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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. RAMON JIMENEZ, Defendant and Appellant.	G051753 (Super. Ct. No. 12CF2356) O P I N I O N

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

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Collette Cavalier and Arlene A. Sevidal, Deputy Attorneys General, for Plaintiff and Respondent.

Ramon Jimenez appeals from the judgment after the jury convicted him of numerous sexual offenses and found true numerous enhancements. Jimenez argues the trial court erred when it instructed the jury with CALCRIM No. 330. Jimenez's contention has no merit, and we affirm the judgment.

FACTS

An amended information charged Jimenez with five counts of lewd act on a child under 14 (Pen. Code, § 288, subd. (a),[1] counts 1, 2, 5, 6 & 8), and three counts of oral copulation or sexual penetration with a child 10 years or younger (§ 288.7, subd. (b), counts 3, 4 & 7). The information alleged the multiple victim enhancement as to all counts (§ 667.61, subds. (b), (c) & (e)(4)), and the substantial sexual conduct allegation as to counts 1, 2, 5, 6, and 8 (§ 1203.066, subd. (a)(8)).

At trial, the following evidence was elicited. A. Castillo had two daughters, A.R., born in March 2006, and H.R., born in July 2007. While Castillo was at work, Angelica Jimenez (Angelica) babysat A.R. and H.R. at her apartment where she lived with her husband, Jimenez, and many others.

One day in 2012, Castillo was playing with H.R. When Castillo tickled her, H.R. started crying. Castillo asked H.R. why she was crying, and she said Jimenez had touched her in her private parts underneath her underwear. H.R. said it happened more than once. Castillo later spoke to A.R., who also said Jimenez touched her. The next day, A.R. told Castillo that her grandfather "Roberto" orally copulated her. Castillo called Orange County Social Services (SSA) to report the abuse. When SSA did not call back, Castillo called the police. Castillo also contacted the Mexican consulate to report Roberto's actions because he had previously moved to Mexico.

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[1] All further statutory references are to the Penal Code.

H.R. testified Jimenez touched her chest underneath her clothes, and touched her private area "where you go pee-pee" and "where you go poo-poo'" more than once. H.R. stated he touched her while they were in the living room of his home when Angelica was babysitting her. In her recorded interview with the Child Abuse Services Team (CAST), H.R. said that when she was four years old, Jimenez touched her private areas under her shirt, under her shorts, and inside her underwear many times. Jimenez grabbed her hand and placed it on his penis, which was hard. He told her not to say anything to anyone, but she told her mom what happened. H.R. also said Roberto orally copulated her many times when she was three years old.

A.R. testified that when she was five years old and in kindergarten, Angelica babysat her and Jimenez was also there. A.R. stated the following: "[Jimenez] would always touch [her]. He always touched [her] body every day." Jimenez touched her chest over her clothes, "where the pee comes out," and where the "poop comes out" both over and under her clothes. A.R. testified Jimenez's hand went inside her vagina and it hurt. One time, after going to the park, A.R. went to the bathroom, Jimenez took off her bottoms, and he cleaned her because she had urinated in her pants. Jimenez touched her vagina, causing her to bleed. Jimenez told A.R. not to tell anyone, but she told H.R., who told their mother. In her recorded interview with CAST, A.R. said that when she was five and six years old, Jimenez touched her vagina, buttocks, and navel many times. On one occasion, Jimenez touched inside her vagina and inside her anus. A.R. stated she saw Jimenez touch H.R.'s buttocks. A.R. also disclosed Roberto molested, orally copulated, and raped her when she was four years old.

Defense

Martin Gomez, Jimenez's brother-in-law, and Maria Jimenez (Maria), Jimenez's daughter, were home most of the time. Gomez and Maria never saw Jimenez tickle or watch movies with H.R. and A.R. or have either girl sit on his lap. Angelica

never saw Jimenez act strangely around A.R. or H.R. or any other girls. He never played with A.R. or H.R. or tickled them. Angelica never left A.R. or H.R. alone with Jimenez.

Jimenez denied doing anything improper to A.R. or H.R. He denied ever touching their chests or inserting his finger in their private parts. He denied telling police about an incident when one of the girls urinated in her pants or when he put a girl on his shoulders because she would not walk across the intersection quickly. He claimed the only time he touched the girls was when he caught one falling down the stairs.

Dr. Barton Wachs, a urologist, reviewed Jimenez's medical records, which showed he suffered from uncontrolled diabetes and erectile dysfunction.

Rebuttal

After Officer Andy Garcia visited Jimenez's home to investigate H.R.'s and A.R.'s allegations, Jimenez went to the police station and spoke with Garcia. Jimenez stated he slapped H.R. and A.R. on the buttocks one time to hurry them across a crosswalk. Jimenez claimed that once at the park, he touched A.R. in the vaginal area over her shorts to see if she had urinated. He admitted to tickling both girls in the inner thighs. Finally, Jimenez claimed he touched H.R. in the vaginal area to catch her as she fell down the stairs.

