daughter of Maria and is defendant's stepdaughter.

Incidents Involving M.D. and L.C.

The trial was held in 2012. M.D. was 17 years old at the time, in the 11th grade, and living in Los Angeles County. M.D. and L.C. lived in Mexico until M.D. was in the fourth grade, at which time they moved to the United States and lived with their grandmother in Los Angeles County.

While they lived with their grandmother, they would occasionally visit Maria and her children, M.D. and L.C.'s cousins, in Maria and defendant's apartment in Anaheim. M.D. described two incidents that occurred in the apartment and involved defendant. One occurred while she was in the fourth grade and the other when she was in the fourth or fifth grade. On one occasion she was at the apartment for a sleepover and was asleep next to her cousin A.C. when defendant entered the room. He touched her

¹ Penal Code section, former subdivision (e)(5)—“[t]he defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim”—has been renumbered as subdivision (e)(4) of Penal Code section 667.61. (Stats. 2010, ch. 219, § 16.)

vagina on top of her clothing. When M.D. moved closer to her cousin, defendant stopped touching her.

Another incident occurred while she was at the apartment for a “family night.” The children played and watched movies. She fell asleep in the living room and felt someone touching her. The touching was on her thighs and was moving up her legs. She woke up to find defendant lying next to her, touching her “private part” below her navel, underneath her clothing, and rubbing her with his hand and fingers. Defendant told her not to worry, he was not going to hurt her. M.D. did not remember whether defendant’s fingers penetrated her, but the incident frightened her and, not knowing what to do, she got up and went to the restroom. When she left the restroom, she went into Maria’s bedroom and crawled into bed with her. The next morning, Maria asked M.D. why she was in her (Maria’s) bed. M.D. said it was because she had a bad dream. She did not tell Maria what happened because she was frightened and she did not want Maria to have any problems.

L.C. was 16 years old at the time of the trial. She was seven years old when she and M.D. came to the United States to live with their grandmother. While she still lived with her grandmother, she spent a night at Maria’s apartment. M.D. was not there that night because it was a school night, but L.C.’s school was on a break. L.C. woke up in the morning and went into the living room to watch television. Three of her cousins had already gone to school and Maria was asleep in her bedroom. L.C. sat down on the couch. Defendant entered the room and sat down next to L.C. He put an arm around L.C.’s shoulder and put his other hand inside her shirt and bra and touched her breasts for about a minute. He then put his hand inside her pajama pants and started touching her “bottom private part.” The touching lasted more than two minutes. He stopped when L.C.’s youngest cousin started crying.

M.D. and L.C. lived with their grandmother until M.D. was in seventh grade. They were taken out of their grandmother’s house after a physical altercation

between L.C. and the grandmother. M.D. and L.C. lived in a foster home after leaving their grandmother's home and later went to live with another aunt and uncle.

On September 17, 2008, Los Angeles County Deputy Sheriff Dawn Maher responded to the residence of L.C. and M.D.'s foster parents regarding a report of child abuse. Maher responded to the residence because someone M.D. told about the molestations reported it to law enforcement.

Maher first spoke with L.C. L.C.'s description of the molestation was consistent with her testimony at trial. She said she had not seen defendant since she was molested.

When Maher was finished speaking with L.C., she spoke with M.D. M.D. was 13 years old at the time. Maher asked M.D. if she had been touched in an inappropriate way. M.D. said she had on two different occasions in defendant's residence in Anaheim. During the first incident, she had been asleep and woke up to defendant touching her under her clothes "on the top and on the bottom." M.D. said defendant touched her "in between her legs," digitally penetrated her, and "it hurt." She said defendant told her something to the effect of, "don't worry, I won't hurt you."

Maher prepared a police report after speaking with M.D. and L.C. She immediately sent the report to the Anaheim Police Department because the incidents occurred in Anaheim.

Incidents Involving A.C. and Detective Alvarez's Interviews of M.D. and L.C.

