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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGARDO TRIGUEROS,

Defendant and Appellant.

B187098

(Los Angeles County
Super. Ct. No. BA272076)

APPEAL from an order of the Superior Court of Los Angeles County. Anita H. Dymant, Judge. Affirmed in part, reversed in part, and remanded.

Janice Wellborn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Edgardo Trigueros appeals from the judgment of conviction for corporal injury to a cohabitant, assault by means likely to produce great bodily injury, assault with a semiautomatic firearm, making criminal threats, dissuading a witness, and two counts of child abuse. He argues that (1) jury instructions were improper and (2) the court erred in imposing an aggravated term for several of the crimes. We conclude only his second argument has merit. We remand the case to the trial court to sentence him in accordance with the requirements of *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856] (*Cunningham*). In all other respects, the judgment is affirmed.

PROCEDURAL BACKGROUND

Trigueros was charged as follows: (1) count 1 -- willful infliction of corporal injury upon a cohabitant (Pen. Code, § 273.5, subd. (a))¹; counts 2 and 3 -- assault with a deadly weapon or force likely to produce great bodily injury (§ 245, subs. (a)(1) & (b)); count 4 -- criminal threats against an immediate family member (§ 422); count 5 -- intimidation of a witness (§ 136.1); counts 6, 7, and 8 -- child abuse (§ 273a, subd. (a)); and count 9 -- forcible sexual penetration by a foreign object (§ 289, subd. (a)(1)). With respect to count 3, it was further alleged that Trigueros personally used a firearm within the meaning of section 12022.5, subdivision (a)(1).

The three counts of child abuse were reduced from felonies to misdemeanors. Those counts referred to Christina's three sons. The remaining counts referred to Christina, Trigueros's girlfriend.

The jury found Trigueros guilty of counts 1 through 7. It also found that the assault was committed with a semiautomatic firearm within the meaning of section 12022.5, subdivision (a). He was found not guilty of count 9. The jury could not reach a verdict on count 8 (child abuse with respect to one son) and the trial court declared a mistrial. Subsequently, the court dismissed that count at the request of the prosecutor.

¹ All undesignated statutory citations are to the Penal Code.

Trigueros was sentenced to the high term of nine years on count 3, plus the high term of 10 years for the gun enhancement for a total of 19 years on count 3. The court imposed a consecutive sentence of one-third the midterm for a total of one year on count 1. Pursuant to section 654, the court stayed a high term sentence of four years for count 2. On counts 4 and 5, the court imposed a concurrent high term of three years for each count. On count 6, the court imposed a consecutive one year term, and on count 7 a concurrent one year term. The total consecutive term was 21 years.

Trigueros timely appealed.

FACTUAL BACKGROUND

Trigueros lived with Christina for 11 years and they had four children together. Christina also had one other child. On September 23, 2004, Christina went to a seminar. Lance, a friend of Trigueros, drove her home from the seminar. They arrived at Trigueros's and Christina's home around 9:00 p.m.

After Trigueros thanked Lance for driving Christina, Trigueros and Christina went into their bedroom and Trigueros looked at her strangely, smelled her hair, neck, stomach, shoulders, and arms. He told Christina that she "smell[ed] like [she] showered before [she] got home" and asked her "why don't you smell like sweat?" He told her that she "smelled too clean."

Trigueros then told Christina to take off her underwear and bra. She complied. He picked up her underwear and said " 'your underwear is stained. You have sperm on them.' " Trigueros accused Christina of having sex. Christina denied it. Trigueros pinned Christina by putting his knees on her rib cage so that she could not move. Christina was crying. Trigueros repeated multiple times that he believed Christina cheated on him. Trigueros left the room with Christina's underwear, telling her he was going to lock it in a safe. Two children heard Trigueros tell Christina that he had to check her underwear.

The next morning, Trigueros again accused Christina of cheating on him. When she would not admit to it, he said "for your life the test better not come back positive," referring to a test he planned to conduct of her underwear. Christina understood this as

“a threat for [her] life.” Trigueros grabbed Christina around her neck and pinned her on the dining room table. She could not breathe. One of their sons saw Trigueros choking Christina. Afterwards, Christina had red marks on her neck.

Trigueros warned Christina “if you fight with me, I am going to kill you right here, you’re going to die” and continued to scream at her. Christina briefly lost consciousness.

