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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

RUBEN AVILA,

Defendant and Appellant.

B234995

(Los Angeles County
Super. Ct. No. BA358716)

APPEAL from a judgment of the Superior Court of Los Angeles County, Drew E. Edwards, Judge. Affirmed with directions.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Ruben Avila, of two counts of lewd act upon a child under the age of 14 (counts 9 and 10). (Pen. Code,¹ § 288, subd. (a).) Following a mistrial on several counts, defendant pleaded no contest to two additional counts of lewd act upon a second child victim under the age of 14 (counts 1 and 3). Defendant was sentenced to 14 years in state prison. We affirm the judgment. We direct the clerk of the superior court to correct the abstract of judgment.

II. DISCUSSION

A. Lesser Included Offense

Defendant argues it was error not to instruct the jury on battery as a lesser included offense of lewd act upon a child as charged in count 10. Count 10 alleged that between March 1, 2006, and July 1, 2006, defendant committed a lewd act upon E. B. E. testified defendant was her neighbor. One day when E. was six, defendant took her and others to a lake and then back to his house. E. needed to use the restroom, but the downstairs facility was occupied. Defendant took E. upstairs to use the restroom. When E. came out of the bathroom, defendant pulled her pants down to her ankles and touched her vagina with two fingers. It did not hurt. E. pulled her pants up and they went downstairs. Defendant denied that he had ever touched E. in any inappropriate way.

There is a split of authority in the Courts of Appeal as to whether battery is a lesser included offense of lewd acts upon a child. In *People v. Santos* (1990) 222 Cal.App.3d 723, 739, the Court of Appeal for the Sixth Appellate District held without analysis that battery is not a lesser included offense of lewd acts. In *People v. Thomas* (2007) 146 Cal.App.4th 1278, 1291-1293, the Court of Appeal for the First Appellate

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

District disagreed. The issue is currently before our Supreme Court in *People v. Gray* (2011) 199 Cal.App.4th 167, review granted December 14, 2011, S197749, and *People v. Shockley* (2010) 190 Cal.App.4th 896, review granted March 16, 2011, S189462. We need not address the merits of defendant's included offense contention. There is no reasonable probability the jury would have convicted defendant of battery had included offense instructions been given. (*People v. Breverman* (1998) 19 Cal.4th 142, 165; *People v. Nakai* (2010) 183 Cal.App.4th 499, 511-512.) The jury believed E. and disbelieved defendant's denial. There was no evidence from which the jury could reasonably infer defendant touched E.'s vagina for any reason other than for his sexual gratification.

B. Abstract of Judgment

The abstract of judgment incorrectly reflects defendant was convicted on counts 9 and 10 pursuant to a plea. As noted above, the jury convicted defendant of counts 9 and 10. Defendant pleaded no contest to counts 1 and 3. The abstract of judgment must be corrected to reflect defendant was convicted on counts 9 and 10 by the jury rather than pursuant to a plea.

III. DISPOSITION

The judgment is affirmed. The clerk of the superior court shall correct the abstract of judgment to reflect defendant was convicted on counts 9 and 10 by a jury rather than pursuant to a plea. The clerk shall deliver a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

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TURNER, P.J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.