On July 20, 2009, Detective German Alvarez of the Anaheim Police Department was working as a sexual assault detective at the Anaheim Family Justice Center when he received a report from a patrol officer. As a result of that report, Alvarez spoke with Maria, who reported an incident involving defendant and her oldest daughter, A.C. Maria also provided Alvarez information about defendant and her two nieces, L.C. and M.D.

Alvarez had Maria make a covert “pretext” telephone call to defendant to see if he would make any admissions. During the telephone call, Maria told defendant she had seen him on top of A.C. in the middle of the night. Defendant denied it. She also accused him of molesting her two nieces. Defendant denied that as well.

Alvarez had Anaheim Detective Omar Adham speak to A.C. that same day. Defendant, who was born in 1972, was arrested the same day Adham spoke with A.C.

During his investigation, Alvarez learned of Maher’s September 17, 2008 report involving M.D. and L.C. He reviewed the report and decided to interview M.D. and L.C. He arranged with their foster mother to have them transported to the family justice center on July 23, 2009.

Alvarez first spoke with M.D. and recorded the interview. M.D. was 14 years old at the time and going into the ninth grade. M.D. said the incidents with defendant occurred about five years before the interview, about the same time she arrived in the United States from Mexico. She said there were two incidents that occurred in defendant and Maria’s residence in Anaheim. Her statement was consistent with her testimony.

L.C. described an incident in which defendant touched her inappropriately while she was in the living room in Anaheim. She said it occurred during the period of time she lived with her grandmother. L.C.’s statement was also consistent with her testimony.

Maria contacted Alvarez again on January 12, 2010. She gave him a handful of letters defendant wrote to her and her children from the Orange County jail,² as well as a camcorder containing a videotape. She said she found the videotape hidden

² The prosecutor asked Alvarez if Maria contacted him again on January 12, 2000, but it was apparent the prosecutor and Alvarez meant 2010, given the fact that defendant was arrested in 2009 and the letters written from jail referred to the pending case.

in defendant's toolbox. In one of the letters, defendant instructed Maria to "get rid of" the video and promised he was going to change because he was training himself to act "like a human being." He asked her not to make him out to be a bad guy, "like I am." He added, "The recent was just a moment of craziness. Everything that has happened is possibly what they are saying." Another of the letters was addressed to A.C. It instructed her to speak with L.C. and M.D., and tell them they must say they lied, or A.C. and the rest of the family will never forgive them.

The video was played for the jury. Two events were recorded. The first part shows a child square dancing at school. The second part shows A.C. sleeping and defendant's hand. The left thumb in the video is deformed and defendant has the same deformity. Maria said that prior to watching the video she had hoped defendant had not molested A.C. Although the videotape was not made part of the record on appeal, it apparently showed defendant molesting A.C.³

A.C. said that on more than one occasion when she was asleep she woke up to find defendant, her stepfather, touching her vagina under her clothing. She said he also touched her inappropriately while at the auto shop where he worked. A.C. explained that she did not tell Alvarez what defendant had done to her because she was afraid, but that after the interview she told her mother what defendant had done.

At her interview by the Child Abuse Services Team, A.C. told the interviewer the last time defendant touched her was when she was 12 years old. She said defendant told her she would be taken out of the home and placed in foster care if she ever told her mother about the incidents.

³ In her argument to the jury, defense counsel stated defendant was not contesting the count involving A.C. and that this was the hardest case she had ever had, "and the reason is the video," which she admitted was "a powerful piece of evidence."

