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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

TROY J. ANDERSON,

Defendant and Appellant.

A139800

(Contra Costa County  
Super. Ct. No. 05-110688-9)

Defendant Troy J. Anderson appeals from a judgment of conviction, following a jury trial, of oral copulation with a child under age 10 (Pen. Code, § 288.7, subd. (b),<sup>1</sup> count 1), lewd and lascivious touching of a child under age 14 (§ 288, subd. (a), counts 2–3), and child molestation (§ 647.6, subd. (a)(1), count 4). The trial court, accounting for the three strikes’ law, sentenced defendant to 30 years to life on count 1, 12 years for count 3 (consecutive to count 1), 12 years for count 2 (concurrent to count 3), and time served for count 4. Adding other enhancements, defendant’s total sentence is 48 years to life. On appeal, defendant complains of instructional error, ineffective assistance of counsel (IAC), and that the sentence on count 2 should have been stayed under section 654. We conclude there was neither instructional error, nor IAC. We agree, however, the judgment must be modified to stay the sentence on count 2, as the conduct giving rise to counts 1 and 2 was the same.

<sup>1</sup> All further statutory references are to the Penal Code unless indicated.

## DISCUSSION

Given the issues defendant raises on appeal, we discuss the relevant evidence in connection with each issue.

### *Instruction of Jury Regarding Circumstantial Evidence*

Before deliberations, the trial court instructed the jury with CALCRIM No. 223, describing the nature of, and differences between, direct and circumstantial evidence.<sup>2</sup> It then chose between CALCRIM Nos. 224 and 225. CALCRIM No. 224<sup>3</sup> is a broader

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<sup>2</sup> CALCRIM No. 223 states:

“Facts may be proved by direct or circumstantial evidence or by a combination of both. *Direct evidence* can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that testimony is direct evidence that it was raining. *Circumstantial evidence* also may be called indirect evidence. Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question. For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside.

“Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all the evidence.”

<sup>3</sup> CALCRIM No. 224 states:

“Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

“Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial

instruction discussing when circumstantial evidence may prove any aspect of defendant's guilt. CALCRIM No. 225<sup>4</sup> is a narrower instruction that focuses on when circumstantial evidence may prove a defendant's intent or a mental state. According to the use notes for CALCRIM No. 225, it should be given "when the defendant's intent or mental state is the only element of the offense that rests substantially or entirely on circumstantial evidence. If other elements of the offense also rest substantially or entirely on circumstantial evidence, do not give this instruction. Give CALCRIM No. 224." With the express consent of defense counsel, the trial court selected the narrower CALCRIM No. 225 instruction, over CALCRIM No. 224. On appeal, defendant contends the trial court had a sua sponte obligation to give CALCRIM No. 224, the broader instruction, given the state of the evidence.

The trial court must give CALCRIM No. 224 or its equivalent (for instance, CALJIC No. 2.01) "on its own motion when the prosecution relies substantially on

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evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

<sup>4</sup> CALCRIM No. 225 states in part:

"A[n] (intent/ [and/or] mental state) may be proved by circumstantial evidence.

"Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

"Also, before you may rely on circumstantial evidence to conclude that the defendant had the required (intent/ [and/or] mental state), you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required (intent/ [and/or] mental state). If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required (intent/ [and/or] mental state) and another reasonable conclusion supports a finding that the defendant did not, you must conclude that the required (intent/ [and/or] mental state) was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

circumstantial evidence to prove guilt. [Citations.] Conversely, the instruction need not be given when circumstantial evidence is merely incidental to and corroborative of direct evidence, due to the ‘danger of misleading and confusing the jury where the inculpatory evidence consists wholly or largely of direct evidence of the crime.’ ” (*People v. McKinnon* (2011) 52 Cal.4th 610, 676.)

To assess whether the charges against defendant were based substantially on circumstantial evidence we must review the evidence presented against him.

We start with the trial testimony of the victim, Jane Doe I (Doe).<sup>5</sup> One night in 2010, Doe, then 10 years old, and her younger sister went to sleep. They shared one of two beds in a bedroom. Doe was wearing underwear and a long nightshirt that went to her knees. Doe’s mother and defendant, an acquaintance of mother’s, shared the other bed in the same room.

