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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.

JAVIER RUDY MEJIA,

Defendant and Appellant.

G049002

(Super. Ct. No. 11CF1580)

O P I N I O N

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

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Ryan H. Peeck, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Javier Rudy Mejia of continuous sexual abuse (Pen. Code,<sup>1</sup> § 288.5, subd. (a); count one) from November 18, 2004, to September 20, 2006, two counts of oral copulation on a child 10 years old or younger (§ 288.7, subd. (b); counts two and three) between September 21, 2006 and July 4, 2007, and one count of exhibiting pornography to a minor (§ 313.1, subd. (a); count four). The jury further found defendant engaged in substantial sexual conduct with a child under 14 years of age. (§ 1203.066, subd. (a)(8).) The court sentenced defendant to 12 years in state prison on count one and a consecutive term of 15 years to life on count two. The sentences on the remaining counts were either ordered to run concurrently or were suspended. Defendant contends the trial court prejudicially erred in failing to give a unanimity instruction and defense counsel rendered ineffective assistance in failing to move to suppress his confession. We affirm.

## I FACTS

### *Count One*

Jacob, a child under 10 years old at the time of the charged offenses, moved into an apartment complex in Orange in 2001. Defendant moved into the apartment complex six months to a year later. Jacob's mother and defendant became close friends.

Jacob's grandmother used to babysit him while his mother worked at night, but when Jacob was in second grade, his mother and grandmother had a falling out. Defendant started babysitting Jacob and Jacob's mother paid defendant what she could. She trusted defendant because he had a young niece and he played video games with children in the area.

One day while Jacob was at defendant's apartment, he found Playboy magazines in defendant's bedroom closet and became aroused. Defendant said Jacob's

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<sup>1</sup> All undesignated statutory references are to the Penal Code.

erection would go away if defendant sucked his penis. Defendant then orally copulated Jacob. Defendant thereafter orally copulated Jacob on approximately 10 other occasions while Jacob was in second or third grade and they both were living in the apartment complex. Each act of oral copulation was preceded by defendant showing Jacob pornography.

A neighbor caught defendant molesting Jacob on one occasion when she looked through defendant's window and saw Jacob and defendant together in bed. Defendant had his hands inside Jacob's shorts. The neighbor called out for Jacob to come out of the apartment. She took Jacob back to his apartment. When Jacob's mother got home from work, the neighbor told her about the incident, but defendant and Jacob denied it and Jacob's mother believed the neighbor was either lying or mistaken.

#### *Count Two*

Defendant moved out of the apartment complex and to Mission Viejo prior to Thanksgiving 2006. Jacob helped defendant unpack in Mission Viejo. During that visit, defendant again showed Jacob pornography and orally copulated him.

#### *Count Three*

Jacob visited defendant in Mission Viejo three times after he helped defendant unpack from moving. He and his mother spent Thanksgiving 2006 with defendant. Jacob stayed the night with defendant on Saint Patrick's Day 2007, and on the Fourth of July in 2007, while his mother went out. Jacob said defendant orally copulated him once at the Mission Viejo residence after the incident when he helped defendant unpack. The act occurred after he and defendant watched videos. According to Jacob that occurred when he spent Thanksgiving with defendant. Jacob last visited defendant on July 4, 2007.

*Defendant's Statement to the Police*

When Jacob was in the seventh grade he told his mother about the molestations. He admitted he lied to her when the neighbor said she had seen defendant in bed with him. His mother called the police that same day.

On June 13, 2011, two detectives went to defendant's residence and contacted him at the front door. He complied with the request to step outside and talk to them. Both detectives were in plain clothes. Defendant was not handcuffed and was told he was not under arrest and did not have to speak with the detectives. He spoke with the detectives. The conversation was recorded. Defendant admitted orally copulating Jacob two or three times while he lived in Orange and having watched a pornographic movie with Jacob.

II

DISCUSSION

*A. Jury Instruction*

The trial involved testimony concerning a number of acts of oral copulation over an extended period of time from November 18, 2004 to July 4, 2007. Those acts of oral copulation that occurred between November 18, 2004, and September 20, 2006 were part of the prosecution on count one, section 288.5, subdivision (a). A violation of section 288.5 requires evidence of at least three incidents of molestation by defendant against the same child. (§ 288.5, subd. (a).) The oral copulation charged in count two was alleged to have occurred on or between September 21, 2006 and July 4, 2007. The acts covered by count one are those that occurred in the apartment complex in Orange. The violation of section 288.7 alleged in count two was based on the act of oral copulation on the day Jacob went to Mission Viejo to help defendant unpack from his move from the apartment complex in which Jacob lived in Orange as the act supporting the charge.

Defendant contends the trial court prejudicially erred in failing to instruct the jury on the requirement of unanimity in connection with the oral copulation charge in count three. He argues the prosecution relied on evidence from three different dates (Thanksgiving 2006, St. Patrick's Day 2007, and July 4, 2007) and the jury should have been instructed they must agree on the act supporting the charge.

CALCRIM No. 3500 informs a jury of a charge and the date it is alleged to have occurred. It then instructs the jury as follows: "The People have presented evidence of *more than one act* to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act [he] committed." (Italics added.) "[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

Instead of instructing pursuant to CALCRIM No. 3500, the court instructed the jury with a modified version of CALCRIM No. 3502: "You must not find defendant guilty of oral copulation on a minor 10 years of age or younger as alleged in count three unless you all agree the People have proved specifically that the defendant committed that offense on an overnight visit with the defendant in Mission Viejo after the move event alleged in count two. Evidence the defendant may have committed the alleged offense on another day or in another manner is not sufficient for you to find the defendant guilty of the offense charged in count three."

