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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.

LUIS ALBERTO PINEDA,

Defendant and Appellant.

G047983

(Super. Ct. No. 10NF2388)

O P I N I O N

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

Catherine White, 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 James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Luis Alberto Pineda of 17 counts of committing a lewd act on a child under 14 years old (Pen. Code, § 288, subd. (a); all statutory references are to the Penal Code unless otherwise stated), two counts of forced sodomy (§ 286, subd. (c)(2)), two counts of sodomy of a child under 16 years old (§ 286, subd. (b)(2)), two counts of oral copulation of a child under 16 years old (§ 288a, subd. (b)(2)), two counts of committing a lewd act on a child at least 10 years younger (§ 288, subd. (c)(1)), one count of oral copulation or sexual penetration of a child under 10 years old (§ 288.7, subd. (b)), one count of attempted lewd act on a child (§ 288, subd. (a), § 664, subd. (a)), and three counts of misdemeanor assault (§ 240). As to counts 1-2, 5-11, 14-18 and 26-30, the jury found that appellant committed crimes against multiple victims (§ 667.61, subds. (b), (e)). As to counts 2, 6-7 and 14-15, the jury found that substantial sexual contact occurred with the victims (§ 1203.66, subd. (a)(8)).

Pineda contends the trial court abused its discretion by excusing an ill juror during trial and replacing her with an alternate. The parties agree the court's sentencing minutes should be amended to reflect that Pineda was found guilty by the jury of counts 27 through 29. For the reasons expressed below, we affirm the judgment and direct the trial court to correct its minutes.

I

FACTUAL AND PROCEDURAL BACKGROUND

In 2010, 11 children on Pineda's youth soccer teams and in his karate classes came forward alleging sexual abuse spanning a time period from 2005 through 2010. The boys testified Pineda touched their penises, buttocks, anuses, and scrotums, kissed them, placed their hands on his penis, instructed them to touch his penis, attempted

to force their hands onto his penis, sodomized them, attempted to digitally penetrate their anuses, and orally copulated them. A lone female child testified Pineda touched her vagina and breasts. In 2010, Anthony G. disclosed abuse to his mother, and Anaheim investigators collected rosters of Pineda's teams and classes that led to the other victims. The children had not disclosed the abuse to each other.

The defense theorized the children made up the sexual abuse so their parents could obtain U Visas, which grant victims of certain qualifying crimes, such as sexual molestation, and their families nonimmigrant status in the United States.

Following trial in November 2012, a jury convicted Pineda as noted above. In December 2012, the trial court sentenced appellant to 285 years to life in state prison, plus 13 years and six months.

II

DISCUSSION

A. *The Trial Court Did Not Err in Discharging Juror No. 9*

Pineda contends the trial court abused its discretion by discharging an ill juror rather than grant a continuance. We disagree.

On October 15, 2012, the trial court seated 12 jurors and three alternate jurors. On the fourth day of trial, the court informed the parties outside the presence of the jury the clerk had received a telephone call and voicemail message at 4:30 a.m. from Juror No. 9 stating she was ill. The juror, who took an early bus to court, appeared outside of the courtroom at 8:00 a.m. The court advised the parties that if Juror No. 9 was not well enough to proceed, "I'm going to send her home and then we'll discuss how we proceed from there." The parties agreed to that procedure.

The court asked the juror how she felt. She explained she was “[j]ust extremely tired” and was “sick all night” with “[d]iarrhea, upset stomach.” The court asked if she needed to go home, and she replied, “I’d like to but I’m willing to stay if I can handle it.” The court stated, “Obviously, we need you to pay attention, and if you’re sick, I don’t want you to be here if you’re in discomfort.” She stated she “would prefer to go home, if it’s all right.” The court consulted with the parties and allowed her to go home for the day.

