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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE GARCIA MEJIA,

Defendant and Appellant.

H036144

(Santa Clara County

Super. Ct. No. CC762274)

**I. STATEMENT OF THE CASE**

In a 20-count information, defendant Jose Garcia Mejia was charged with 14 counts of sexual intercourse or sodomy with a child 10 years old or younger, two counts of aggravated sexual assault on a child under 14 years old, and four counts of forcible lewd and lascivious conduct on a child under 14 years old. (Pen. Code, §§ 288.7, subd. (a), 269, 288, subd. (b)(1).) In a negotiated agreement, defendant pleaded guilty to three counts with the understanding that his sentence would be 75 years to life. However, when previously withheld exculpatory evidence concerning some of defendant's victims was disclosed to the defense, defendant moved to withdraw his plea, and court granted the motion. Thereafter, the parties waived a jury trial and agreed that the prosecution would submit its case on the preliminary hearing transcript and various other documents with defendant reserving the right to call witnesses, including defendant himself. At trial, the defense presented additional documentary evidence, and defendant testified. The

court found defendant guilty of count one (unlawful intercourse or sodomy). It appears that the parties had an agreement that if defendant was convicted of this count, the remaining counts would be dismissed and defendant would be sentenced to a maximum term of 25 years to life, and that is what happened.

On appeal from the judgment, defendant claims the court committed reversible error in failing to advise him of the direct consequences of a conviction and failing to elicit from him waivers of his rights to confront and subpoena the witnesses against him and of his privilege against self-incrimination.

We agree that the court erred but find the error harmless and affirm the judgment.

## **II. FACTS<sup>1</sup>**

In 2007, police learned that someone had called Child Protective Services and reported that some children were possibly being molested by their grandfather. Police interviewed the children and defendant.

At the preliminary hearing, C., then aged nine, testified that in 2007, she lived in San Jose with her mother, her siblings (P., N., and U.), her cousins (J., A., M., and K.), an aunt, and defendant, her grandfather. C. testified that when defendant babysat, he touched her private part with his hand or his own private part, and this happened more than five times. When she tried to push him away, he got mad. Sometimes she would wake up, her pants would be pulled down, and defendant would either be touching her private part or penetrating her with his private part. It hurt when he did it and later when she urinated. C. reported defendant to her mother who got scared but continued to let defendant babysit.

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<sup>1</sup> We base our factual summary on the documentary evidence before the trial court, including the police reports, testimony at the preliminary hearing, various medical reports, the testimony adduced at the preliminary hearing, and defendant's testimony at the court trial.

P., age 11, testified that at night, when her mother was at work, defendant touched her private part with either his hand or his private part, and this happened between five and nine times. She told him to stop and tried to push his hand away, but defendant would get mad and not listen. She testified that one night, he carried her to his bed, took off their pants, lay on top of her, and moved his body up and down. P.'s cousin J. came in and told him to stop, but he told her to leave. P. said that she had seen defendant touch C. and N. and take K. to bed and do what he had done to her.

K., age nine, testified that one night, she woke up to find that her pants had been pulled down. Defendant was touching her private part.

N., who was eight, testified that defendant touched her private part with his hand and also penetrated her with his private part more than 10 times. It made her private part hurt. When she tried to leave, defendant would stop her.

The medical examination of C. revealed evidence of penetrating hymenal trauma. The medical examination of P. revealed mildly suggestive evidence of penetrating trauma. The examinations of K. and N. revealed no evidence of penetrating trauma.

At the court trial, defendant denied that he had molested any of the girls. He admitted that sometimes the girls slept with him, and he hugged them, but there was never any sexual conduct, and he denied ever telling police that he could have unintentionally committed some sexual act. He said that he wrote a letter to the girls falsely apologizing only because he was nervous about and frightened by the accusations against him and because the police had pressured him to write it.

### **III. FAILURE TO ADVISE AND ELICIT WAIVERS**

In *Bunnell v. Superior Court* (1975) 13 Cal.3d 592 (*Bunnell*), the court held that “in all cases in which the defendant seeks to submit his case for decision on the transcript or to plead guilty, the record shall reflect that he has been advised of his right to a jury trial, to confront and cross-examine witnesses, and against self-incrimination. It shall

also demonstrate that he understands the nature of the charges. Express waivers of the enumerated constitutional rights shall appear. In cases in which there is to be a submission without a reservation by the defendant of the right to present evidence in his own defense he shall be advised of that right and an express waiver thereof taken. If a defendant does not reserve the right to present additional evidence and does not advise the court that he will contest his guilt in argument to the court, the defendant shall be advised of the probability that the submission will result in a conviction of the offense or offenses charged. In all guilty plea and submission cases the defendant shall be advised of the direct consequences of conviction such as the permissible range of punishment provided by statute.” (*Id.* at p. 605.)