Doe’s sleep was first disturbed when she “felt someone touching [her] leg” on the side of her thigh. The touch lasted about three seconds and was under the nightshirt, on her skin. Doe scooted over and rolled over, and saw it was defendant who had touched her. She went back to sleep.

Later, in the morning, Doe was again awakened. This time, she “felt something in [her] mouth” on her “teeth and [her] tongue” she described as “squishy.” Doe opened her eyes and the first thing she saw was defendant down on a knee putting “the thing” back in the front of his pants. The thing defendant was putting away was his penis. Doe was not “able to see his [penis] outside of his pants while he” was putting it away. Doe felt a sticky, gooey feeling around her lips she had never felt before.

Doe went into the living room. Defendant followed and said, “ [s]orry about what happened. I have something wrong with me.’ ”

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<sup>5</sup> The parties referred to the victim in this case as Jane Doe 1 in the trial court and in the appellate briefing. Another victim, from a separate incident also testified at trial and was given the moniker Jane Doe 2.

A short while later, Doe passed by the bathroom with the door open and saw defendant doing something in the mirror with his penis: he was moving his hand up and down his penis. Defendant asked Doe for lotion.

Doe had previously made a statement to an investigating police officer, and that statement was played for the jury in addition to her live testimony. (See Evid. Code, § 1360 [allowing out-of-court statement of minor to be admissible in certain situations].) She told the officer “I felt [defendant] under the cover touching my thigh.” She also told the officer she felt defendant’s penis in her mouth and that she “saw it and then he took it out of my mouth and I rolled my head down and then he put it back in his pants.” When she saw it, it was touching the tip of her tongue.

Count 4, based on defendant masturbating in front of Doe, was unquestionably based substantially on direct evidence, namely Doe’s account that she saw defendant in the act.

As to counts 1 and 2, related to the oral copulation, defendant contends Doe testified she never saw defendant’s penis, thus making her testimony circumstantial. To begin with, defendant’s characterization of Doe’s testimony is inaccurate. Doe stated she did not see defendant’s penis while he was putting it away in his pants—testimony that is not inconsistent with Doe’s statement to the investigating police officer that she saw defendant’s penis touching her tongue, which was also admitted into evidence. Moreover, Doe testified to *feeling* defendant’s penis in her mouth. Defendant cites no authority suggesting feeling something is less “direct evidence” than seeing something. Indeed, direct evidence is simply “evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.” (See Evid. Code, §§ 410, 140 [“ ‘Evidence’ means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.”]; accord, *United States v. Yousef* (2d Cir. 2003) 327 F.3d 56, 133[“ ‘Direct evidence is something that a witness sees, hears, tastes, touches, something

that comes directly to his knowledge through his senses.’ ”].) Thus, the evidence against defendant on these counts, though corroborated by circumstantial evidence, was substantially direct.

As to the remaining charge, count 3, related to touching Doe’s thigh, Doe told the police officer “I felt him[, defendant,] under the cover touching my thigh.” For the reasons just discussed, this count was also substantially based on direct evidence.

But even if the trial court should have given CALCRIM No. 224, the error was harmless. The failure to give the broader circumstantial evidence instruction “is assessed under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836.” (*People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1274.) That is, “reversal is required only when the reviewing court finds, after an examination of the entire cause, that it is reasonably probable a result more favorable to the defendant would have been reached in the absence of the error.” (*Ibid.*; cf. *People v. McKinnon*, *supra*, 52 Cal.4th at p. 677 [failure to instruct on the evaluation of circumstantial evidence is not error under federal law, if “jury is properly instructed on the reasonable doubt standard”].)

It is not reasonably probable a more favorable result would have been reached in this case. First, the jury was instructed that the People had to prove the elements of each crime beyond a reasonable doubt and that if there was reasonable doubt, the jury must acquit. They were also given CALCRIM No. 223, concerning the nature of direct and circumstantial evidence. And they were given CALCRIM No. 225, which explains, in the same language as CALCRIM No. 224 employs: “Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.”

