20-6411

EXHIBIT. A

Court of Appeal, Third Appellate District - No. C082061

S262672

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

MIGUEL A. RAMIREZ, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

3rd Appellate District

Change court

Court data last updated: 11/24/2020 06:39 AM

Disposition

The People v. Ramirez
Case Number C082061

Description:	Affirmed in full
Date:	05/04/2020
Disposition Type:	Final The judgment is affirmed.
Publication Status:	Signed Unpublished
Author:	Raye, Vance W.
Participants:	Murray, Jr., William J. (Concur) Krause, Peter A. (Concur)
Case Citation:	none

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Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

3rd Appellate District

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Case Summary

Trial Court Case:	14F05783
Court of Appeal Case:	**C082061**
Supreme Court Case:	S262672
Court of Appeal Opinion:	[PDF] [DOCX]

Caution: For information on when opinions may be cited or relied upon, click here.

Division:	
Case Caption:	The People v. Ramirez
Case Type:	CR
Filing Date:	05/13/2016
Completion Date:	07/16/2020
Oral Argument Date/Time:	

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Supreme Court No. _____

SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. MIGUEL RAMIREZ, Defendant-Appellant.	Ct. of App. No. C082061 Sup.Ct. No. 14F05783

APPEAL FROM SACRAMENTO COUNTY SUPERIOR COURT HONORABLE KEVIN J. McCORMICK, JUDGE

PETITION FOR REVIEW IN THE SUPREME COURT AFTER THE UNPUBLISHED OPINION OF THE THIRD APPELLATE DISTRICT, AFFIRMING THE JUDGMENT

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Supreme Court No. _____

SUPREME COURT OF THE STATE OF CALIFORNIA

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APPEAL FROM SACRAMENTO COUNTY SUPERIOR COURT HONORABLE KEVIN J. McCORMICK, JUDGE

PETITION FOR REVIEW IN THE SUPREME COURT AFTER THE UNPUBLISHED OPINION OF THE THIRD APPELLATE DISTRICT, AFFIRMING THE JUDGMENT

TO THE HONORABLE TANI CANTIL SAKAUYE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner Miguel A. Ramirez petitions this Honorable Court to review the unpublished opinion issued by the Court of Appeal, Third Appellate District, on May 4, 2020, affirming the petitioner's convictions and sentence for a variety of sex offenses. A copy of the opinion is attached as Appendix "A."

QUESTIONS PRESENTED FOR REVIEW

1. Whether a jury instruction incorrectly stating that continuous sexual abuse of a child is a general intent crime was prejudicial?
2. Whether the trial court's unanimity instruction improperly allowed jurors to convict petitioner of continuous sexual abuse based on a single act?
3. Whether cumulative instructional error rendered petitioner's trial unfair under the U.S. Constitution?

STATEMENT OF THE CASE

The opinion adequately sets forth the procedural and factual history of the case.

REASONS FOR GRANTING REVIEW

I.

THE INCORRECT INSTRUCTION ON INTENT IMPROPERLY ALLOWED JURORS TO CONVICT PETITIONER ON LESS THAN PROOF BEYOND A REASONABLE DOUBT

The Court of Appeal agreed that the version of CALCRIM 252 given to petitioner's jury incorrectly identified continuous sexual abuse of a minor as a general intent crime, but held that the error was harmless, finding overwhelming evidence proved Mr. Ramirez must have intended to arouse himself when he touched Doe. [Slip op. at 5-6.] This Court should grant review to reject the Court of Appeal's use of the "overwhelming evidence" standard to find the error harmless.