After the close of evidence, the trial court granted Jimenez's request to dismiss count 7 pursuant to section 1118.1. At a hearing on the jury instructions, Jimenez did not object to CALCRIM No. 330.

The jury convicted Jimenez of all the counts and found true all the allegations except the multiple victim allegation as to counts 3 and 4. After the trial court denied his motion for new trial, the court sentenced Jimenez to 15 years to life on count 1 and a consecutive term of 15 years to life on count 5 for a total prison term of 30 years to life. The court imposed concurrent terms of 15 years to life for the remaining counts.

DISCUSSION

Jimenez argues the trial court erred by instructing the jury with CALCRIM No. 330, "Testimony of Child 10 Years of Age or Younger." We disagree.

Preliminarily, Jimenez concedes he did not object to CALCRIM No. 330. Failure to object to an instruction forfeits the claim on appeal. (*People v. Lucas* (2014) 60 Cal.4th 153, 290-291 & fn. 51, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19 [failure to object to otherwise legally correct instructions forfeits the error].) In fact, the forfeiture rule has been applied to an identical challenge to CALCRJM No. 330. (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 559 (*Fernandez*).) Consequently, Jimenez's failure to object to CALCRIM No. 330 at trial forfeited his appellate claim. Nevertheless, we will address the merits of his claim.

CALCRIM No. 330 stated as follows: "You have heard testimony from a child who is age 10 or younger. As with any other witness, you must decide whether the child gave truthful and accurate testimony. [¶] In evaluating the child's testimony, you should consider all of the factors surrounding that testimony, including the child's age and level of cognitive development. [¶] When you evaluate the child's cognitive development, consider the child's ability to perceive, understand, remember, and communicate. [¶] *While a child and an adult witness may behave differently, that difference does not mean that one is any more or less believable than the other*. You should not discount or distrust the testimony of a witness just because he or she is a child." (Italics added.)

Relying on the above italicized language, Jimenez asserts CALCRIM No. 330 invaded the jury's province by bolstering A.R.'s and H.R.'s credibility, prevented him from presenting a defense, and denied him the right to confront A.R. and H.R. Specifically, he asserts this language prevented the jury from considering their age and cognitive ability in judging their credibility.

Jimenez acknowledges several appellate decisions have rejected his argument with respect to former CALJIC No. 2.20.1, the predecessor to CALCRIM No. 330. (*People v. McCoy* (2005) 133 Cal.App.4th 974, 979-980 (*McCoy*); *People v. Jones* (1992) 10 Cal.App.4th 1566, 1572-1574 (*Jones*); *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1392 (*Gilbert*); *People v. Harlan* (1990) 222 Cal.App.3d 439, 455-457 (*Harlan*).) In fact, *McCoy* also rejected the implication CALCRIM No. 330 is invalid. (*McCoy, supra,* 133 Cal.App.4th at p. 980.)

More recently, in *Fernandez, supra,* 216 Cal.App.4th 540, the Court of Appeal approved of CALCRIM No. 330. First, the *Fernandez* court noted appellant conceded his arguments had been rejected with respect to CALJIC No. 2.20.1 in *McCoy*, *Jones*, *Gilbert*, and *Harlan*. (*Fernandez, supra,* 216 Cal.App.4th at p. 559.) The *Fernandez* court concluded the following: "CALCRIM No. 330 simply instructs the jury to take into account a child's ability to perceive, understand, remember and communicate when making a credibility determination. It does not instruct the jury to subject a child's testimony to a less rigorous credibility determination, nor does it excessively inflate a child witness's credibility. We reject appellant's constitutional challenge to CALCRIM No. 330." (*Fernandez, supra,* 216 Cal.App.4th at p. 560, fn. omitted.)

Jimenez offers us no new compelling justification to depart from this well-reasoned authority, and we follow it here. There is nothing in CALCRIM No. 330 that prohibits the jury from considering the child's demeanor in determining her/his credibility and thus it is not reasonably likely the jury applied this instruction in a way that violated Jimenez's federal constitutional rights.

Finally, Jimenez relies on *People v. Dennis* (1998) 17 Cal.4th 468 (*Dennis*) to support his claim. *Dennis* is of no help to Jimenez. (See *People v. McDonald* (2013) 214 Cal.App.4th 1367, 1377.) Although the *Dennis* court stated previous attacks to the instruction in *Jones*, *Gilbert*, and *Harlan* were not "so baseless and unreasonable," the *Dennis* court concerned an ineffective assistance of counsel claim and the *Dennis* court

did not overrule these cases. (*Dennis, supra,* 17 Cal.4th at p. 527.) Therefore, the trial court did not err in instructing the jury with CALCRIM No. 330.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.