No. 18-9583

ORIGINAL

Supreme Court, U.S.
FILED
JUN 01 2019
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Alfredo M. Vasquez — PETITIONER
(Your Name)

vs.

C. Koenig Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

In The Supreme Court Of California
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Alfredo M. Vasquez # AW7411
(Your Name)
CTF North B-S/B-309
P.O. Box 705
(Address)

Soledad, CA 93960
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

(1.) Was it error, and a denial of Due process of law under the Federal and State constitutions, to exclude from evidence the fact that on the day alleged victim disclosed her alleged sexual contacts with her father, she had intercourse with her boyfriend for the forts time?

(2.) Was it error, and a denial of Appellants right to due process of law under the Federal and California constitution, to instruct the jury in a way that allowed them to convict even if not unanimously convinced that the acts attributable to every count were proved beyond a reasonable doubt?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Wrong

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TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix ____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix ____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Court of Appeal of the State of California First Appellate District Division Four court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was 4-10-19.
A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

On May 19, 2011, appellant ALFREDO MALDONADO VASQUEZ was charged in a 69-count Information with 68 counts of sexual molestation of Jane Doe, plus one count of felonious threats. (1 CT 25-65). Before submission to the jury, the People filed an Amended Information (2 CT 468). The following counts were alleged to have taken place between January 23, 2006 and January 22, 2009:

Counts 1 through 12: Violations of Penal Code Section 288, subdivision (a) when Doe was aged 11;

Counts 13 through 24: Violations of Penal Code Section 288, subdivision (a) when Doe was aged 12;

Counts 25 through 36: Violations of Penal Code Section 288, subdivision (a) when Doe was aged 13;

Count 37: Sodomy with a person under the age of 16 (Pen. Code §286, subd. (b)(2);

Counts 38 through 47: sexual intercourse with Doe, who was then under the age of 16, in violation of Penal Code section 261.5, subdivision (d), between the dates of January 23, 2009 and October 31, 2010;

Counts 48 through 68: Oral copulation with Doe between the above dates, in violation of Penal Code section 288a, subdivision (b)(2).

Count 69: Felonious threats against Doe in October, 2010.

(2 CT 468-499).

The matter came on for jury trial on November 5, 2013 (2 CT 416). The court addressed in limine motions, and granted a motion to include as evidence appellant's statement to the police; thus denying appellant's motion to exclude it (2 CT 418). On November 7, 2013, a jury was selected (2 CT 445).

Opening statements were given on November 8, 2013, and the prosecution began the presentation of evidence (2 CT 450). On November 15, 2013, the People rested and the defense called witnesses (2 CT 502). On November 18, 2013, the defense rested (2 CT 511). At the close of evidence, appellant moved to dismiss the case for lack of evidence; the motion was granted as to Count 69 only (2 CT 524; 7 RT 1011-1016). On the following day, the case was argued and the jury commenced deliberations (2 CT 525). On November 21, 2013, the jurors reached verdicts of guilty on all remaining counts (2 CT 590-597).

Appellant retained new counsel for further proceedings including a motion for a new trial, which was filed and denied.

On March 20, 2015, the court sentenced appellant to a total term of 48 years in prison, with credits limited to 15% (3 CT 837-845). According to the Abstract of Judgment, count 1 (Pen. Code §288, subd. (a)) was given the mid term of 6 years. 12 identical counts were sentenced at one-third the midterm, or two years each, making the sentence for multiple acts of child molestation 30 years; the remaining child-molesting charges (Pen. Code

§288. subd. (a)) were concurrent. Appellant was sentenced to 8 months (1/3 the middle term) for sodomy with a person under 16, and to 10 consecutive 1-year terms for sexual intercourse with a person under 16. This brought the total to 40 years, 8 months. Appellant was sentenced to 11 8-month terms for oral copulation with a person under 16, 88 months, or 7 years, 4 months, bringing the total to 48 years. The remaining counts of oral copulation were sentenced concurrently (3 CT 853-859).

Credit was given for presentence custody, and various fines and fees were imposed. Appellant filed a timely appeal, which was denied by unpublished opinion on January 28, 2019.

DISCUSSION

I.