The Court of Appeal agreed that the prejudice standard for this error is governed by *Chapman v. California* (1967) 386 U.S. 18, 24 [see slip op. at 5], but *Chapman* explicitly precludes a reviewing court from finding harmless error based solely "upon the court's [own] view of 'overwhelming evidence.'" (*Chapman, supra*, 386 U.S. at p. 23.) "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

When the U.S. Supreme Court used "overwhelming evidence" to describe the harmless error standard in *Neder v. United States* (1999) 527 U.S. 1, it said instructional error would be harmless if the omitted element was ***both*** uncontested and supported by overwhelming evidence. Justice Liu has noted in dissent that appellate courts should not measure the sufficiency of the evidence in determining whether an error is harmless under *Chapman*, because sufficiency determinations are supposed to belong to juries:

> The risk of an appellate court usurping the jury's role becomes especially great when harmless error analysis focuses not on whether error might have affected the jury's decisionmaking, but on whether

there was overwhelming evidence to support the result. As Chief Justice Traynor explained, "It is one thing for an appellate court to determine that a verdict was or was not affected by error. It is quite another for an appellate court to become in effect a second jury to determine whether the defendant is guilty." (Traynor, *The Riddle of Harmless Error* (1970) p. 21 (Traynor); see *Neder v. United States* (1999) 527 U.S. 1, 31–32 [144 L. Ed. 2d 35, 119 S. Ct. 1827] (conc. & dis. opn. of Scalia, J.); *Sullivan*, at p. 280; Edwards, *supra*, 70 N.Y.U. L.Rev. at pp. 1185–1199; Field, *Assessing the Harmlessness of Federal Constitutional Error – A Process in Need of a Rationale* (1976) 125 U.Pa. L.Rev. 15.)

(*People v. Jackson* (2014) 58 Cal.4th 724, 790-791.)

This Court also should grant review on the harmlessness analysis because it improperly placed the burden of proof on petitioner – noting "Defendant provided no explanation for any acts before Doe turned 14" [slip op. at 6] – in contravention of *Chapman*'s explicit command that the prosecution prove that any constitutional error is harmless beyond a reasonable doubt. The question under *Chapman* is not whether the defendant provided any or much of a defense the charges. It is whether the erroneous instruction influenced the jury's assessment of the evidence, including the credibility of the prosecution's witnesses and the credibility of the prosecution's interpretation of that evidence.

If the Court of Appeal had followed *Chapman*, it would have agreed with Mr. Ramirez's characterization of the prejudice: (1) Mr. Ramirez testified that none of the prior touching occurred. In *People v. Valenti* (2016) 243 Cal.App.4th 1140, superseded by statute on other grounds as stated in *People v. Brooks* (2018) 23 Cal.App.5th 932, 945, footnote 17, the defendant's testimony was sufficient to show the instructional error was prejudicial. "This testimony, if believed, would have supported a contrary finding on the omitted element." (*Valenti*, *supra*, at p. 1167.) (2) Doe made numerous vague allegations against Mr. Ramirez, even though she denied to her mother, police and health care providers that anyone had touched her sexually before August 2014 (the date on which her mother found her and Mr. Ramirez in bed together). (3) Doe was actively involved in therapy for a prior sexual assault when these alleged new assaults were happening, and she refused to tell that therapist that she was being assaulted. (4) No forensic evidence corroborated the acts underlying count one.

The only count that was a slam dunk was count twelve. All of the others had credibility and vagueness problems. These are exactly the kinds of problems that can be exacerbated by incorrect or conflicting jury instructions on intent.

This Court also should grant review to address the federal constitutional error caused by the instructions, which removed an element of the offense from jurors' consideration. (U.S. Const., amend. 5; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324 [a

failure to instruct on an element of an offense is federal constitutional error].)

II.

THE UNANIMITY INSTRUCTION IMPROPERLY ALLOWED JURORS TO CONVICT PETITIONER OF CONTINUOUS SEXUAL ABUSE BASED ON A SINGLE ACT

Mr. Ramirez argued that CALCRIM 3501 and CALCRIM 1120, read together, gave jurors improperly contradictory instructions on their duty to make unanimous findings on what acts he committed. In particular, he argued that the trial court's version of CALCRIM 3501 failed to explain that jurors' unanimous agreement on one act – in the face of generic allegations of multiple sex acts over time – would be insufficient to convict Mr. Ramirez of continuous sexual abuse. He also argued that even though CALCRIM 1120 directed jurors to unanimously find that three acts occurred, CALCRIM 1120 did not address the particular challenges presented by generic testimony and purportedly cured by CALCRIM 3501. In particular, CALCRIM 1120 does not tell jurors how to assess vague, generic allegations of multiple acts alleged to have occurred over a period of months or years, or how to aggregate that vague evidence to find the commission of three acts sufficient to prove continuous sexual abuse. And CALCRIM 3501 addresses vague generic testimony but does not explain how to aggregate vague generic testimony to find the commission of three acts.