Although these advisements and waivers are required in every plea and submission case, they are *constitutionally* compelled only in cases where the defendant pleads guilty or the submission on the preliminary hearing transcript is tantamount to a guilty plea, that is, a slow plea. Otherwise, the advisements are required by a judicially declared rule of criminal procedure designed to minimize error, maximize the protection of constitutional rights, and eliminate difficult determinations concerning whether a submission constitutes a slow plea. (*People v. Barella* (1999) 20 Cal.4th 261, 266; *People v. Wright* (1987) 43 Cal.3d 487, 495 (*Wright*), abrogated on other grounds as recognized in *People v. Mosby* (2004) 33 Cal.4th 353, 360.) Where the defendant pleads guilty or enters a slow plea, the failure to advise and obtain waivers is structural constitutional error and reversible per se. (*Wright, supra*, 43 Cal.3d at p. 494.) Otherwise, the failure to advise and obtain waivers is an error of state law and subject to the harmless error test articulated in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) under which reversal is required only if it is reasonably probable the defendant would have obtained a more favorable result had he been advised. (*Wright, supra*, 43 Cal.3d at p. 495.)

Defendant contends that the court erred in failing give advisements or obtain waivers concerning of the consequences of a conviction, his rights to confront and subpoena adverse witnesses, and his privilege against self-incrimination. The Attorney General concedes that the court erred. Thus, the issue becomes whether the error is reversible per se or subject to review under *Watson*. That question turns on whether the submission here was tantamount to a guilty plea, that is, a slow plea.

“A ‘slow plea’ has been defined as follows: ‘It is an agreed-upon disposition of a criminal case via any one of a number of contrived procedures which does not require the defendant to admit guilt but results in a finding of guilt on an anticipated charge and, usually, for a promised punishment.’ [Citation.] ‘Perhaps the clearest example of a slow plea is a bargained-for submission on the transcript of a preliminary hearing in which the only evidence is the victim's credible testimony, and the defendant does not testify and counsel presents no evidence or argument on defendant's behalf . . . . [¶] Submissions that are not considered slow pleas include those in which . . . the facts revealed at the preliminary examination are essentially undisputed but counsel makes an argument to the court as to the legal significance to be accorded them. [Citation.]’ [Citation.] ‘If it appears on the whole that the defendant advanced a substantial defense, the submission cannot be considered to be tantamount to a plea of guilty. Sometimes, a defendant’s best defense is weak. He may make a tactical decision to concede guilt as to one or more of several counts as part of an overall defense strategy. A submission under these circumstances is not a slow plea . . . .’ [Citation.]” (*People v. Stone* (1994) 27 Cal.App.4th 276, 282 (*Stone*), quoting *People v. Tran* (1984) 152 Cal.App.3d 680, 683, fn. 2 (*Tran*), and *Wright, supra*, 43 Cal.3d at pp. 496-497.) Likewise, a submission on the preliminary hearing transcript where there was substantial cross-examination of prosecution witnesses and the presentation of additional evidence by the defense is not considered a slow plea. (*In re Mosely* (1970) 1 Cal.3d 913, 925, fn. 9 (*Mosely*).

In short, the critical inquiry is whether the defendant advanced a substantial defense either at the preliminary hearing or at the submission trial; if he or she did so, there is no slow plea. (*Wright, supra*, 43 Cal.3d at pp. 496-497; *Mosley, supra*, 1 Cal.3d at p. 925, fn. 9.)

For example, in *Tran, supra*, 152 Cal.App.3d 680, after the prosecution's case faltered, the parties stipulated that the court could consider lesser included offenses, defendant did not cross-examine witnesses and presented no evidence, witnesses, or argument, and the parties submitted the matter. Under the circumstances, the court held that the submission constituted a slow plea. (*Id.* at pp. 684-685.)

On the other hand, in *Stone, supra*, 27 Cal.App.4th 276, the parties agreed to submit the matter on the grand jury transcript. However, the defendant did not concede guilt, counsel introduced witnesses and evidence in his defense, and counsel argued for acquittal on some or all of the charges. Under the circumstances, the court held that the submission was not a slow plea. (*Id.* at pp. 282-283.)