THE COURT ERRED BY REFUSING TO ALLOW EVIDENCE THAT ON THE DAY DOE REPORTED THE OFFENSES, SHE HAD HAD SEXUAL INTERCOURSE WITH HER BOYFRIEND, THUS DENYING APPELLANT HIS DUE PROCESS RIGHT TO PUT ON A COMPLETE DEFENSE.

A. The court initially denies the motion to admit evidence of Doe's sexual activity with her boyfriend, but changes its mind, and holds a hearing at which Doe admits to having had sex with her boyfriend on the day she went to the police.

Before trial, appellant moved to be able to inquire whether Doe had had sex with her boyfriend Antonio on the day when she ultimately reported the sexual contact with her father. The motion was denied without a hearing.

During Doe's testimony, the court reconsidered the issue and decided that appellant was entitled to a hearing (5 RT 772). Accordingly, the court conducted a hearing in camera at which Doe testified. Doe testified that she had not gone to school on the day she went to the police, because she "just didn't" want to (5 RT 782). Instead, she went to the park. Actually, she had gone to school during part of the morning, and she and her boyfriend Antonio left school and went to the park together (5 RT 784). They went to a secluded place in the park in order to have sex, and were

there about an hour and a half (5 RT 788). After that, they went to the mall for two hours, and then to Cynthia's place (5 RT 789-79)

Doe does not remember if she knew she was going to report her father's behavior to Cynthia's mother (5 RT 792). But she heard that Cynthia had told her mother about what she had told Cynthia, and the mother wanted to talk to her (5 RT 794). She had been thinking about this all day (5 RT 795).

The trial court ruled that any reference to Doe's tryst with Antonio at the park should be excluded under Evidence Code section 352, asking whether "the fact of being intimate over that hour and a half is so probative of her credibility that it outweighs the prejudicial nature of delving into that testimony." (5 RT 800). It was "of de minimis relevance to her credibility as a witness, at most" but "undeniably prejudicial, insofar as it is – or could be taken as bad character evidence of the complaining witness and used in that fashion." (5 RT 803).

B. The evidence was both relevant and probative because it explained why Doe would want to make a claim that would separate herself from her father for as long a time as possible.

The sole contested issue in this case was, did appellant start having sex with his daughter before she was 14, or only after? This of course made a huge difference as to the potential sentence, and also as to credits for

presentence custody and for good behavior in prison, since Penal Code section 2933.1 limits credits to 15% for those convicted of "violent felonies' as defined in Penal Code section 667.5, subdivision (c) which include many of the charges in this case. Even nonviolent cases of molesting a child under 14 are now "violent felonies".

The daughter could have reported the sexual activity with her father at any time. However, the result of doing so would have been to separate herself from her father, her mother, and her siblings, for according to her, her mother refused to believe her when she claimed to have been "raped". In fact, that is just what happened. After going to the police, she was put in foster care. But she still had a boyfriend, a person she could talk to and rely on and trust, a person she could rely on like no other. That person was Antonio, and they were still together at the time of trial. When she visited her father in jail, she told him she had lied to the police because she wanted to be with her boyfriend Antonio (5 RT 682, 684). She is still with Antonio today (5 RT 685).

The importance of Doe and Antonio skipping school to have sex cannot be overestimated. When a teenage girl first has sex with a boy she loves, and who loves her, this is a threshold moment in her life. Even more so where she is about to take a step that will require the boyfriend to, in effect, become her family. She needed to be sure of him before severing ties with her parents and siblings. By skipping school to have sex in the park,

knowing she would soon tell the authorities what she and her father had been doing, she made a life-changing decision. As Caesar said when he crossed the Rubicon into Roman territory, "the die is cast" and there was no turning back. Doe may not have been a student of the Penal Code, but it does not take a lawyer to know that having sex with a teenager is far less serious than having sex with a child too young for high school. Having decided to take an action that would put her father in jail and break up her family, depriving them of support, it was very much in her interest to make sure that appellant would not return to her life until she was an adult living on her own.