The Court of Appeal rejected this argument, stating that no

unanimity instruction was required and that the instructions as given were correct because the singular term "act" as stated in CALCRIM 3501 described "continuous abuse," which was described in CALCRIM 1120 as "three or more acts." [Slip op. at 6-7.] This analysis ignores how confusing it is to characterize a crime that requires proof of three acts as a single act. Lawyers — and judges might be expected to understand these subtle distinctions, but asking that level of analysis from jurors is unreasonable. And the purpose of jury instructions is to give jurors an understandable and usable exposition of the law.

The Court of Appeal unreasonable refused to recognize that jurors could have found the term "at least one of these acts" conflicted with "three or more lascivious acts." The terms are facially contradictory, and the instructions did nothing to explain the conflict between them. This Court should grant review to address the conflict and to address the federal constitutional error it created by allowing the jury to convict Mr. Ramirez with continuous sexual abuse on less than proof beyond a reasonable doubt of every element of the charged offense. (See U.S. Const., amend. 14; *In re Winship* (1970) 397 U.S. 358.)

III.

THIS COURT SHOULD GRANT REVIEW BECAUSE THE TRIAL WAS INFECTED WITH CUMULATIVE INSTRUCTIONAL ERROR

Not surprisingly, the Court of Appeal rejected Mr. Ramirez's claim that the cumulative effect of the errors in his case violated his federal constitutional right to due process

because it found no errors in the conduct of the trial. The U.S. Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 298, 302-03 [combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"].) The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. (*Chambers, supra*, 410 U.S. at 290 n. 3. See also *Montana v. Egelhoff* (1996) 518 U.S. 37, 53 [stating that Chambers held that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation"].)

Once this Court agrees with Mr. Ramirez that the Court of Appeal incorrectly assessed the merit of his claims, it should revisit the cumulative error analysis and find that even if no error alone merits reversal, the cumulative effect of the errors in this case violate due process.

CONCLUSION

For the foregoing reasons, this Court should grant review on the questions presented.

Respectfully submitted,

Dated: June 10, 2020 By:_____

REBECCA P. JONES
Calif. Bar No. 163313
Attorney for Petitioner RAMIREZ

CERTIFICATE OF COMPLIANCE

I, Rebecca P. Jones, counsel for Miguel A. Ramirez, certify pursuant to the California Rules of Court that the word count for this document is 2,134 words, excluding the tables, this certificate, and any attachment permitted under rule 8.360. This document was prepared in Word Perfect and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at San Diego, California, on June 10, 2020.

Respectfully submitted,

REBECCA P. JONES
Attorney for Petitioner RAMIREZ

EXHIBIT

B.

EXHIBIT. B.

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9/20/19

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. MIGUEL A. RAMIREZ, Defendant-Appellant.	Ct. of App. No. C082061 Sup. Ct. No. 14F05783

APPEAL FROM SACRAMENTO COUNTY SUPERIOR COURT
HONORABLE STEVE WHITE, JUDGE

APPELLANT'S REPLY BRIEF

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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. MIGUEL A. RAMIREZ, Defendant-Appellant.	Ct. of App. No. C082061 Sup. Ct. No. 14F05783

I.

THE TRIAL COURT INCORRECTLY INSTRUCTED JURORS THAT COUNT ONE WAS A GENERAL INTENT OFFENSE

Respondent contends that CALCRIM 252 correctly stated the law, any possible error in its language was harmless, and trial counsel forfeited any objection to the instruction by failing to object. Respondent is wrong on all counts.

A. CALCRIM 252 did not state the law correctly based on the facts of this case.

Respondent spends plenty of space discussing how Penal Code section 288.5 can be violated by general intent conduct – substantial sexual contact – to explain why respondent believes CALCRIM 252 was correct as given here. [Respondent's Brief "RB" 12-15, 18-19.] This entire argument

ignores the fact that the prosecution specifically decided that it did not want jurors to be instructed on substantial sexual conduct and that it believed the lewd and lascivious conduct language would cover all of its allegations. [3 RT 609.] The prosecution specifically asked that the "substantial sexual conduct" language be removed from CALCRIM 1120. [3 RT 609.]. The trial court agreed and only defined lewd and lascivious conduct to jurors. [CT 217 (CALCRIM 1120 describing predicate acts as lewd and lascivious acts).]