II

DISCUSSION

A. Evidence of Prior Sexual Conduct

Defendant first contends the trial court erred in prohibiting him from introducing evidence of alleged prior sexual experiences of L.C. and M.D. We may find a trial court erred in excluding evidence of prior sexual conduct if we find the court abused its discretion. (*People v. Bautista* (2008) 163 Cal.App.4th 762, 782.) A trial court abuses its discretion when its decision “exceeds the bounds of reason, all of the circumstances being considered.” (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

An alleged victim’s past sexual experience is generally inadmissible. (Evid. Code, §§ 782, 1103, subd. (c)(1); all undesignated statutory references are to the Evidence Code unless otherwise stated.) When admissible, the defendant must have complied with the strict requirements of section 782. (*People v. Fontana* (2010) 49 Cal.4th 351, 362.) The Legislature enacted section 782 “to protect victims of molestation from ‘embarrassing personal disclosures’ unless the defense is able to show in advance that the victim’s sexual conduct is relevant to the victim’s credibility. [Citation.]” (*People v. Bautista, supra*, 163 Cal.App.4th at p. 782.)

Section 782 permits the admission of prior sexual conduct when the evidence is relevant for purposes of attacking a victim’s credibility under section 780. (§ 782, subd. (a).) Section 780 authorizes relevant evidence tending to prove or disprove the truthfulness of the witness’s testimony including evidence relevant to: “(a) [Her] demeanor while testifying and the manner in which [she] testifies. [¶] (b) The character of [her] testimony. [¶] (c) The extent of [her] capacity to perceive, to recollect, or to communicate any matter about which [she] testifies. [¶] (d) The extent of [her] opportunity to perceive any matter about which [she] testifies. [¶] (e) [Her] character for honesty or veracity or their opposites. [¶] (f) The existence or nonexistence of a bias, interest, or other motive. [¶] (g) A statement previously made by [her] that is consistent

with [her] testimony at the hearing. [¶] (h) A statement made by [her] that is inconsistent with any part of [her] testimony at the hearing. [¶] (i) The existence or nonexistence of any fact testified to by [her]. [¶] (j) [Her] attitude toward the action in which [she] testifies or toward the giving of testimony. [¶] (k) [Her] admission of untruthfulness.” (§ 780, subs. (a)-(k).)

Defense counsel complied with section 782’s requirement of a written motion and an offer of proof as to the relevancy of the evidence of sexual conduct. (§ 782, subd. (a)(1).) A sealed declaration was filed in support of the motion. (§ 782, subd. (a)(2).) A hearing wherein the complaining witness may be asked questions regarding the defendant’s offer of proof is required only if the court finds the offer of proof sufficient. (§ 782, subd. (a)(3).) The trial court denied defendant’s motion without an evidentiary hearing.

There was no reason for the court to hold an evidentiary hearing. Whether the proffered evidence existed or not, the bald assertion that prior sexual experience would make the alleged victims more amenable to lying is not supported by any authority or reason.

In the present case, where the alleged victims testified to relatively generic activity on defendant’s part—he put his hand under their clothing and touched their vaginas—is distinguishable from *People v. Daggett* (1990) 225 Cal.App.3d 751. In *Daggett* the alleged prior sexual acts were purportedly committed on the alleged victim were similar to the oral copulation and sodomy alleged to have been committed by the defendant, and the prosecutor argued the victim learned of the behavior because he had been molested by the defendant. (*Id.* at pp. 754, 757.) Not only was there no showing in the offer of proof that the purported sexual experiences of M.D. and L.C. were similar to the acts they said defendant committed, the prosecutor did not argue the victims must have learned of this particular behavior from defendant. Even if the proffered evidence

had some minimal relevance, and it does not, that relevance would have been outweighed by its prejudicial effect. (§ 352.)

The trial court did not err in precluding defendant from offering evidence of prior sexual experience without an evidentiary hearing. The offer of proof did not trigger the need for such a hearing. We also reject defendant's argument that excluding such evidence denied him the right to present a defense, a fair trial, and confrontation. (U.S. Const., 5th, 6th, & 14th Amends.; Cal. Const. art. I, §§ 7, 15.) As the evidence was not relevant, no constitutional violation occurred.

B. *Instructional Issues*

Defendant argues the trial court violated his right to due process, a fair trial, and the presumption of innocence when it instructed the jury pursuant to CALCRIM No. 362, and a fair trial and due process when it instructed the jury pursuant to CALCRIM No. 1190. We disagree.