The prosecutor advised the court five children were scheduled to testify that day. The court stated it was inclined to excuse the juror based on her condition and because the testifying children were missing school. Defense counsel objected stating, Juror No. 9 “sat through this trial for two weeks,” and “it seems . . . that the condition is not a long condition.” Counsel suggested “taking a half-day break or a day break.” After consideration, the court excused the juror, explaining that based on “the totality of the circumstances, the court does feel that there is good cause, based on the condition of the juror and the status of minor children are willing in the courthouse, . . . who have been taken out of school and having to come to court in somewhat of an embarrassing, awkward environment.” The court sat an alternate juror.

Section 1089 provides: “If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.” (§ 1089.)

A trial court has discretion to discharge a juror who has fallen ill during trial. (*People v. Bell* (1998) 61 Cal.App.4th 282, 286-287 (*Bell*)). The decision under section 1089 to discharge a juror and seat an alternate is reviewed for abuse of discretion. (*People v. Smith* (2005) 35 Cal.4th 334, 348-349 (*Smith*)). In exercising discretion, “[t]he court must make a reasonable inquiry to determine whether the person in question is able to perform the duties of a juror. [Citation.] If the answer is in the negative, the inability to perform those duties must be shown on the record to be a ‘demonstrable reality.’ [Citation.]” (*Bell, supra*, at p. 287.) A “reviewing court must be confident that the trial court’s conclusion is manifestly supported by evidence on which the court actually relied [¶] In reaching that conclusion, the reviewing panel will consider not just the evidence itself, but also the record of reasons the court provides.” (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1053.)

In *Smith*, the Court of Appeal upheld the trial court’s action in discharging a juror who had to deal with a family emergency, even though the juror stated “he was willing to come back and serve on the jury if the trial could be delayed to accommodate him.” (*Smith, supra*, 35 Cal.4th at p. 348.) The court in *Smith* concluded, “[W]hen, as here, a juror has good cause to be absent from trial for an indefinite period, the trial court does not abuse its discretion in replacing that juror with an alternate juror.” (*Id.* at p. 349; see *People v. Hall* (1979) 95 Cal.App.3d 299, 307 [excusal of juror needing to take wife to doctor’s appointment was not abuse of discretion].)

In *Bell*, the trial court discharged a juror on the second day of trial after the juror called in to inform the court he had to take his son to the doctor due to a medical emergency. (*Bell, supra*, 61 Cal.App.4th at p. 287.) The juror indicated he anticipated being able to return to court that afternoon at the earliest. (*Ibid.*) The defendant

recommended continuing the trial to the afternoon, particularly since the juror was one of two African-Americans on the panel and the only African-American male. (*Id.* at p. 287-288.) The trial court excused the juror after considering the juror’s inability to make a firm commitment as to when he would return, and in light of the number of witnesses scheduled to testify that day. (*Id.* at p. 288.) The reviewing court concluded “given the uncertain timing of his return and the fact so many jurors, alternates, and witnesses were waiting, the court was well within its discretion to discharge [the juror] and replace him with an alternate juror.” (*Id.* at p. 289.)

Here, the trial court reasonably inquired of Juror No. 9 and determined she was too ill to perform her duties, and there was no indication when she would be well enough to return. As in *Bell*, while the court could have continued the trial, we do “not second-guess the trial court’s discretionary decisions.” (*Bell, supra*, 61 Cal.App.4th at p. 288; *Smith, supra*, 35 Cal.4th at p. 348 [no abuse of discretion in discharging juror who was willing to continue if the court would delay trial so he could care for a sick family member.]) We discern no abuse of discretion.

B. *The Court Minutes Should Be Amended to Accurately Reflect Proceedings Below*

The parties agree the sentencing minute order must be modified to reflect the jury convicted Pineda of counts 27 through 29. The court’s December 6, 2012 minute order erroneously provides Pineda pleaded guilty to these charges. We will direct the court to correct its minutes. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [court has authority to correct clerical error to make the records reflect the true facts].)

III

DISPOSITION

The judgment is affirmed. The trial court is directed to correct its December 6, 2012, sentencing minute order to reflect the jury convicted Pineda of counts 27 through 29.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.