C. The fact that Doe and her boyfriend had sex in the park created no substantial danger of "undue prejudice".

Evidence that may cause "undue prejudice" has been defined as evidence that is of such a nature as to inflame the minds of the jury, causing them to use it not upon the point on which it is relevant, but to make it likely the evidence will be misused because it has inflamed the emotions of the jury (*People v. Howard* (2010) 51 Cal.4th 15, 32). Such evidence may be excluded where it uniquely tends to evoke an emotional bias against a party as an individual (*People v. Roberts* (2010) 184 Cal.App.4th 1149, 1192). We disagree with the Court of Appeal to the extent they concluded that the evidence was in any way prejudicial to appellant's daughter.

Whatever prejudice existed in this case was the result of her decision to come forward and disclose what she and appellant had done together, three or four times a month according to what she told Detective Harrison. Compared to this, her decision to have sex with her boyfriend was not shameful, and was part of her understandable decision to break free from her father. And this entirely laudable decision gave her some motive to exaggerate. Whether or not she had a particular awareness of the exact sentence likely to be imposed on appellant, she surely understood that today, sexual acts with a child are regarded with horror, and severely punished, while sexual acts with a teenager are regarded as much less reprehensible.

When Doe testified, she was 18 years of age, and had been in a serious relationship with Antonio for several years. It is impossible to imagine that the tryst with Antonio would inflame the emotions of any juror against her. The judge therefore acted unreasonably in minimizing the importance of Doe's decision to skip school and go to the park with Antonio, and equally unreasonably in declaring that permitting Doe to testify to this would prejudice her in any way. There was no reason to believe that Doe's decision to have sex with her boyfriend would impugn her character at all. From her testimony, it is clear that she was often a willing partner in the sex and oral copulation, and appellant's own claim that she fell in love with him is entirely credible. To switch her affections to

a boy close to her own age could not, under the circumstances, have prejudiced her in the eyes of the jury.

D. Exclusion of the evidence was prejudicial and denied appellant due process of law

The court's decision violated appellant's constitutional rights because it denied him the right to fully and effectively confront his accuser. A defendant in a criminal case has a fundamental due process right to present evidence in his defense. (U.S. Const., 5th Amend.; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *In re Martin* (1987) 44 Cal.3d 1, 29; *People v. Hill* (1986) 41 Cal.3d 826, 831-835; *People v. Reeder* (1978) 82 Cal.App.3d 543, 552-553.) The due process clause of the Fourteenth Amendment and the confrontation and compulsory clauses of the Sixth Amendment guarantee a defendant "a meaningful opportunity to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690; *LaJoie v. Thompson* (9th Cir. 2000) 217 F.3d 663, 668; *In re Martin*, supra, 44 Cal.3d at p. 29.) A defendant's right to confront witnesses against him as guaranteed by the Sixth and Fourteenth Amendments includes the right to cross-examine witnesses to attack their general credibility or show their bias or self-interest. (*Davis v. Alaska* (1974) 415 U.S. 308, 316; *Olden v. Kentucky* (1988) 488 U.S. 227; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-679.)

Moreover, "the right to cross-examine includes the opportunity to show [not only] that a witness is biased, [but also] that the testimony is exaggerated or [otherwise] unbelievable." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 51-52; see also *Delaware v. Fensterer* (1985) 474 U.S. 15, 22.)

Similarly, the Confrontation Clause requires the defense be given a full and fair opportunity "to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." (*Davis v. Alaska*, supra, 415 U.S. at p. 316.) Cross-examination can implicate constitutional protections because there is no certainty about what the jury might think. (See *Davis v. Alaska*, supra, 415 U.S. at p. 317.)

In *Davis*, the court refused to "speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted th[e] [defendant's] line of reasoning had counsel been permitted to fully present it." The court concluded the trial court violated the defendant's Sixth Amendment right to cross-examination by precluding the proffered cross-examination. It is sufficient that a jury "might reasonably" have questioned the witness's reliability or credibility in light of the cross-examination. (See *Delaware v. Van Arsdall*, supra, 475 U.S. at p. 679.)