Further, defense counsel, when addressing the jury at the close of trial, made the very arguments defendant makes on appeal regarding the equivocal or allegedly “circumstantial” nature of the evidence. Counsel asked the jury to consider that simply

stuffing a penis back inside one's pants does not equate with oral copulation and urged the jury to find Doe had not actually seen defendant's penis and might have been mistaken about what she felt in her mouth. Counsel also asked the jury to disbelieve Doe that defendant touched her under the covers, arguing Doe was groggy and could not be sure. To find defendant guilty, under the instructions given regarding circumstantial evidence and reasonable doubt, the jury had to reject defense counsel's proffered conclusions as being *unreasonable*. If presented with CALCRIM No. 224's clarifying instruction that innocence must be found if a *reasonable* conclusion of innocence may be drawn from any circumstantial evidence (not just that related to intent or mental state), the jury would not have been asked to take a materially different view of the evidence.

### ***Instruction Regarding Flight***

The jury also heard evidence defendant was apprehended one day after the charged conduct—at a Greyhound bus station and while carrying two bags. Defendant was subject to a parole condition that forbade him from traveling outside of 50 miles of his Vallejo residence. Defendant testified he was leaving the state to take a job in Utah.

The trial court instructed the jury with a version of CALCRIM No. 372, stating:

“If the defendant fled or tried to flee immediately after the crime was committed or after he was accused of committing the crime, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself.”

Defendant argues this instruction was inconsistent with section 1127c, which governs flight instructions, and was argumentative because it identifies only a prosecution inference, namely guilt.

Section 1127c provides: “In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: [¶] The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in

itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.” (§ 1127c.)

As can be seen from comparing the text of CALCRIM No. 372 and section 1172c, there is little substantive difference between them. Primarily, it is just the ordering of concepts that is different. Accordingly, for the reasons discussed in *People v. Paysinger* (2009) 174 Cal.App.4th 26, 31–32 (*Paysinger*), we conclude there was no inconsistency between the statute and the jury instructions given.

Defendant argues CALCRIM No. 372 is argumentative because, unlike a similar instruction, CALJIC No. 2.52, and section 1127c, it does not ask the jury to consider flight in light of all other facts in deciding “guilt *or innocence*.” (See *People v. Mendoza* (2000) 24 Cal.4th 130, 179, italics omitted.) The Supreme Court ruled CALJIC No. 2.52 is not argumentative because it does not invite a single inference. (*People v. Mendoza*, at p. 180.) Although phrased differently, CALCRIM No. 372 tells the jury it must decide the meaning and import of any asserted flight for itself. Thus, like CALJIC No. 2.52 and section 1127c, it does not require a finding of guilt.

In *Paysinger*, the defendant complained, as defendant does here, that CALCRIM No. 372 unfairly told the jury flight may prove only guilt, unlike section 1127c, and CALJIC No. 2.52, which both expressly mention innocence. (*Paysinger, supra*, 174 Cal.App.4th at pp. 31–32.) As the *Paysinger* court noted “[i]t has long been accepted that if flight is significant at all, it is significant because it may reflect consciousness of guilt, which in turn tends to support a finding of guilt. [Citation.] That CALCRIM No. 372 tells the jury this does not in any way make the instruction unconstitutional.” (*Ibid.*; see also *People v. Rios* (2007) 151 Cal.App.4th 1154, 1159 [CALCRIM No. 372 does not lessen the prosecution’s burden].) Indeed, there has been no suggestion that defendant’s flight or attempted flight, if proven, might somehow point to innocence. Accordingly, the instruction was not argumentative in this case.

### ***Ineffective Assistance of Counsel***

Defendant argues his trial counsel was ineffective in several respects. A defendant asserting IAC must “show[] by a preponderance of the evidence that (1) counsel’s performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficiencies resulted in prejudice.” (*People v. Centeno* (2014) 60 Cal.4th 659, 674.)