Trigueros pushed her on the floor and slapped her face twice. Then he choked her again. Trigueros told her to go to the bathroom and when she did, he put two gun boxes on the toilet. He told her that if she continued to make noise he would “splatter [her] brains all over the floor and watch [her] die.” He showed her that the gun was loaded and then placed a nine millimeter gun against her head. One child remembered Trigueros putting a gun to Christina’s head and saying “ ‘if you make one more sound, I will blast your head into little pieces[.]’ ” He saw Trigueros holding a gun to the side of Christina’s head and Trigueros said “I will blast your brains out.” Later, Trigueros warned Christina that if she left with his kids or went to the police he would “murder your mom and dad and shoot you in the head with a sniper rifle.”

Items found in a search of Trigueros’s residence included an envelope with blue underwear accompanied by a letter asking for the \$95 test. In a safe that was six feet tall and four feet deep, there were six rifles, one shotgun, three semiautomatic pistols, and multiple magazines. Over 100 pounds of ammunition was found in the apartment.

Other evidence indicated that Trigueros hit one of his sons with a belt. His son had a scar on his right leg from when his father hit him with a belt. Trigueros also hit the other son. Sometimes he used his hand and sometimes he used a belt. Other times Trigueros would use his knuckles and hit his son on the head. This son had a scar on his arm from where Trigueros hit him.

Trigueros did not testify but his coworkers and friends testified that he was a hard worker, a good father, and that they were not aware of any mistreatment of Christina or his children. When Trigueros and Christina lived with one of his friends, she never heard Trigueros beat Christina or saw any signs of abuse.

DISCUSSION

I. Alleged Error in Instructing Jury on Prior Incidents of Domestic Violence

Both Christina and her children testified regarding prior incidents of domestic violence. The testimony documented uncharged abusive conduct by Trigueros against Christina, including a similar choking incident. Christina further testified that Trigueros would warn her not to fight back or she “would die.”

The jury was instructed as follows: “If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit other offenses involving domestic violence.

“However, if you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit any of the crimes of which he is accused involving domestic violence.

“However, if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that he committed one or more of the charged offenses here.

“If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all of the other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of one or more of the charged crimes.”

The jury was also instructed: “If you find other crimes were committed by a preponderance of the evidence, you are nevertheless cautioned and reminded that before a defendant can be found guilty of any crime charged in this trial the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime.”

Trigueros acknowledges that his trial counsel did not object to the foregoing instruction, but argues that the instruction is reviewable because it lessens the prosecution’s burden of proof. He argues that the instruction allowed the jury to convict him because he committed some other crime. We review this contention even in the absence of an objection. (*People v. McCoy* (2005) 133 Cal.App.4th 974, 978 [established

rule allows appellate review “even in the absence of an objection, of any instruction affecting the substantial rights of the accused”].)

There is no meaningful distinction between the instruction given in this case and the instruction in *People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*), which the Supreme Court found to describe the appropriate burden of proof. The *Reliford* instruction was as follows: “If you find that the defendant committed a prior sexual offense in 1991 involving S[.]B[.], you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused.

“However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense in 1991 involving S[.]B[.], that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime. The weight and significance of the evidence, if any, are for you to decide.” (*Reliford* at p. 1012.)

Our high court rejected *Reliford*’s argument that jurors who found that he committed the uncharged act by a preponderance of the evidence would rely on that finding to convict him of the charged offenses. The court emphasized that the instruction told the jury that finding the uncharged act by a preponderance of the evidence “ ‘is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime.’ ” (*Reliford* at p. 1013.) “[N]o juror could reasonably interpret the instructions to authorize conviction of a charged offense based solely on proof of an uncharged sexual offense. It is not possible, for example, to find each element of the charged crimes, as the jury was instructed to do before returning a guilty verdict, based solely on the 1991 offense. Nor is it possible to find a union or joint operation of act or conduct and the requisite intent for each charged crime, as the jury was also instructed to do.” (*Id.* at p. 1015.)

Like in *Reliford*, in this case, the jury was instructed, “However, if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable

doubt that he committed one or more of the charged offenses here.” Although the instruction in this case referred to domestic violence and the instruction in *Reliford* referred to sexual offenses, the standard of proof described in each instruction is identical. The statute upon which the two instructions are based are “complimentary portions of the same statutory scheme.” (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333.) Our high court rejected the argument made by Trigueros and we are required to follow the holding of *Reliford*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Other courts have rejected a challenge similar to Trigueros’s challenge. (*People v. Pescador* (2004) 119 Cal.App.4th 252, 262; *People v. Brown, supra*, 77 Cal.App.4th at pp. 1335-1337.)

In addition, in this case the jury was expressly “cautioned and reminded” that “before a defendant can be found guilty of any crime charged in this trial the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime.” Therefore, contrary to Trigueros’s argument, the jury could not convict him of the charged offenses simply because it found by a preponderance of the evidence he committed domestic violence in the past as other courts have found.

