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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICKY PATRICK MANKINI,

Defendant and Appellant.

A140740

(Solano County
Super. Ct. No. FCR 292499)

Defendant Ricky Mankini appeals a judgment convicting him of one count of oral copulation with a child under the age of 10 and one count of sexual penetration with a child under the age of 10 and sentencing him to prison for two consecutive terms of 15 years to life. On appeal, defendant does not challenge his conviction or sentence with respect to the oral copulation charge. He contends, however, that two instructional errors require reversal of his conviction on the sexual penetration charge. We find the asserted instructional errors harmless and, therefore, we shall affirm the judgment.

Factual and Procedural History

Defendant was charged with three offenses: (1) digital penetration of a child who was 10 years of age or less, in violation of Penal Code section 288.7, subdivision (b)¹ (count 1); (2) oral copulation of the same child, in violation of the same section and subdivision (count 2); and (3) committing a lewd act on a second child who was under the age of 14, in violation of section 288, subdivision (a) (count 3).

¹ All statutory references are to the Penal Code unless otherwise noted.

The following evidence was presented at trial:²

In 2011 and early 2012, defendant lived with Regina C. and her three children, who were all under the age of 10. The victim in this case is Regina's oldest daughter who was 10 at the time of trial.

Regina testified that on one occasion defendant called the child into the bedroom when Regina was on the bed. He asked the child to get on the bed and took off her pants and underwear. As the child lay on the bed between defendant and Regina, defendant put his mouth on the child's vagina. Defendant then suggested that Regina do the same, which she did. After this, defendant put his fingers inside the child's vagina. The child then got dressed and left the room, and Regina and defendant had sex.

Regina also described a separate incident during which defendant called the child into the room, took off the child's pants and underwear and rubbed his penis "on [the child's] vagina." He said his penis "wouldn't fit." Regina claimed to have seen a couple of such incidents.

Regina was arrested on April 17, 2012. She pled guilty to the crime involving her oral copulation of her daughter—a violation of Penal Code section 288, subdivision (a). As a result of her guilty plea, she will receive a six-year prison term.

The victim testified that defendant orally copulated her "a lot of times." On one occasion defendant removed her underwear and licked her privates. After that, he tried to put his "private" in her. Defendant had his "private out" and was rubbing it "in [her] private." The victim confirmed that on one occasion her mother had touched her on her private with her (Regina's) mouth after defendant made Regina do it.

When asked if defendant ever touched her private with any other body part other than his private and his mouth, the victim said no. When asked if defendant touched her privates with his finger or hand, the victim said no.

² Because the jury found defendant not guilty on count 3, we do not recite any of the evidence presented with respect to the second alleged victim. Likewise, because defendant does not challenge his conviction on count 2, we have limited our recitation of the facts with respect to the evidence of oral copulation.

The prosecutor played a videotape of an interview of the child made on April 17. The jury was provided a transcript of the interview during the playing of the videotape.

In the interview, the child says that defendant put his tongue and his fingers “inside” her private. On this same occasion, Regina touched the victim’s privates with her tongue. The victim said that defendant did this sort of thing to her all the time. She said that defendant would touch her “down there,” put his tongue “down there,” and put his private area “on her.”

Defendant denied the allegations and testified that he never molested the child.

The jury found defendant guilty on counts 1 and 2, and not guilty on count 3 and on all lesser included offenses of that count. Defendant was sentenced to state prison for 30 years to life consisting of consecutive terms of 15 years to life for counts 1 and 2. Defendant filed a timely notice of appeal.

Discussion

Defendant was charged in count 1 with digitally penetrating the victim, in violation of section 288.7, subdivision (b).³ The jury was instructed pursuant to CALCRIM No. 252 that the offense charged in count 1 is a general intent crime: “The crimes charged in counts 1, 2 and 3 require proof of the union, or joint operation, of act and wrongful intent. [¶] The following crimes require general criminal intent: sexual

³ Section 288.7, subdivision (b) provides: “Any person 18 years of age or older who engages in oral copulation or sexual penetration, as defined in Section 289, with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 15 years to life.” Section 289, subdivision (k) provides: “As used in this section: [¶] (1) ‘Sexual penetration’ is the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object. [¶] (2) ‘Foreign object, substance, instrument, or device’ shall include any part of the body, except a sexual organ. [¶] (3) ‘Unknown object’ shall include any foreign object, substance, instrument, or device, or any part of the body, including a penis, when it is not known whether penetration was by a penis or by a foreign object, substance, instrument, or device, or by any other part of the body.”

penetration of child under 10 as charged in count 1, oral copulation of child under 10 as charged in count 2, and battery, a lesser crime of lewd act on a child under 14 as charged in count 3. For you to find a person guilty of these crimes, that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act; however, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime.”