Had the jury understood that the day Doe made her disclosures was also the day she first had sex with her boyfriend, they would have understood why Doe chose that day to claim not only that she and her father had been having sex, but why she would be willing to break forever the ties to her family, in the hope that appellant would be out of his life for many years or decades. In his closing argument, defense counsel made the point that Doe had a motive to lie about when the sexual contact started. "She wanted to be with her boyfriend" (9 RT 1303) and because she was not getting the reaction from the police she was looking for, "she takes it up a notch and makes something up." (9 RT 1305). He went on to say, "I certainly understand why Jane Doe would want to change her life.... She wants to be with her boyfriend. She wants some freedom. She wants to get away from this very difficult life." (9 RT 1314). Of course the one thing counsel was not permitted to say was the reason why Doe chose that particular day to make her bid for freedom. Counsel was reduced to saying, "Why is Jane Doe waiting three weeks after something happened? What happened to serve as the catalyst to the cause her to, on this day, have to report? Nothing. Nothing at all." (9 RT 1310).

But of course counsel knew, and the jury did not know, that something very important had happened on that day. Doe and her boyfriend had skipped school to have sex in the park. She now had an anchor in her life, other than her abusive and demanding family.

II.

IT WAS PREJUDICIAL ERROR TO GIVE THE JURY THE MODIFIED UNANIMITY INSTRUCTION CONTAINED IN CALCRIM NO. 3501.

A. The jury was instructed that it can rely on generic testimony of child abuse.

The jury was given the modified instruction on unanimity available only in sexual assault or abuse cases, as follows:

> The People have presented evidence of more than one act to prove the defendant committed these offenses.
>
> You must not find the defendant guilty unless:
>
> One, 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 for each offense; or, two, you all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period and have proved that the defendant committed at least the number of offenses charged.

(9 RT 1255-1256)

In this case, Doe was specific as to only three acts: The first act of sexual intercourse when she was 12 (and according to her, her mother was at baby school), the sole act of sodomy, and perhaps the final act of intercourse, possibly including oral sex, that took place three weeks before Doe went to the police. All the rest of her testimony was generic.

B. The generic testimony cannot support the verdicts given in this case.

The instruction is based on *People v. Jones* (1990) 51 Cal.3d 294, and was specifically approved in *People v. Fernandez* (2013) 216 Cal.App.4th 540, 558. *Jones* is of course binding on this Court, despite the persuasive dissent of the late Justice Mosk. But we believe this case can be distinguished from *Jones*, both as to the facts and the rationale.

In *Jones*, our Supreme Court overturned precedent going back to 1901 that held that only specific acts of molestation or other offenses could be the basis for a conviction under a charge limited to a single, separate offense (see, e.g., *People v. Castro* (1901) 133 Cal.11; *People v. Williams* (1901) 133 Cal. 165, whose principles were reaffirmed in *People v. Van Hoek* (1988) 200 Cal.App.3d 811 and *People v. Vargas* (1988) 206 Cal.App.3d 831, 845). As the *Jones* opinion recognized, those latter cases were responsible for the enactment of the "resident child molester" statute, Penal Code section 288.5 (51 Cal.3d at p. 310).

The *Jones* opinion held that nonspecific, generic testimony about repeated sexual acts was sufficient if the *number of acts* and *general time period* when the acts occurred was described in the alleged victim's testimony (51 Cal.3d at p. 316). It went on to hold that generic testimony at a preliminary hearing gave sufficient notice to the accused (*Id.* at p. 317). It also held that such testimony does not interfere with the defendant's ability

to present a defense, in part because the defendant has the right to present an alibi, and the opportunity to cross-examine the alleged vicim (*Id.* at p. 319).

However, one reason *Jones* should not have permitted a conviction on generic testimony in this case is that in this case, appellant had a perfect and unchallengeable refutation, comparable to an alibi, and of course the ability to cross-examine, and still was convicted. Doe, it will be recalled, was quite specific as to when her father first had intercourse with her, and when he subsequently did so, accompanied by the usual lewd touchings. This happened on a weekend day while Doe's mother was at "baby school" with her sister Angela (ACT 47-49). Appellant produced irrefutable evidence that the special classes for Angela and her mother never were on Saturday or Sunday (8 RT 1177-1182). In closing argument, defense counsel emphasized this point strongly (9 RT 1303). The prosecutor could not refute it. Yet appellant was convicted of every count.