II. Alleged Error in Instructing The Jury on How to Evaluate the Testimony of a Child

Without objection, the jury was instructed: “In evaluating the testimony of a child ten years of age or younger, you should consider all of the factors surrounding the child’s testimony, including the age of the child and any evidence regarding the child’s level of cognitive development. [¶] *A child because of age and le[v]el of cognitive development may perform differently than an adult as a witness, but that does not necessarily mean that a child is any more or less believable than an adult.* You should not discount or distrust the testimony of a child solely because he or she is a child.” (Italics added.)

Trigueros argues that the italicized sentence invaded the jury’s role in assessing witness credibility and added credibility to the testimony of the children. Like the foregoing instruction, we review this instruction even absent an objection because it affects the substantial rights of the accused. (*People v. McCoy, supra*, 133 Cal.App.4th at p. 978.) Trigueros’s argument, however, lacks merit.

Penal Code section 1127f provides that “[i]n any criminal trial or proceeding in which a child 10 years of age or younger testifies as a witness, upon the request of a party, the court shall instruct the jury, as follows: [¶] In evaluating the testimony of a child you should consider all of the factors surrounding the child’s testimony, including the age of the child and any evidence regarding the child’s level of cognitive development. Although, because of age and level of cognitive development, a child may perform differently as a witness from an adult, that does not mean that a child is any more or less credible a witness than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child.”

This statute was passed in 1986 because then “recent studies ha[d] undermined traditional notions regarding the unreliability of child witnesses, their untruthfulness, susceptibility to leading questions, or inability to recall prior events accurately. ‘Empirical studies have produced results indicating that most of these traditional assumptions are completely unfounded.’ [Citations.]” (*People v. Jones* (1990) 51 Cal.3d 294, 315.) In *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1393, the court concluded that the jury instruction “provides sound and rational guidance to the jury in assessing the credibility of a class of witnesses as to whom ‘“traditional assumptions”’ may previously have biased the factfinding process.”

The second sentence of CALJIC No. 2.20.1 does not instruct the jury to believe a child witness has additional credibility. Instead, CAJIC No. 2.20.1 instructs the jury regarding the factors it may consider in assessing the testimony of a child without requiring the jury to find such testimony to benefit from enhanced credibility. The other appellate courts to have considered this issue have reached the same conclusion. (*People v. McCoy, supra*, 133 Cal.App.4th at p. 980; *People v. Harlan* (1990) 222 Cal.App.3d 439, 455-457; *People v. Jones* (1992) 10 Cal.App.4th 1566, 1573.) In addition, the jury was instructed, “You are the sole judges of the believability of each witness and the

weight to be given the testimony of each witness.”² Trigueros has not shown any error in instructing the jury with CALJIC No. 2.20.1.

III. Imposition of the Aggravated Term Requires Resentencing

The court imposed the high term because of “the viciousness and callousness and cruelty that was demonstrated by the defendant in this incident[.]” The court also found the victim to be particularly vulnerable and concluded Trigueros would pose a serious danger if a lesser term were imposed.

Subsequent to the imposition of Trigueros’s sentence, the United States Supreme Court decided *Cunningham v. California*, *supra*, 127 S.Ct. 856 and held that California’s determinate sentencing law violates a defendant’s right to a jury trial. (*Id.* at p. 860.) “[T]he Federal Constitution’s jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant.” (*Ibid.*) The Sixth Amendment requires that a jury find true beyond a reasonable doubt “any fact that exposes a defendant to a greater potential sentence. . . .” (*Id.* at p. 863.) The midterm is the relevant maximum – the term that can be imposed solely based on facts reflected in the jury verdict. (*Id.* at p. 868.)

Here, the judge made factual findings in order to impose the high term on counts 2, 3, 4, 5, and the section 12022.5 enhancement. Under *Cunningham*, the sentence is improper because the factual findings were not made by a jury applying the beyond the reasonable doubt standard of proof. (*Id.* at p. 871.) Therefore, the case must be remanded to the trial court to resentence Trigueros in conformity with the requirements of *Cunningham*.

² In contrast to the instruction at issue in *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, the instruction at issue in this case does not require the jury to view the testimony of a child witness with caution. *Rincon-Pineda* disapproved the following instruction in a rape case: “ ‘law requires that you examine the testimony of the female person named in the information with caution.’ ” (*Id.* at p. 871) No similar instruction was given in this case.

DISPOSITION

Trigueros's sentence is vacated. The case is remanded to the trial court for resentencing. In all other respects, the judgment is affirmed. The trial court shall prepare a revised abstract of judgment and forward a copy to the Department of Corrections.

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COOPER, P. J.

We concur:

RUBIN, J.

FLIER, J.