The jury was instructed pursuant to CALCRIM No. 1128, on the elements of count 1 as follows: “The defendant is charged in count 1 with engaging in sexual penetration with a child under 10 years or younger [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant engaged in an act of . . . sexual penetration with [the victim]; [¶] 2. When the defendant did so, [the victim] was 10 years of age or younger; [¶] 3. At the time of the act, the defendant was at least 18 years old. [¶] . . . [¶] Sexual penetration means penetration, however slight, of the genital or anal opening of the other person or causing the other person to penetrate, however slightly, the defendant’s or someone else’s genital or anal opening or causing the other person to penetrate, however slightly, his or her own genital or anal opening by any foreign object, substance, instrument, device, or any unknown object for the purpose of sexual abuse, arousal, or gratification. [¶] . . . [¶] An unknown object includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object penetrated the opening. [¶] A foreign object, substance, instrument, or device includes any part of the body except a sexual organ.” Defendant was found guilty of sexual penetration.

Defendant contends the above instructions were erroneous in two respects. First, defendant argues that the court erred in instructing the jury that the offense of sexual penetration is a general intent crime when it is actually a specific intent crime. (See *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1538 [“[T]he crime of unlawful sexual penetration requires the specific intent to gain sexual arousal or gratification or to inflict abuse on the victim.”]; *People v. Ngo* (2014) 225 Cal.App.4th 126, 161 [“sexual penetration

of a child under 10 is a specific intent crime, requiring the jury to find the defendant penetrated the victim ‘for the purpose of sexual arousal, gratification, or abuse.’ ”.) The Attorney General points out that at least one court has described the offense of sexual penetration as a general intent crime. (See *People v. Dillon* (2009) 174 Cal.App.4th 1367, 1380 [“[C]ontrary to the trial court’s instruction under CALCRIM No. 252, forcible sexual penetration is a general intent crime. . . . [T]he mental state required to be found guilty of forcible sexual penetration is not the same as the specific intent to commit that crime.”].) The Attorney General also argues, however, that the distinction is largely immaterial in this case because the jury was properly instructed that “in order to convict, the act of penetration must be accompanied by the intent to achieve sexual gratification.” Therefore, any potential error, the Attorney General asserts, was not prejudicial because “[t]aking the jury instructions as a whole, it is not reasonably probable that the jury found appellant guilty of count one without determining that appellant had penetrated [the victim] for the purpose of sexual abuse, arousal, or gratification.”

We agree that any error with regard to the identification of count 1 as a general intent crime was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The jury was instructed that defendant could be found guilty only if (1) he acted with wrongful intent in that he intentionally did the prohibited act (i.e., sexually penetrated victim) (CALCRIM No. 252), and (2) he performed the prohibited act for the purpose of sexual abuse, arousal, or gratification (CALCRIM No. 1128). According to defendant, the jury should have been instructed that defendant could be found guilty only if he intentionally committed the prohibited act (i.e., sexually penetrated victim) with a specific intent to do so for the purpose of sexual arousal, gratification, or abuse. We see little difference between the formulation given by the trial court and defendant’s proposed instruction. “If we assume, as we must, that ‘ “the jurors [were] intelligent persons and capable of understanding and correlating all jury instructions . . . given,” ’ ” then we can only conclude that there is no reasonable likelihood they misapplied the instructions. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1089, italics omitted.)

There is no likelihood that the arguably erroneous instruction contributed in any manner to defendant's conviction.

Defendant also contends that his conviction on count one must be reversed because CALCRIM No. 1128 allowed the jury to find him guilty based on either digital penetration or penetration with an unknown object, including his penis, and there is no evidence to support his conviction for penetration with an unknown object. He argues, "The instruction should not have included any language about penetration with an unknown object or any suggestion that the statute could be violated by penetration with a penis. This is because this case does not involve penetration with an unknown object. The objects that penetrated [the victim] were known objects." The Attorney General concedes that "[t]he evidence consistently showed that [the victim] knew the nature of the foreign object, and thus, the instruction on when penetration by a penis can constitute the crime was not applicable."