1. *CALCRIM No. 362*

The court went over potential jury instructions with counsel. Without stating any grounds, defense counsel objected to the court instructing the jury with CALCRIM No. 362. The court stated its belief that it had a sua sponte duty to give the instruction and instructed the jury as follows: "If the defendant made a false or deliberately misleading statement before the trial relating to the charged crimes, knowing the statement was false or intending to mislead, that conduct may show that he was aware of his guilt of the crime and you may consider it in determining his guilt [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself." The issue of whether the court had a sua sponte duty to instruct on this issue aside (compare *People v. Najera* (2008) 43 Cal.4th 1132, 1139 [no sua sponte duty to instruct on consciousness of guilt instruction] with *People v. Edwards* (1992) 8

Cal.App.4th 1092, 1103-1104 [where there is evidence from which an inference of “consciousness of guilt may be drawn, the court has a duty to instruct on the proper method to analyze the testimony”]), we review de novo whether a jury instruction properly states the law. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

Contrary to defendant’s contention, CALCRIM No. 362 does not violate due process. (*People v. McGowan* (2008) 160 Cal.App.4th 1099, 1104; cf. *People v. Nakahara* (2003) 30 Cal.4th 705, 713 and cases cited therein, [upholding challenges to CALJIC No. 2.03, the precursor to CALCRIM No. 362].) The fact that all suspects are motivated to exculpate themselves does not make it irrational to infer consciousness of guilt from a lie concerning a charged offense.

In addition, even if the instruction was flawed, and we do not so find, its use in this matter was harmless. Although the defendant argues the trial court concluded the instruction was appropriate based on statements defendant made to his wife, Maria, in the monitored pretext telephone call, the court did not mention to the jury any statement made by defendant. The jury could have used the instruction in connection with another statement of defendant’s.

In fact, the prosecutor did not argue defendant made any false statements. Rather, the prosecutor referred to statements defendant made in an effort to get his nieces to say they lied. (See CALCRIM No. 371 [suppression and fabrication of evidence].) Additionally, the jury was instructed that some of the instructions may not apply, depending upon the facts found by the jury. There is no reason to believe the jury was confused by CALCRIM No. 362.

What is more, the evidence of defendant’s guilt was substantial. There was a video of his sexual assault on his sleeping stepdaughter. Not only did M.D. and L.C. report defendant having molested them a year *before* Maria went to the police with the video of defendant molesting A.C., defendant’s act of molesting M.D. while she slept is the *same* conduct defendant filmed himself engaging in with A.C. Any error would be

harmless under any standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

2. CALCRIM No. 1190

In addition to instructing the jury that the testimony of a single witness can prove any fact (CALCRIM No. 301), the court also instructed the jury pursuant to CALCRIM No. 1190, an instruction specifically tailored for use in cases involving a sex offense: “Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone.” Defendant argues the court erred in giving both instructions. Specifically, he contends CALCRIM No. 1190 “is outmoded,” and that since CALCRIM No. 301 covers the possible impact of a single witness’s testimony, the giving of CALCRIM 1190 in this case operated as “an unauthorized prosecution pinpoint instruction.”

Defendant’s argument must fail due to the California Supreme Court’s decision in *People v. Gammage* (1992) 2 Cal.4th 693. There the trial court instructed the jury pursuant to CALJIC Nos. 2.27 and 10.21, the respective predecessors to CALCRIM Nos. 301 and 1190. (*People v. Gammage, supra*, 2 Cal.4th at pp. 696-697.) Considered separately, both instructions correctly state the law. (*Id.* at p. 700.) And while the instructions “overlap to some extent” (*ibid.*), if the court were to only instruct pursuant to CALCRIM No. 1190, the jury would be correctly instructed that a complaining witness’s testimony need not be corroborated, leaving the question of whether the testimony of a noncomplaining witness needs corroboration in order to establish facts testified to by that witness. Nor must the court instruct only in terms of CALCRIM No. 301. “Neither [instruction] eviscerates or modifies the other.” (*People v. Gammage, supra*, 2 Cal.4th at p. 701.) In fact, “[t]he instructions in combination are no less correct, and no less fair to both sides, than either is individually.” (*Ibid.*) We are bound by this precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we reject

defendant's contention that the trial court erred in instructing the jury with CALCRIM No. 1190.

