Filed 7/31/09 P. v. Nieves CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE NIEVES, Defendant and Appellant.	F056770 (Super. Ct. No. F06909749) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Robert H. Oliver, Judge.

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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* Before Vartabedian, Acting P.J, Gomes, J., and Dawson, J.

By a first amended information filed September 8, 2008,[1] appellant, Jose Nieves, was charged with four counts of committing a lewd or lascivious act on a child under the age of 14 (Pen. Code, § 288, subd. (a); counts 1-4) and two counts of sexual battery (Pen. Code, § 243, subd. (e)(1); counts 5, 6). The matter was set for jury trial, the court heard pretrial motions on September 5 and testimony began on September 8.

On September 9, pursuant to a plea agreement, appellant pled no contest to counts 1 and 3, and the People dismissed the remaining charges. On November 12, the court imposed a prison term of eight years, consisting of the six-year midterm on count 1 and two years, representing one-third of the midterm, on count 3.

On December 12, appellant filed a notice of appeal in which he requested the court issue a certificate of probable cause (Pen. Code, § 1237.5). On that same date, the court denied that request.

Appellant's appointed appellate counsel has filed an opening brief which summarizes the pertinent facts, with citations to the record, raises no issues, and asks that this court independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) Appellant has not responded to this court's invitation to submit additional briefing.

FACTS

Count 1

J.N. was born December 1987.[2] Appellant is her stepfather. J.N. "grew up with him."

Appellant began "touching [J.N.] inappropriately" when she was "very young," when they were living in San Jose. When she was approximately 10 years old appellant "would walk by and ... grab ... [her] breast." When she was between 11 and 13 years of

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[1] Except as otherwise indicated, further references to dates of events are to dates in 2008.

[2] Our summary of the facts of the count 1 offense is taken from J.N.'s trial testimony.

age, appellant would come into her room every night, except when there were visitors at the family's residence, and, while she was sleeping, "touch[] [her] thighs."

When J.N. was 14 years old, the family moved to Madera. While J.N. lived there, "there [were] a lot of times" when appellant would come into her room while she was sleeping and pull her sweat pants down. On another occasion in Madera, she had gone to bed with her bra on, but she woke up to find her bra off and appellant touching her on her breast.

The family moved to Fresno when J.N. was 17 years old. The "touching" that occurred in San Jose and Madera "continued in Fresno"; it was "the same." On one occasion, J.N. was awoke to find appellant on her bed, next to her, masturbating and touching J.N. "over [her] clothes" on her "inner thighs." On other occasions, while she was living in Fresno, appellant touched her on her breasts, under her clothes.

Count 2

City of Fresno Police Officer Miguel Archan testified that on November 24, 2006, while investigating a complaint of domestic violence, he was approached by a minor, Y.N., who was born October 1990.[3] Y.N. told the officer the following. When she lived in San Jose, appellant would enter her room at night and touch her breasts and "vaginal area" over her clothing. She later moved to Madera, where the "same incidents" occurred. The family moved to Fresno when Y.N. was 16 years old. There, "the same incidents continued."

DISCUSSION

Following independent review of the record, we have concluded that no reasonably arguable legal or factual issues exist.

The judgment is affirmed.

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[3] Our summary of the facts of the count 2 offense is taken from Officer Archan's preliminary hearing testimony.