The trial court and the parties had an extended discussion about the fact that the main difference between the lewd and lascivious act theory and the substantial sexual conduct theory is that the prosecution does not need to prove the defendant's intent under a substantial sexual conduct theory. (*People v. Whitham* (1995) 38 Cal.App.4th 1282, 1288, 1290.) [See, e.g., 3 RT 607-610.]

When the only theory of liability upon which the jury is instructed requires proof of a specific intent, and jurors are told that that very same offense does not require proof of a defendant's specific intent, respondent cannot credibly contend there was no error.

B. The error was not harmless.

Importantly, respondent failed to distinguish Mr. Ramirez's citation

to and explanation of *People v. Valenti* (2016) 243 Cal.App.4th 1140, superseded by statute on other grounds as stated in *People v. Brooks* (2018) 23 Cal.App.5th 932, 945, which involved a similar instructional problem.

Respondent also fails to address the fact that there were other charges that required proof of a specific intent and CALCRIM 252 identified those charges but explicitly excluded count one from that requirement.

The prosecutor did argue that the acts underlying the 288.5 charge required specific intent to arouse the defendant or the complaining witness, 3 RT 635, but the prosecutor's arguments are not a valid substitution for legally correct and complete jury instructions. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 488-489.)

Respondent argues that any possible error must have been harmless because Doe did not testify to any acts that could have involved touching without the specific intent to arouse Mr. Ramirez or Doe. [RB 20-23.] The problem here is that contrary to respondent's argument, this was not a case in which jurors necessarily had to believe all of Doe's accusations or none of them. Obviously, the fact of the last sex act was undisputed. But jurors also had to sort out whether Doe's accusations of prior sex acts were credible, particularly when they were remote in time and she had not

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reported them previously. Jurors could have believed that more recent sex acts – not covered by count one – occurred but also could have believed that the earliest allegations were not true. Similarly, they could have believed that Doe's allegations underlying count one were exaggerated, intentionally or not, or were misdescribed.

The question is not whether Mr. Ramirez impeached Doe's description of the acts underlying count one. The question is whether the verdict on count one was tainted by the fact that jurors received contradictory instructions on the intent element.

Respondent has not proved that the error was harmless beyond a reasonable doubt.

C. Mr. Ramirez did not forfeit this issue through his counsel's failure to object.

Respondent argues that Mr. Ramirez has forfeited his right to make this argument because his trial counsel did not object to the instructions. [RB 20.] Respondent bases his argument on the fact that defense counsel affirmatively agreed to the instruction and on his contention that CALCRIM 252 was technically correct. [Ibid.]

Although respondent is correct that defense counsel agreed to the instruction as given, defense counsel's acquiescence only operates as a valid waiver if counsel actually had a valid tactical reason for failing to

object. (*People v. Weaver* (2001) 26 Cal.4th 876, 970 [doctrine of invited error bars defendant from challenging on appeal an instruction given by the trial court when defendant has made a conscious and deliberate tactical choice to request the instruction].) The instructional discussion quoted in respondent's brief shows that neither the court nor counsel understood that telling jurors 288.5 is a general intent crime could conflict with the instruction that the underlying 288(a) acts were specific intent crimes. [See 3 RT 613-615.] Thus, unless the record shows that defense counsel understood the way the instructions could be confusing and had a tactical reason for refusing ask that they be edited, this Court cannot find a valid waiver of the issue on appeal.

Furthermore, as Mr. Ramirez demonstrated in *supra,* CALCRIM 252 as given here, within the context of the evidence and the arguments of counsel, was not correct.

Defense counsel could not have intended to reduce the prosecution's burden of proof by failing to require proof that Mr. Ramirez specifically intended to arouse himself or the complaining witness.