The *Jones* court went on to declare that a conviction on generic testimony did not deny the accused the right to a unanimous verdict, provided "there is no possibility of jury disagreement regarding the defendant's commission of any of those acts." However, if there was evidence that "indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given" (51 Cal.3d at p. 321). For that reason, it is enough for a conviction if "the

jury unanimously agrees the defendant committed all the acts described by the victim" (*Id.* at p. 322).

The jury was instructed in accordance with the *Jones* requirement. Yet it is quite clear that in this case, the jury easily could have *disagreed* as to the acts the defendant committed while Doe was still under the age of 14. The only charges against appellant involving acts done before Doe turned 14 on January 23, 2009 were charges of child molestation. Yet some jurors might have believed, that as to the sexual contact, Doe did submit to intercourse with her father, as she testified. Others might have wholly disbelieved Doe on this important issue, because clearly when she tied the acts of sexual intercourse to her mother's weekend trips to "baby school", Doe was lying or mistaken. But these jurors, though distrustful of that aspect of her testimony, could have concluded that there were at least 36 acts of lewd touching of some sort, when appellant was 11, 12, or 13.

Therefore, the rationale of *Jones* falls apart. Because it is possible the jury was not truly unanimous as to the acts committed, that case did not apply, and it was error to give CALCRIM No. 3501.

With due respect, we do not believe the Court of Appeal adequately addressed this issue. Because several acts were directly claimed to have occurred on a weekend while the mother was at "baby school", there is plenty of reason for the jury to have concluded that they did not happen at all, since "baby school" was not on weekends. True, the daughter described

several acts of sexual misconduct that happened over a period of years. But the majority of those acts, or at least the majority of the credible acts, happened after she turned 14, and therefore what did happen was not covered by Counts 1 through 36, all of which charged child molestation of a person under 14. The claim that intercourse (but not necessarily oral copulation) occurred 36 or more times while the daughter and appellant shared a bed, with others in the room or within earshot is unlikely to have been believed by at least some of the jurors, while the claim that sexual activities of various kinds happened at other times of day, but while the mother and her baby were out of the house was entirely credible. Under the unique circumstances of this case, the unanimity instruction could not be given without denying appellant a fair trial and due process of law.

C. Appellant was denied due process of law because the jury was not required to render a truly unanimous verdict as to each count.

Jones recognized that there is a state constitutional right to a unanimous verdict (51 Cal.3d at p. 321, citing Cal. Const., art. I, §16). While a state may in some cases allow a non-unanimous verdict (see, e.g., *Johnson v. Louisiana* (1972) 406 U.S. 356; *Apodaca v. Oregon* (1972) 406 U.S. 404), the fact remains that appellant is entitled under California law to a unanimous verdict, and to allow a less than unanimous verdict in his case

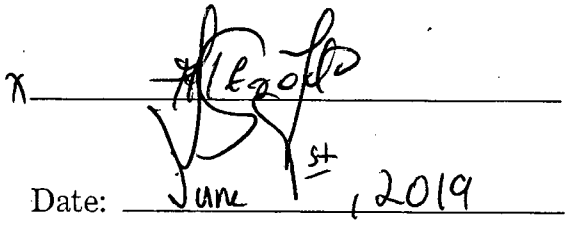
would deny due process and the equal protection of the laws (*Hicks v. Oklahoma* (1980) 447 U.S. 343).

Moreover, any criminal defendant has the basic right to a unanimous jury verdict on the *act* that the defendant committed. While there need be no unanimous agreement as to the theory allowing for guilt, the actus reus is something the jury must agree on (*United States v. Gipson* (5th Cir. 1977) 553 F.2d 453, 457). Here, some jurors could have believed that the incidents of sexual intercourse and any accompanying lewd touchings took place on a weekend day when Doe's mother was attending baby school, as Doe told the detective, and as she testified on direct examination (4 RT 592-593). Others could have concluded that the molestation charges were supported by generic evidence of touchings on worknights, while Doe and appellant were lying next to each other before appellant and his wife went to work. Thus there is a real chance that the jury in this case was not required to be unanimous, and was not in fact unanimous.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: June 1st, 2019