#### **A. Submission as Slow Plea**

Here, the record reveals that defense counsel cross-examined the victims at the preliminary hearing. At the court trial, defense counsel raised hearsay objections to statements contained in the preliminary hearing transcript and introduced reports from a defense medical expert who, after reviewing the evidence of the medical examinations concerning C. and P., disputed the conclusions reached by the prosecution experts and found no evidence of penetrating hymenal trauma to either.<sup>2</sup> Defendant testified and denied any improper sexual conduct. During closing argument, defense counsel did not concede any of the charges. He claimed that the prosecution had failed to prove any of them beyond a reasonable doubt and vigorously argued defendant's innocence, attacking

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<sup>2</sup> As noted, there was no evidence of penetrating trauma to K. or N.

the credibility of the victims and urging the court to credit the opinion of the defense expert.

On this record, we find that defendant advanced a substantial defense against the most serious charges of sexual intercourse or sodomy. Indeed, defendant had previously moved to withdraw his guilty plea so that he could present exculpatory expert medical evidence that he claimed would likely to lead to his exoneration. Moreover, as defendant notes, he consistently maintained his innocence. Under the circumstances, we conclude that defendant's submission was not tantamount to a guilty plea, that is, it was not a slow plea.

Defendant opines that defense counsel's cross-examination of the victims at the preliminary hearing did not appear to have elicited much additional information about the alleged misconduct. He further argues that the parties' apparent agreement concerning dismissal of charges and a maximum term "strongly lends itself to the inference that everyone assumed, except appellant perhaps, that he would be found guilty of the single count." Neither argument suggests that defendant conceded that he was guilty as charged. Nor do these arguments negate the substantial nature of the defense defendant reserved and advanced at the court trial. We especially reject appellate counsel's suggestion that defense counsel's performance was, in essence, a pro forma charade because everyone—defense counsel, the prosecutor, and the court—assumed defendant would be convicted.

Defendant's reliance on *Bunnell* is misplaced. In *Bunnell*, the issue before the court was whether the submission was a trial for double jeopardy purposes and not whether the submission constituted a slow plea. " "It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered." ' [Citation.] 'An appellate decision is not authority for everything said in the court's opinion but only "for

the points actually involved and actually decided.” ’ [Citation.]” (*People v. Knoller* (2007) 41 Cal.4th 139, 154-155.) Thus, although *Bunnell* established that advisements and waivers must be given in all submission cases, we do not consider *Bunnell* relevant or persuasive authority for what constitutes a slow plea, an issue it did not address or decide in that case.

### **B. Prejudice**

Because defendant’s submission was not a slow plea, we review the court’s failure to advise and elicit waivers under *Watson*. In particular, we ask whether it is reasonably probable defendant would have obtained a more favorable result had he been advised concerning the consequences of a conviction and his rights to cross-examine and subpoena witnesses against him and his privilege against self-incrimination and declined to submit the case.

Initially, we note that defendant does not contest the validity of his jury waiver. Thus, whether the case was submitted or fully tried, defendant knew the court would decide his guilt. Next, we note that defendant obtained dismissal of 19 of the 20 counts under what appears to have been an agreement between the parties. Moreover, that agreement substantially reduced defendant’s potential sentencing exposure. In this respect, we note that each of the 14 charges of intercourse or sodomy carried a potential penalty of 25 years to life. Each of the two aggravated sexual assault charges carried a potential term of 15 years to life. And each of the four charges of forcible lewd conduct carried terms of between three and eight years. Thus, for purposes harmless error review, the only more favorable result that defendant could have obtained from the trial court would have been acquittal on *all* charges.

With this in mind, we note that the prosecution’s evidence included the testimony of four victims, and that testimony was mutually corroborative concerning the nature of defendant’s conduct and his modus operandi. Moreover, there was medical evidence to

support charges of intercourse against C. and P., and defendant wrote the girls a letter asking for forgiveness. Finally, the court found that defendant was not a credible witness and was not persuaded by his self-serving testimony.

On this record, we find no reasonable possibility, let alone a reasonable probability that defendant would have obtained a more favorable result had he been properly advised and declined to submit the matter. Accordingly, we conclude that that the non-constitutional *Bunnell* error was harmless. (*People v. Watson, supra*, 46 Cal.2d at p. 836; e.g., *Stone, supra*, 27 Cal.App.4th at pp. 284-285 [finding *Bunnell* error harmless].)

#### IV. DISPOSITION

The judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.