Defendant did not object to the instruction but argues that the court had a duty " 'to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.' " (*People v. Saddler* (1979) 24 Cal.3d 671, 681.) The Attorney General argues that the instructional error was waived by defendant's failure to object. Defendant responds correctly that the court had a sua sponte duty to correctly instruct the jury on all elements of the charged offenses and general principles of law relevant to the issues raised by the evidence and no objection was required to preserve the issue for appellate review. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Because there was no evidence to support liability based on penetration by an unknown object, the jury should not have been so instructed.

"[G]iving an irrelevant or inapplicable instruction is generally ' 'only a technical error which does not constitute ground for reversal.' " (*People v. Cross* (2008) 45 Cal.4th 58, 67.) In cases where a jury instruction is factually unsupported, "affirmance is the norm." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129 ["If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required

whenever a valid ground for the verdict remains.”].) An error in giving a legally correct but irrelevant instruction requires reversal only if it is reasonably probable the defendant would have obtained a more favorable verdict absent the error. (*People v. Mills* (2012) 55 Cal.4th 663, 681, citing *Guiton*, *supra*, at p. 1130 [“The error of instruction on an inapplicable legal theory is reviewed under the reasonable probability standard of *People v. Watson* (1956) 46 Cal.2d 818, 836.”].)⁴

“In determining whether there was prejudice, the entire record should be examined, including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict. [Citation] Furthermore, instruction on an unsupported theory is prejudicial only if that theory became the sole basis of the verdict of guilt; if the jury based its verdict on the valid ground, or on both the valid and the invalid ground, there would be no prejudice, for there would be a valid basis for the verdict. . . . [T]he appellate court should affirm the judgment unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory.” (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1130.) In *Guiton*, the court “hypothesize[d] a case in which the district attorney stressed only the invalid ground in

⁴ Defendant’s reliance on *People v. Chun* (2009) 45 Cal.4th 1172 for the proposition that the *Chapman* standard of review is applicable is misplaced. In *People v. Guiton*, *supra*, 4 Cal.4th at page 1129, the court carefully distinguished between instructions involving a legally inadequate theory from a factually inadequate theory on the ground that “ ‘[j]urors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.’ ” (*Id.* at p. 1125.) As the court in *Guiton* explained, “if the inadequacy [of proof] is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute,” then reversal is generally required “absent a basis in the record to find that the verdict was actually based on a valid ground.” (*Id.* at p. 1129.) *People v. Chun*, *supra*, 45 Cal.4th 1172, cited by defendant, involves instruction on a legally inadequate theory of liability and thus applies the different rule.

the jury argument, and the jury asked the court questions during deliberations directed solely to the invalid ground” and observed that in such a case, a court “might well find prejudice. The prejudice would not be assumed, but affirmatively demonstrated.” (*Id.* at p. 1129.)

Here, the prosecutor argued in closing that the jury could rely on either digital or penile penetration to convict defendant, so long as they all agreed on one: “So what the jury instruction tells you is that for count 1 -- I’m going to break these down separately -- that’s a sexual penetration. It can be either with a penis or a finger, basically, in this case. There’s no other foreign object.” The prosecutor continued, “And let me just explain to you, the judge read you what we call a unanimity instruction. You can decide which one of those is the one that fits the crime. You don’t have to tell us which one you decided. It can be the one with the penis. It could be the one with the finger. You’re the decider of that. You just all have to decide that one of those events happened.”

The record does not demonstrate a probability that the jury relied solely on the unsupported theory. In her videotaped interview, the victim testified that she was penetrated both digitally and by defendant’s penis. At trial, she denied that defendant digitally penetrated her but testified that he penetrated her with his penis. Her mother, however, testified that the child was digitally penetrated in her presence, but not penetrated by defendant’s penis. At no time did the victim testify that she was penetrated by an unknown object. As defendant concedes, based on the record before us it is impossible to determine on what theory of liability the jury relied. Accordingly, we must presume the jury properly followed the instructions and determined that because there was no evidence of penetration by an “unknown object” defendant’s penetration of the victim with his penis could not support a guilty finding.

Disposition

The judgment is affirmed.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.