In his opening brief, defendant claimed his trial counsel should have objected to the evidence he was on parole when he left for the Greyhound station. Defendant has since abandoned this claim, conceding a proper objection was made and ruled upon. (See generally *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1020, fn. 2; *People v. Durham* (1969) 70 Cal.2d 171, 189.)

Defendant also claims his trial counsel should have objected to the withholding of CALCRIM No. 224 and the giving of CALCRIM No. 372. Because we have concluded the trial court did not err with respect to these instructions, no IAC claim regarding them is viable. (See *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1131 [“Ineffective assistance claims based upon the failure to make evidentiary objections are routinely denied on the bases that the unasserted objection was nonmeritorious and would have been overruled.”]; see also *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1140.)

Defendant additionally complains his trial counsel should have objected to questioning about defendant’s pretrial statements to the court. At various times during the trial court proceedings, defendant chose to represent himself and submitted a number of pleadings on his own behalf. In these pleadings, defendant argued he was “sovereign” and not subject to California’s criminal laws. The prosecutor, when cross-examining defendant at trial, asked about his “sovereignty” argument and whether he presented it to the court in pretrial motions while representing himself in propria persona. The prosecutor then asked defendant whether he understood he was testifying under penalty

of perjury and could face consequences for lying, whether or not he thought he was “sovereign.”

Defendant argues his counsel should have objected to questioning about defendant’s pretrial motions because that information was privileged, irrelevant, and more prejudicial than probative, and because the questions constituted prosecutorial misconduct. As none of these objections have merit, defendant’s counsel was not ineffective for raising them. (See *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1140; *People v. Roberts*, *supra*, 195 Cal.App.4th at p. 1131.)

First, defendant’s in-court statements made in the course of representing himself are not privileged or immunized by the litigation privilege set forth in Civil Code section 47. Parties’ statements from early in a lawsuit are routinely used against them later on, despite the litigation privilege. (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1168 [“ ‘The privileges of Civil Code section 47, *unlike evidentiary privileges which function by the exclusion of evidence . . . , operate as limitations upon liability.*’ . . . [I]t is quite clear that section 47(2) has never been thought to bar the *evidentiary* use of every ‘statement or publication’ made in the course of a judicial proceeding: answers to interrogatories or to questions at depositions are, for example, routinely admitted into evidence and relied on in determining liability even though they are clearly ‘statements made in the course of a judicial proceeding.’ Thus, while section 47(2) bars certain tort causes of action which are predicated on a judicial statement or publication itself, the section does not create an evidentiary privilege for such statements.”]; see also *People v. Kiney* (2007) 151 Cal.App.4th 807, 815 [questioning in propria persona defendant about statements previously made to court does not generally impinge on right to self-representation].)

Additionally, defendant’s contentions about being a “sovereign” not subject to California law, and his willingness to present those contentions to the court, were relevant to defendant’s credibility. If defendant believed himself immune from perjury

charges, or if he was willing to make specious arguments to the court with a straight face—those facts would bear on his credibility. (See *People v. Mackey* (2015) 233 Cal.App.4th 32, 115 [offer of immunity to witness may affect credibility of witness].)

Finally, the prosecutor's questions did not elicit any inflammatory testimony that unduly prejudiced defendant (see *People v. Hollie* (2010) 180 Cal.App.4th 1262, 1276–1277), and those questions, which sought unprivileged, relevant evidence, did not constitute prosecutorial misconduct.

### ***Sentence on Count 2***

As discussed, count 1 (oral copulation) and count 2 (the first of two lewd touching counts) each arose from the same conduct. Defendant thus maintains his sentence on count 2 should have been stayed pursuant to section 654, not run concurrently to count 3 (the other lewd touching count). The Attorney General agrees, as do we.

### **DISPOSITION**

The judgment is affirmed, except the sentence on count 2 shall be stayed pursuant to section 654. The superior court is directed to issue an amended abstract of judgment reflecting this change, which it shall communicate to the Department of Corrections.

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Banke, J.

We concur:

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Margulies, Acting P. J.

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Dondero, J.

A139800, *People v. Anderson*