D. Respondent has conceded the issue of federal constitutional error.

Although Mr. Ramirez recognizes that respondent argues there was

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no instructional error, respondent did fail to address the argument that any error violated the U.S. Constitution by undermining Mr. Ramirez's federal constitutional right to trial by jury and conviction only upon proof beyond a reasonable doubt of every element of the charge offense. Therefore, this Court should deem respondent to have any conceded that if there is error, it violated the U.S. Constitution. (E.g., *People v. Bouzas* (1991) 53 Cal.3d 467, 480 [respondent apparently conceded legal point by ignoring appellant's arguments and failing to address them].)

II.

THE TRIAL COURT IMPROPERLY FAILED TO MODIFY CALCRIM 3501 TO REQUIRE UNANIMITY ON THE QUESTION OF WHETHER MR. RAMIREZ COMMITTED THREE ACTS SUPPORTING COUNT ONE

Respondent argues any possible conflict between CALCRIM 1120 and CALCRIM 3501 was harmless. [RB 25-26.] Respondent is wrong.

First, Mr. Ramirez agrees that the heading to his argument II misstated the issue – jurors did not need to unanimously agree on all the acts underlying count one. Instead, they did need to unanimously agree that Mr. Ramirez committed at least three acts to support the section 288.5 charge. [Compare AOB 20 with RB 25.]

Second, respondent does not actually argue there was no conflict between CALCRIM 3501 and CALCRIM 1120. This Court should find

that point conceded.

Third, this Court should disagree that any error was harmless. Even though respondent concedes that the majority of this state's courts have analyzed similar issues under *Chapman v. California* (1967) 386 U.S. 18, 24, he pins his entire harmlessness argument on his assessment that Mr. Ramirez's defense was simply not credible. [See RB at 26.]

The question under *Chapman* is not whether respondent or this Court believes the defendant's testimony was credible. The question is whether the prosecution can show, beyond a reasonable doubt, that the instructional error had no effect on the jury's verdict. As the California Supreme Court explained in *People v. Neal* (2003) 31 Cal.4th 63, this Court must "'find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' [Citation.] Thus, the focus is what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is 'whether the . . . verdict actually rendered in this trial was surely unattributable to the error.' (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 . . .)" (*Neal, supra*, at p. 86.)

Mr. Ramirez contested all of the allegations, but the fact that he was convicted of all counts does not mean the jury necessarily found his

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testimony incredible on every count. Count one was focused on the acts that allegedly occurred before Doe turned 14; the remaining counts focused on acts that occurred when she was 14 and older. Given that Doe was 16 when the sexual acts were discovered, it is not unreasonable to think that jurors might have struggled to agree that the behavior most remote in time and that was described most vaguely actually occurred. And jurors could have believed, based on Doe's admitted lies and prior failure to report, that most of the count one allegations were not true, even if they believed the other allegations were true.

Respondent fails to address these possibilities, even though Mr. Ramirez pointed them out in his AOB. [AOB 27.]

Respondent fails to show beyond a reasonable doubt that the error was harmless.

CONCLUSION

For the foregoing reasons, this Court should reverse Mr. Ramirez' conviction on count one.

Respectfully submitted,

/s/ Rebecca P. Jones

Dated: September 16, 2019 By: _____

REBECCA P. JONES
Attorney for Defendant-Appellant
MIGUEL RAMIREZ

CERTIFICATE OF COMPLIANCE

I, Rebecca P. Jones, counsel for Miguel Ramirez, certify pursuant to the California Rules of Court that the word count for this document is 1,976 words, excluding the tables, this certificate, and any attachment permitted under rule 8.360. This document was prepared in Word Perfect and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Diego, California, on September 16, 2019.

Respectfully submitted,

/s/ Rebecca P. Jones

REBECCA P. JONES
Attorney for Defendant-Appellant
RAMIREZ

PEOPLE V. RAMIREZ
Case No. C082061

PROOF OF SERVICE
C.C.P. 1013a, 2015.5

I declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States and employed in the City and County of San Diego. I am over the age of eighteen (18) years and not a party to the within above-entitled action; my business address is 3549 Camino del Rio South, Suite D, San Diego, California 92108; on this date I mailed the APPELLANT'S REPLY BRIEF addressed as follows:

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REBECCA P. JONES