C. Sentencing

The jury found true allegations that defendant committed sex offenses against more than one victim in connection with each of the four counts. (Pen. Code, § 667.61, former subd. (e)(5) [multiple victims].) At sentencing, the prosecutor requested the court to impose consecutive sentences, pointing out the molestations not only involved multiple victims but also occurred over a period of years and defendant took advantage of a position of trust in committing the offenses against family members. Defense counsel's argument was limited to simply requesting that the court exercise its discretion and impose concurrent sentences for an aggregate sentence of 15 years to life. Of the four 15 years to life terms imposed, the court ordered consecutive sentences on but two, the count involving L.C. and a count involving M.D. The court stated it ordered a consecutive sentence because the crimes involved separate victims. The court then imposed concurrent sentences on the other count involving M.D. and the count involving A.C.

When a court exercises its discretion to impose consecutive sentences, it must state the reasons for its sentencing choice. (Pen. Code, § 1170, subd. (c); *People v. Neal* (1993) 19 Cal.App.4th 1114, 1117.) Defendant claims the trial court erred in ordering consecutive sentences, because the only reason cited for the sentencing choice—the crimes involved separate victims—was necessary to trigger Penal Code section 667.61's 15 years to life terms.⁴ California Rules of Court, rule 4.425(b)(2) precludes a court from using a “fact used to otherwise enhance the defendant's prison sentence” as the basis for imposing a consecutive sentence. Defendant does not seek a remand for

⁴ A violation of Penal Code section 288, subdivision (a) is normally punished by three, six, or eight years in state prison. (Pen. Code, § 288, subd. (a).)

resentencing based on this purported error. Instead, he asks that we modify the judgment and order the sentences on the four counts to all be served concurrently. We reject the invitation.

The court had discretion to impose concurrent or consecutive sentences on the four convictions for committing lewd acts on a child under 14 years of age. (*People v. Valdez* (2011) 193 Cal.App.4th 1515, 1524.) The trial court was well aware of its discretion.

Apparently recognizing the offenses in this case not only involved separate victims, but also separate occasions, defendant argues the fact that the crimes occurred on separate *occasions* was necessary for purposes of imposing multiple 15 years to life terms under Penal Code section 667.61 and therefore, “separate occasions” could not be used to justify consecutive sentences. He is mistaken. Penal Code section 667.61, former subdivision (e)(5) authorized a sentence of 15 years to life when a defendant stands convicted of a violation of Penal Code section 288, subdivision (a) “against more than one victim.” (Pen. Code, § 667.61, former subd. (e)(5).) There was no requirement that the molestations occurred on separate occasions. “If there are multiple victims *during a single occasion*, the term specified in subdivision (a) or (b) shall be imposed on the defendant once *for each separate victim*.” (Pen. Code, § 667.61, former subd. (g), italics added.) Thus, the fact that the molestations in this case occurred on separate occasions was not necessary to the application of Penal Code section 667.61 and was sufficient to justify consecutive sentences.

Moreover, even if “multiple victims” could not be used as a basis for imposing consecutive 15 years to life terms under Penal Code section 667.61 in a case involving but two victims, the present case involved three victims. As it took only two victims to qualify for enhanced sentencing under Penal Code section 667.61, former subdivision (e)(5), imposition of a consecutive sentence based on the existence of an

additional victim does not run afoul of the dual use of facts prohibition of rule 4.425(b)(2) of the California Rules of Court.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.