Count three alleged defendant orally copulated Jacob "[o]n or about and between September 21, 2006 and July 4, 2007." CALCRIM No. 3500 does not apply to the facts of this case. It applies when the prosecution has presented evidence of different *acts* that could support a finding of guilt. That situation was not present here. Although there was some dispute as to what nights Jacob actually spent at defendant's residence

after defendant moved to Mission Viejo, there was only evidence of one act of oral copulation in Mission Viejo after the act that occurred the first time Jacob went to Mission Viejo and helped defendant unpack. While the *date* on which defendant orally copulated Jacob within the charged time frame alleged in count three may have been open to debate, which *act* of oral copulation formed the basis of the offense was not. There was only one act of oral copulation during the charged period.

Instruction pursuant to CALCRIM No. 3500, which requires unanimity on one of a number of acts, is not appropriate where there is but one act that could serve as the basis for a finding of guilt. There having been only one act of oral copulation testified to as a basis for count three—the act of oral copulation that occurred in Mission Viejo after the incident when Jacob helped defendant unpack after moving—the jury did not have to choose one from a number of acts that could have served as the basis for a finding of guilt in count three. The court did not err in failing to instruct the jury pursuant to CALCRIM No. 3500.

#### B. *Ineffective Assistance of Counsel*

Defendant contends his counsel rendered ineffective assistance in failing to bring a motion to suppress his confession. We disagree. There is no evidence such a motion had any merit.

A criminal defendant has a federal and state constitutional right to the effective assistance of counsel. (U.S. Const., 6th & 14th Amends; Cal. Const., art. I, § 16.) There is no substantive difference between the federal and state constitutional right. (*People v. Doolin* (2009) 45 Cal.4th 390, 421.) “The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process. [Citation.] The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.

[Citations.]” (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 374-375.) “To establish ineffective assistance of counsel, a petitioner must demonstrate that (1) counsel’s representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the petitioner. [Citations.]” (*In re Wilson* (1992) 3 Cal.4th 945, 950, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687.)

“[A]n involuntary confession is inadmissible in part because such a confession is likely to be unreliable, it is also inadmissible even if it is true, because of the “strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.” [Citation.]” (*Watkins v. Sowders* (1981) 449 U.S. 341, 347.) When counsel’s shortcoming is alleged to have been the failure to move to suppress evidence obtained in violation of the Constitution, the defendant must demonstrate the suppression motion was meritorious and there is a reasonable probability the verdict would have been different had he prevailed on the motion. (*Kimmelman v. Morrison, supra*, 477 U.S. at p. 375 [failure to bring motion to suppress evidence under Fourth Amendment].) “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218, quoting *Strickland v. Washington, supra*, 466 U.S. at pp. 693-694.) To prevail on a claim of ineffective assistance of counsel, a defendant must establish by a preponderance of the evidence that he is entitled to relief. (*People v. Ledesma, supra*, 43 Cal.3d at p. 218.)

A confession is involuntary if the ““defendant’s will was overborne” by the circumstances surrounding the giving of [the] confession.’ [Citation.]” (*People v. Dykes* (2009) 46 Cal.4th 731, 752.) In addressing an involuntary confession claim, the courts consider the ““totality of the circumstances’ test, looking at the nature of the

interrogation and circumstances relating to the particular defendant. [Citation.]” (*Ibid.*)

At one point during the questioning outside defendant’s front door, one of the detectives said he understood defendant would not physically hurt Jacob. The other detective, in an apparent effort to get defendant to admit more than what defendant had admitted to at that point—that Jacob wanted defendant to orally copulate him—the detective stated, “Like I said we’re not arresting you . . . . [¶] . . . [¶] . . . for it we’re just coming here to hear what happened okay.” Defendant now asserts this was an improper promise of leniency and rendered his subsequent statements involuntary. He claims the only way to view the statement made by the detective, and the way he interpreted the statements, was that he would not be arrested if he confessed. There are two flaws with the assertion. First, the statement appears to simply reemphasize that defendant was not under arrest. Second, there is no evidence in the record to support the assertion that *defendant* interpreted the detective’s statement to mean he would not be arrested regardless of what he said. Indeed, just before the recording device was turned off, defendant stated he expected to be arrested in the future. “And now it’s gonna, to be scared cause they’re going to come back and arrest me or something.” Notwithstanding the lack of evidence to support defendant’s assertion that *he* thought the statement meant he would not be arrested if he confessed, his own statement, made immediately after his confession, indicates he thought the confession would result in his arrest.

There is no reason to believe the detective’s statement overcame defendant’s free will or constituted a “motivating cause” of his confession. (*People v. Kelly* (1990) 51 Cal.3d 931, 953.) In resolving a claim of ineffective assistance of counsel, a court need not address the issue of whether counsel’s action or inaction was deficient if it appears sufficient prejudice is lacking even if one assumed counsel failed to act as a reasonably competent defense counsel. (*Strickland v. Washington, supra*, 466 U.S. at p. 687.) Defense counsel has no obligation to make meritless motions. (*People v. Frye* (1998) 18 Cal.4th 894, 989, disapproved on another issue in *People v. Doolin*

(2009) 45 Cal.4th 390, 421, fn. 22.) Defendant has failed to demonstrate counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by the failure to bring a motion to suppress his confession. Consequently, his ineffective assistance of counsel claim fails.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.